

# THE SALE OF EU CITIZENSHIP AND THE ‘LAW’ BEHIND IT

MAGDALENA ZABROCKA\*

*Investment migration in the European Union (‘EU’) as well as outside of it has been the subject of many legal and socio-political studies, with numerous developments emerging in recent years. There is considerable disagreement on the legal position at EU level, which can be observed in the differing views of commentators on the EU’s competence on the matter. Thus, this article maps the situation concerning citizenship by investment (‘CBI’) in the EU by canvassing the policy and legal developments to date as well as the main critical perspectives from scholarly work. In doing so, this article explores the exact legal position of both EU Member States and organs in the context of the split of competence on nationality matters, as well as routes to potential intervention at EU level. The core research question in this regard is whether the matter is one of law or merely policy, and what could justify EU level intervention in an effort to approximate Member States’ laws on investment migration. Thus, the first part of this article explores relevant theoretical frameworks before moving onto a discussion of trends and tendencies among states (inside and outside the EU). A brief overview of the risks, scandals and controversies attached to CBI throughout the years will follow. Next, the internal and external dimensions of the EU’s approach to CBI will be discussed in order to lay the foundation for a more substantive analysis of the EU’s legal position on CBI, including a discussion on EU citizenship and nationality laws. Last, this article will briefly consider CBI from a public international law perspective, and conclude with a critical commentary of the issues canvassed, including on the so-called ‘soft law’ considerations of citizenship and on the European Commission’s proposals in response to investment migration in the EU.*

## TABLE OF CONTENTS

I	Introduction.....	45
II	What is Investment Migration?.....	45
III	Trends and Tendencies .....	47
IV	Risks, Scandals and Controversies .....	49
V	Investment Migration and the EU: Internal Dimensions .....	52
VI	Investment Migration and the EU: External Dimensions .....	59
VII	EU Law Perspective.....	60
VIII	EU Citizenship and Nationality Laws.....	63
IX	Public International Law.....	69
X	Comments and Critical Thoughts .....	71
XI	Concluding Remarks.....	74

\* Magdalena Zabrocka is a doctoral researcher and a former faculty member at the School of Law, University of Aberdeen. She is currently taking up a post at the School of Law, University of Nottingham while she also teaches at the University of Essex Online, Kaplan Open Learning and acts as an Affiliated Lecturer at the Brunel Law School. Her core research focus concerns citizenship by investment (‘CBI’) in the EU. Magdalena’s broader areas of expertise include European Union (‘EU’) law and international human rights and has also worked extensively within the field of UK public law. Magdalena’s recent research relates to strategic lawsuits against public participation (‘SLAPPs’) and continues after her co-authorship of a study commissioned by the European Parliament Committee on Legal Affairs (‘JURI’): Justin Borg-Barthet, Benedetta Lobina and Magdalena Zabrocka, ‘The Use of SLAPPs to Silence Journalists, NGOs and Civil Society’ (Study, PE 694.782, European Parliament, Committee on Legal Affairs, June 2021). Magdalena is a member of the Anti-SLAPP Hub which she recently represented as a delegate during an expert seminar on legal and economic threats to the safety of journalists organised by the UN Office for the High Commissioner for Human Rights (‘OHCHR’). She is a visiting lecturer at the Faculty of Law and Administration, University of Gdańsk with her most recent guest seminar devoted to the human rights dimensions of SLAPPs, and an upcoming autumn lecture series on investment migration (2023). Additionally, Magdalena acts as the PGR (Postgraduate) Associate Director of the Aberdeen Centre for Constitutional and Public International Law (‘ACCPIL’) among other professional memberships.

## I INTRODUCTION

Investment migration in the European Union ('EU') as well as outside of it has been the subject of lively debate in the last decade. In recent years, numerous developments have emerged and there seems to be considerable disagreement concerning the legal position at EU level. Thus, this work shall map the situation concerning citizenship by investment ('CBI') in the EU, including policy and legal developments to date as well as the main critical perspectives from scholarly work.<sup>1</sup> In doing so, the exact legal position of both EU Member States and EU organs in the context of the split of competence on nationality matters will be explored, as well as routes to potential intervention at EU level. The core research question will be whether the matter is one of law or merely policy, and what could justify EU level intervention in an effort to approximate Member States' laws on investment migration. This work will not directly consider arguments for and against CBI schemes, nor will it explore the socio-political context of the concept of citizenship. The analysis, however, will be supplemented in places by addressing the policy considerations that arise in the context of the commodification of citizenship. Thus, the first part of this article will be devoted to understanding the definition of, and relevant theoretical framework concerning, investment migration, before moving onto the second part, which involves a discussion of the trends and tendencies of states. Additionally, this article will provide a brief overview of the risks, scandals and controversies identified in relation to investment migration throughout the years. Both the internal as well as external dimensions of the EU's approach to CBI will be discussed in order to lay down the foundation for the more substantive analysis of the EU's legal position, as well as EU citizenship and nationality laws. The article will briefly consider the matter from a public international law perspective and conclude with a critical commentary on the issues discussed.

## II WHAT IS INVESTMENT MIGRATION?

In order to move onto the substantive analysis of citizenship by investment schemes in the EU, it is necessary to first lay down the foundation by providing a background to such schemes and describing the applicable theoretical framework. It has to be noted, however, that the scope of this work is limited to 'golden passports' and does not cover 'golden visas', which refers to residence by investment ('RBI'). Furthermore, the focus will remain on the discussion of developments concerning CBI schemes in the EU to date, as well as relevant legal considerations. This will be supplemented by a critical commentary in the context of both.

The terms 'golden passport' and 'golden visa' are typically used to describe particular measures implemented by countries attempting to lure wealthy people into becoming residents or citizens.<sup>2</sup> CBI and RBI schemes vary among states and need to be differentiated from programmes offering business or entrepreneurial visas. Investment schemes can be characterised by the obtaining of a passport or permanent residence status in exchange for a predetermined amount of money,

---

<sup>1</sup> This article is part of a larger project on investment migration within the EU and further research is planned in the area as an extension of considerations covered in this work. The article considers the state of affairs up to January 2023.

<sup>2</sup> Global Witness, *Europe's Golden Doors: Lack of Progress in Stopping the Criminal and Corrupt Accessing Europe via Golden Passports and Visas* (Briefing, 27 March 2020) 2 <<https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/europes-golden-doors>>, archived at <<https://perma.cc/K6FR-4EWJ>> ('*Europe's Golden Doors*').

often in the form of a passive investment made into, for example, government bonds or the real estate market.<sup>3</sup> Entrepreneurship and business visas, on the other hand, are often targeted at international businesspeople who desire to visit a country in order to launch a new company or join and contribute money to an already established one. This category of visa offers a route to permanent residence and citizenship in the state in question, subject to further immigration requirements, such as physical presence in the country, among other conditions.<sup>4</sup>

CBI schemes offer citizenship to third country nationals (nationals from countries outside the EU) in exchange for a predetermined amount of money (an investment taking on a variety of forms) while allowing applicants to circumvent ordinary immigration procedures and strict naturalisation rules. In particular, CBI often requires little to no evidence of physical residence in a country concerned.<sup>5</sup> To acquire citizenship rights through the schemes under investigation, there needs to be little to no actual activity on the territory of the country offering citizenship for sale. The required investments may be very small and entirely passive (ie, not requiring a business plan or job creation).<sup>6</sup> Investments can be active or passive, such as one-off donations or investment into government bonds (passive), investment into real estate (typically passive) or setting up a business (active).<sup>7</sup>

In the case of the EU, by obtaining nationality of an EU Member State, individuals get ‘backdoor’ access into the EU as a whole, gaining access to the more desirable destinations within the Union. The European Commission has observed that such schemes are often carefully designed and deliberately advertised to third country nationals as a way of obtaining EU citizenship and getting Schengen mobility, as well as all the other rights attached to EU citizenship, including the ability to circumvent ordinary immigration and nationality laws in other Member States.<sup>8</sup> To this extent, one can question whether the exercise of ‘exclusive’ competence by one state in respect of nationality laws would not constitute an abuse of the principles governing the EU and its internal market, including fundamental values, as well as the doctrines of sincere cooperation, mutual recognition and acting in good faith.

CBI schemes, such as the one in Malta, offer a blatant sale of citizenship for a monetary value in the form of an investment.<sup>9</sup> There are very lenient requirements and the applicants enjoy a considerably more privileged route to citizenship than ordinarily naturalised citizens and permanent residents.<sup>10</sup> In 2019, only two other CBI schemes were identified as operating within the EU — Cyprus and Bulgaria — both of which have since been terminated by the Member States in question following developments at EU level.

---

<sup>3</sup> Jelena Džankić et al, ‘Factual Analysis of Member States Investors’ Schemes Granting Citizenship or Residence to Third-country Nationals Investing in the Said Member State (Study Overview, Milieu Ltd, July 2018) 5 <[https://best-citizenships.com/wp-content/uploads/2020/05/deliverable\\_d\\_final\\_30.10.18\\_compressed.pdf](https://best-citizenships.com/wp-content/uploads/2020/05/deliverable_d_final_30.10.18_compressed.pdf)>, archived at <<https://perma.cc/PTM8-8QXA>> (‘Factual Analysis of Member States Investors’ Schemes’); European Commission, *Investor Citizenship and Residence Schemes in the European Union* (Report No SWD (2019) 5 final, 23 January 2019) 3 (‘*European Commission Report 2019*’).

<sup>4</sup> See, eg, Džankić et al, ‘Factual Analysis of Member States Investors’ Schemes’ (n 3) 5.

<sup>5</sup> *European Commission Report 2019* (n 3) 4.

<sup>6</sup> *ibid* 7.

<sup>7</sup> *ibid* 3.

<sup>8</sup> *ibid* 1.

<sup>9</sup> ‘Malta’, *Henley & Partners* (Web Page, 30 November 2012) <<https://www.henleyglobal.com/citizenship-investment/malta>>, archived at <<https://perma.cc/3LJ3-V7XW>>.

<sup>10</sup> *European Commission Report 2019* (n 3) 1.

III TRENDS AND TENDENCIES

The question of whether unification, harmonisation or even approximation of laws would be possible at EU level should first be resolved by conducting a careful analysis of the relevant laws and their interrelations in the context of the split of competence between the EU and Member States. Nevertheless, when deciding that a particular field of law should be harmonised, national laws may be compared to decide whether to choose, for example, the lowest common denominator (ie, the least restrictive laws), the most common approach, a combination of legal rules, the 'best solution' (ie, laws decided through consensus or by majority vote) or a general solution comprised of the existing models.<sup>11</sup> Similarly, in the case of investment migration, a comparative analysis will be applied to identify global trends concerning CBI, which will inform this article's understanding of the common practices and recognised norms among European and non-European states.

CBI and RBI schemes have become significantly more popular throughout the last decade.<sup>12</sup> Nowadays, the commodification of citizenship seems to be a practice found in more than one region, enabling High-Net-Worth Individuals ('HNWI')<sup>13</sup> to access fast-track routes to obtaining visas or passports. The majority of states all over the world offer some form of investment scheme, including states in the Caribbean (which includes some of the oldest, least expensive and most well-known schemes), the EU, Asia and Africa, as well as Australia and the US.<sup>14</sup> However, the regulations and requirements for each passport, as well as the benefits, differ considerably. Thus, there are numerous websites, videos and articles advertising and promoting either specific programmes, or offering a comparison of available options to potential applicants.<sup>15</sup> Some of the most notable benefits relate to mobility, including visa-free access to a number of states (especially in the Schengen Area) tax incentives and preferential tax regimes.<sup>16</sup> The investments can, in most cases, be divided into passive donations and active investments, which can be subject to further conditions, such as the requirement of creation of job revenue.<sup>17</sup>

When the EU Commission released its report in 2019,<sup>18</sup> there were only three EU Member States (reduced to one in early 2023) granting citizenship by investment without the condition of physical residence; these were Bulgaria, Cyprus and Malta.

---

<sup>11</sup> Mathias Siems, *Comparative Law* (Cambridge University Press, 2<sup>nd</sup> edn, 2018) 5.

<sup>12</sup> Kristin Surak and Yusuke Tsuzuki, 'Are Golden Visas a Golden Opportunity? Assessing the Economic Origins and Outcomes of Residence by Investment Programmes in the EU' (2021) 47(15) *Journal of Ethnic and Migration Studies* 3367, 3367–9; Sara Kalm, 'The Business of Citizenship: Investment Citizenship Firms in Global Governance' (2023) 37(1) *Global Society* 68, 68.

<sup>13</sup> See generally Leila Adim, 'Between Benefit and Abuse: Immigrant Investment Programs' (2017) 62(1) *Saint Louis University Law Journal* 121.

<sup>14</sup> Prabhu Balakrishnan, 'Full List of Countries for Investor Residence and Citizenship', *Best Citizenships* (Blog Post, 2021) <<https://best-citizenships.com/2021/08/27/full-list-of-investor-residence-and-citizenship-schemes>>, archived at <<https://perma.cc/9YPS-44NZ>>.

<sup>15</sup> See Nomad Capitalist, 'Every Citizenship by Investment Program for 2019' (YouTube, 2019) <<https://www.youtube.com/watch?v=NIVccwb9aEQ>>, archived at <<https://perma.cc/TR5A-TEJP>>.

<sup>16</sup> Sofia Gaspar and Fernando Ampudia de Haro, 'Buying Citizenship? Chinese Golden Visa Migrants in Portugal' (2019) *International Migration* 1, 1.

<sup>17</sup> *European Commission Report 2019* (n 3) 7.

<sup>18</sup> *ibid.*

In 2019, there were 20 EU countries running RBI schemes (and 12 in early 2023).<sup>19</sup>

On a global scale, many states offer RBI; in particular, the Caribbean Islands offer ‘cash for a passport’ schemes in which there are no requirements besides the making of a passive investment.<sup>20</sup> A number of Caribbean states have even offered COVID-19 ‘discounts’ to applicants.<sup>21</sup> While some may oppose the use of the phrase ‘passport sale’, it is hard to refrain from using this name in light of the above practices. With regard to broader developments concerning the CBI market, Saint Kitts and Nevis suspended Russian and Belarussian applicants following the breakout of the Russia-Ukraine conflict in 2022, with concerns regarding individuals fleeing states under false pretences, but keeping their programmes open,<sup>22</sup> just as Grenada has done.<sup>23</sup> Antigua, against pressure from Europe and the US, refuses to give up on its CBI scheme.<sup>24</sup>

Furthermore, numerous countries in Asia offer some form of investment scheme, although very few Asian states offer CBI schemes. For example, Cambodian schemes require an investment of less than EUR355,000<sup>25</sup> and have additional requirements, such as knowledge of Cambodian history and of the Khmer language before citizenship is granted.<sup>26</sup> This seems comparable to several RBI schemes and other commonly employed naturalisation requirements in many countries.<sup>27</sup> Ultimately, the number of CBI schemes globally do not seem to be as considerable

<sup>19</sup> European Parliament, ‘European Citizenship’, *Multimedia Centre* (Web Page, 28 March 2023) <[https://multimedia.europarl.europa.eu/en/package/european-citizenship\\_22602](https://multimedia.europarl.europa.eu/en/package/european-citizenship_22602)>, archived at <<https://perma.cc/5K9Q-MTAG>>; *European Commission Report 2019* (n 3) 1.

<sup>20</sup> Ayelet Shachar, ‘Dangerous Liaisons: Money and Citizenship’ in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (IMISCOE 2018) 7, 8 (‘Dangerous Liaisons’). See also *European Commission Report 2019* (n 3) 1–4.

<sup>21</sup> Prabhu Balakrishnan, ‘Covid-19 Discounts for Caribbean Citizenship Programs’, *Best Citizenships* (Blog Post, 27 July 2020) <<https://best-citizenships.com/2020/07/27/covid-19-discounts-for-caribbean-citizenship-programs>>, archived at <<https://perma.cc/QHX9-PNKR>>.

<sup>22</sup> Christian Henrik Nesheim, ‘St Kitts Suspends Russian, Belarussian Applicants — Saint Lucia, Grenada, Turkey Remain Open’, *Investment Migration Insider* (Web Page, 9 March 2022) <<https://www.imidaily.com/caribbean/st-kitts-suspends-russian-belarussian-applicants-saint-lucia-grenada-turkey-remain-open>>, archived at <<https://perma.cc/3C8W-HLBU>>.

<sup>23</sup> Christian Henrik Nesheim, ‘4 of 5: Grenada Citizenship by Investment Program Suspends Russian, Belarussian Applicants’, *Investment Migration Insider* (Web Page, 10 March 2022) <<https://www.imidaily.com/caribbean/4-of-5-grenada-citizenship-by-investment-program-suspends-russian-belarussian-applicants>>, archived at <<https://perma.cc/4HPK-L2HD>>.

<sup>24</sup> Christian Henrik Nesheim, ‘Ending CBI is “Not an Option” as Antigua Will “Fight it to the Bitter End,” Says Foreign Minister’, *Investment Migration Insider* (Web Page, 28 March 2022) <<https://www.imidaily.com/caribbean/ending-cbi-is-not-an-option-and-antigua-will-fight-it-to-the-bitter-end-says-foreign-minister>>, archived at <<https://perma.cc/KEC8-WFUD>>. See also Christian Henrik Nesheim, ‘As Antigua Loses Canada Visa-privileges, Caribbean Access to Schengen and UK also at Risk’, *Investment Migration Insider* (Web Page, 27 June 2017) <<https://www.imidaily.com/features/as-antigua-loses-canada-visa-privileges-access-to-schengen-and-uk-also-at-risk>>, archived at <<https://perma.cc/2V4D-4KLN>> (‘As Antigua Loses Canada Visa-privileges’).

<sup>25</sup> The amounts given in Euro (EUR) in this article were originally advertised within these schemes in Pounds (GBP). The amounts are based on the currency exchange approximation 1:1.18 (EUR:GBP) as of 9 August 2022. See, eg, ‘Historical Rates Tables’, *Xe* (Web Page, 2023) <<https://www.xe.com/currencytables/?from=GBP&date=2022-08-04#table-section>>, archived at <<https://perma.cc/C6F6-6TRG>>.

<sup>26</sup> Alison Millington, ‘23 Countries Where Money Can Buy You a Second Passport or “Elite Residency”’, *Insider* (Blog Post, 27 December 2018) <<https://www.businessinsider.com/countries-where-you-can-buy-citizenship-residency-or-passport-2018-9?IR=T>>, archived at <<https://perma.cc/9347-Q4ZC>>.

<sup>27</sup> ‘Mapping Investment-based Citizenship and Residence Schemes in the EU’ in Jelena Džankić (ed), *The Global Market for Investor Citizenship* (Palgrave 2019) 179.

as that of RBI schemes, with the majority of passport sales happening in the Caribbean.<sup>28</sup> It is, therefore, rather unlikely that the normalisation of CBI within the EU will be prescribed, as comparative analysis points strongly to the limited spread and acceptance of the practice among Member States.<sup>29</sup>

#### IV RISKS, SCANDALS AND CONTROVERSIES

CBI and RBI schemes are surrounded by controversy, especially in regard to security. Countries with CBI and RBI schemes claim that checks and balances are applied to prevent fraud and corruption, among others.<sup>30</sup> However, the applicability, accuracy and effectiveness of such checks are highly questionable, which has been proven by a number of scandals unveiled throughout the years.<sup>31</sup> In the case of the EU, the European Commission identified areas of concern, instances of ineffective checks and a lack of transparency and adequate supervision.<sup>32</sup> The integrity of applicants as well as governments eager to sell citizenship also remains under question. For instance, in Bulgaria, a significant number of 'highly suspicious approvals for the granting of citizenship were found in the course of parliamentary investigations, most of them involving Russian applicants',<sup>33</sup> whereas, in Cyprus, Ukrainian elites accused of corruption are said to have been among the successful applicants for the CBI scheme.<sup>34</sup> In Ireland, a previous CBI programme was halted due to allegations of corruption and favouritism.<sup>35</sup> In 2014, Latvia's tightening of RBI regulations led to numerous rejections and, in some cases, revocation of citizenship, as previous ineffective security checks failed to prevent potential spying and threats to economic security.<sup>36</sup> The controversial backgrounds of some successful applicants in Malta have been publicised and there are further allegations regarding corruption connected to the RBI and CBI schemes in the country.<sup>37</sup> A major case in 2015 revealed several Portuguese officials accused of taking bribes for granting residency

---

<sup>28</sup> Kalm (n 12) 72.

<sup>29</sup> Meenakshi Fernandes et al, 'Avenues for EU Action on Citizenship and Residence by Investment Schemes' (Study, European Parliamentary Research Service, October 2021) 2–3.

<sup>30</sup> See, eg, Dominika Langenmayr and Lennard Zyska, 'Escaping the Exchange of Information: Tax Evasion via Citizenship-by-Investment' (Working Paper No 8956, CESifo, March 2021) 3–6.

<sup>31</sup> Amandine Scherrer and Elodie Thirion, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) Schemes in the EU: State of Play, Issues and Impacts' (Study No PE 627.128, European Parliamentary Research Service, October 2018) 28–32.

<sup>32</sup> *European Commission Report 2019* (n 3) 10.

<sup>33</sup> Scherrer and Thirion (n 31) 28.

<sup>34</sup> Sara Farolfi and Stelios Orphanides, 'Russian Billionaire Linked to Trump, Manafort Has New Cyprus Passport', *OCCRP* (online, 5 March 2018) <<https://www.occrp.org/en/goldforvisas/russian-billionaire-linked-to-trump-manafort-has-new-cyprus-passport>>, archived at <<https://perma.cc/M2SW-QJKZ>>.

<sup>35</sup> Scherrer and Thirion (n 31) 28; 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) 64 *Liberty and Security in Europe* 1, 11–3.

<sup>36</sup> Sanita Jemberga and Xenia Kolesnikova, 'Latvia's Once Golden Visas Lose Their Shine but Why?', *OCCRP* (Blog Post, 5 March 2018) <<https://www.occrp.org/en/goldforvisas/latvias-once-golden-visas-lose-their-shine-but-why>>, archived at <<https://perma.cc/CNC4-Z7AW>>.

<sup>37</sup> See, eg, Lily Dobrovolskaya et al, 'How Wealthy Russians Buy Maltese Citizenship', *Transparency International Russia* (Web Page, 8 December 2017) <<https://transparency.org.ru/special/maltese-passports/en>>, archived at <<https://perma.cc/BEC7-FP3K>>. See also Nikolaj Nielsen, 'Russian with Malta Passport in Money-laundering Probe', *euobserver* (online, 25 September 2018) <<https://euobserver.com/justice/142941>>, archived at <<https://perma.cc/9PB8-UDVZ>>.

to Chinese citizens.<sup>38</sup> Numerous fraud allegations regarding the controversial EB-5 programme in the United States ('US') have also been highlighted.<sup>39</sup> The Organisation for Economic Co-operation and Development ('OECD') released a report on corruption risks connected with CBI and RBI schemes which discussed controversies surrounding a number of states' schemes, such as the United Kingdom ('UK'), Portugal, Greece and Hungary.<sup>40</sup> Questions were also raised in regard to due diligence checks and transparency in a number of programs in the Caribbean, which led to Canada revoking its visa waivers for Caribbean nationals.<sup>41</sup>

Although the leaking of documents related to Cyprus' CBI scheme in 2020, known as the Cyprus Papers, was rather loud in terms of publicity,<sup>42</sup> the Maltese CBI scheme is arguably of greater interest due to the revelation of its numerous vulnerabilities, combined with the fact that it is the last CBI scheme standing in the EU.<sup>43</sup> In Malta, applicants are subject to a four tier due diligence process; however, three Russians with suspicious backgrounds (including being on the 'Kremlin list'), obtained Maltese citizenship nevertheless.<sup>44</sup> A news article published by *The Guardian* — one of many instances in which the media has reported on such problems — discusses recently leaked files on the Maltese 'cash-for-passports' scheme, and shows a major loophole that allows wealthy applicants to 'cheat the system' using the help of designated advisors, in order to claim residence in an EU Member State even though they have not been physically present in that state for most of the year.<sup>45</sup> The leak was the fruit of years of hard work by investigative journalist, Daphne Caruana Galizia, who was targeted with numerous strategic lawsuits against public participation ('SLAPPs') and was assassinated in 2017.<sup>46</sup> The leaked documents showed the severity of the issue and that most of the applicants found, or were enabled to find, a way to circumvent the already lenient requirements under the scheme, such as the requirement of a physical

<sup>38</sup> Scherrer and Thirion (n 31) 29.

<sup>39</sup> Katie Beck, 'Why Citizenship is Now a Commodity', *BBC Worklife* (Web Page, 30 May 2017) <<https://www.bbc.com/worklife/article/20170530-why-citizenship-is-now-a-commodity>>, archived at <<https://perma.cc/ZC68-D9TQ>>; Muzaffar Chishti and Faye Hipsman, 'Controversial EB-5 Immigrant Investor Programme Faces Possibility of Overhaul', *Migration Policy Institute* (Web Page, 25 May 2016) <<https://www.migrationpolicy.org/article/controversial-eb-5-immigrant-investor-program-faces-possibility-overhaul>>, archived at <<https://perma.cc/DKU9-T574>>.

<sup>40</sup> Organisation for Economic Co-operation and Development ('OECD'), 'Corruption Risks Associated with Citizen- and Resident-by-Investment Schemes' (Draft Scoping Note, 2019 OECD Global Anti-Corruption & Integrity Forum, 19 March 2019) 6, 8.

<sup>41</sup> Transparency International and Global Witness, *European Getaway: Inside the Murky World of Golden Visas* (Report, 2018) 21 ('*European Getaway*'). See also Nesheim, 'As Antigua Loses Canada Visa-privileges' (n 24).

<sup>42</sup> 'Curbing Corrupt Abuse of EU Golden Passports & Visas: European Commission Must Heed Parliament's Proposals', *Transparency International* (Blog Post, 2022) <<https://www.transparency.org/en/press/eu-golden-passports-visas-corruption-european-commission-must-heed-parliament-proposals>>, archived at <<https://perma.cc/RCE8-JB6J>>. See, eg, Scherrer and Thirion (n 31) 29.

<sup>43</sup> *European Getaway* (n 41) 31.

<sup>44</sup> David Pegg, Luke Harding and Simon Goodley, 'Revealed: Residency Loophole in Malta's Cash-for-passports Scheme', *The Guardian* (online, 22 April 2021) <<https://www.theguardian.com/world/2021/apr/22/revealed-residency-loophole-in-malta-cash-for-passports-scheme>>, archived at <<https://perma.cc/FH5M-KKLM>>.

<sup>45</sup> Maria Diaz Crego and Micaela Del Monte, 'Strategic Lawsuits against Public Participation (SLAPPs)' (Briefing, European Parliamentary Research Service, 29 September 2022) 2–3 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS\\_BRI\(2022\)733668\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS_BRI(2022)733668_EN.pdf)>, archived at <<https://perma.cc/VU9K-UAKH>>.

presence in the country. The files from Henley & Partners, an international investment migration firm, revealed that even from the early days of the scheme some HNWIs were speaking very openly about how they were planning to develop only the 'most superficial' links with Malta, with many being quick to say that they wished to spend no more than three weeks there and do no more than the 'bare minimum' necessary to be granted a hall pass to the EU through Maltese doors.<sup>47</sup> According to documents leaked to the public, advisors often indicated that no physical presence in the country was actually required, but that the 'Maltese government would appreciate reading an indicated number', an average of which was 16 days across 250 letters.<sup>48</sup> Another issue became known as 'two bedrooms for 12 people', in which, instead of renting whole houses or flats, applicants merely rented a fraction of a room for the purpose of seeing through the formalities of the scheme.<sup>49</sup>

In the context of the CBI market in the EU and in countries enjoying visa-free access to the Schengen Area, the phenomenon of individuals with questionable or even criminal backgrounds purchasing Vanuatu passports and, therefore, gaining access to the EU and UK due to visa waiving agreements, has been exposed.<sup>50</sup> This confirmed the validity of fears formerly expressed by the European Commission of a race to the bottom.<sup>51</sup> The programme is advertised as one of the fastest, cheapest and most lax 'golden passport' schemes to be found in the world.<sup>52</sup> Journalists Euan Ward and Kate Lyons have noted that

[e]xperts have warned the scheme is ripe for exploitation, creating a back door for access to the EU and UK and allowing transnational criminal syndicates to establish a base in the Pacific, and Vanuatu's taxation laws make the country an attractive site for money laundering.<sup>53</sup>

It was argued by Jose Sousa-Santos, a Pacific Policy Fellow at the Australian Pacific Security College, that it was not just the fact that successful applicants

can travel through the EU or set up businesses...one of the issues is being able to create these networks to the Pacific, especially as the Pacific becomes more of a trafficking hub for drugs ... [a]nd Vanuatu's tax semi-haven laws make it very attractive for money laundering.<sup>54</sup>

Sousa-Santos further indicated that successful applicants gain the possibility of changing their name in Vanuatu, which can give them a new identity. This would enable individuals who, for instance, may be on travel ban lists due to their criminal record to enter states without any issues encountered on the border. The same news

---

<sup>47</sup> Albert Galea, 'WATCH: "To the Clients, We Say Do the Bare Minimum", Henley Official Says on IIP', *Malta Independent* (online, 23 April 2021) <<https://www.independent.com.mt/articles/2021-04-23/local-news/To-the-clients-we-say-do-the-bare-minimum-Henley-official-says-on-Malta-passport-programme-6736232863>>, archived at <<https://perma.cc/3TX4-EYR9>>.

<sup>48</sup> Pegg, Harding and Goodley (n 45).

<sup>49</sup> *ibid.*

<sup>50</sup> Euan Ward and Kate Lyons, 'Citizenship for Sale: Fugitives, Politicians and Disgraced Businesspeople Buying Vanuatu Passports', *The Guardian* (online, 15 July 2021) <<https://www.theguardian.com/world/2021/jul/15/citizenship-for-sale-fugitives-politicians-and-disgraced-businesspeople-buying-vanuatu-passports>>, archived at <<https://perma.cc/ZW3D-RXY5>> ('Citizenship for Sale').

<sup>51</sup> *European Commission Report 2019* (n 3).

<sup>52</sup> Ward and Lyons, 'Citizenship for Sale' (n 50).

<sup>53</sup> *ibid* (n 50).

<sup>54</sup> *ibid.*



article cites the example of one advertisement brochure where an agency answered a question of whether an applicant can change their name in Vanuatu by saying that there is a possibility of a passport being issued with a new name. The list of ‘questionable’ yet successful applicants is long and includes numerous instances of politicians escaping prosecution in their home country, ‘shady businessmen and suspects in criminal proceedings.’<sup>55</sup> After the names of ‘questionable’ applicants had been published,<sup>56</sup> Vanuatu’s authorities have responded with the assurance that no final nor ‘substantial’ convictions have been made against ‘most’ of the people on the published list.<sup>57</sup>

The scandals and controversies discussed above are linked to what seem to be ‘inherent’ risks of investment migration. These are only a select few, with more reported in relevant literature and policy documents.<sup>58</sup> The examples above are sufficient to signify the severity and breadth of the issue, and suggest that CBI schemes are themselves prone to exploitation. It would not suffice to merely strengthen anti-money laundering or other measures to mitigate all of the risks, nor would such measures adequately address other legal and socio-political concerns that may derive from the trend of commodifying citizenship as nothing more than a sellable good.

## V INVESTMENT MIGRATION AND THE EU: INTERNAL DIMENSIONS

The issue of selling citizenship via investment schemes offered by some Member States has been at the heart of a very heated political and socio-legal debate during the last decade. The discussion, however, has become even more far-reaching in the face of the recent developments at EU level, in particular, due to the strong opposing attitudes towards the Maltese Individual Investor Programme (‘MIIP’ or

<sup>55</sup> ‘EU Halts Vanuatu Visa-Free Access over “Golden Passports” Scheme’, *Al Jazeera* (8 November 2022) <<https://www.aljazeera.com/news/2022/11/8/eu-halts-vanuatu-visa-free-access-over-golden-passports-scheme>>, archived at <<https://perma.cc/4TS8-HHBW>>.

<sup>56</sup> Euan Ward and Kate Lyons, ‘Who’s Buying Vanuatu’s Passports? Crypto Moguls, Disgraced Business People and Wanted Men’, *The Guardian* (online, 15 July 2021) <<https://www.theguardian.com/world/2021/jul/15/whos-buying-vanuatous-passports-crypto-moguls-wanted-men>>, archived as <[perma.cc/32G8-GJEZ](https://perma.cc/32G8-GJEZ)>; Ward and Lyons, ‘Citizenship for Sale’ (n 50).

<sup>57</sup> Ward and Lyons, ‘Citizenship for Sale’ (n 50).

<sup>58</sup> See, eg, European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Damien Carême, *Opinion for the Committee on Economic and Monetary Affairs on Lessons Learnt from the Pandora Papers and Other Revelations* (Opinion, 2022/2989(INI), 12 January 2023) <[https://www.europarl.europa.eu/doceo/document/LIBE-AD-737243\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/LIBE-AD-737243_EN.pdf)>, archived at <<https://perma.cc/5L9B-WALD>>, archived at <<https://perma.cc/5L9B-WALD>>; OECD, ‘Compilation of Comments: Public Input Received on Misuse of Residence by Investment Schemes to Circumvent the Common Reporting Standard’ (Compilation, 17 April 2018) <<https://www.oecd.org/tax/exchange-of-tax-information/public-input-received-misuse-of-residence-by-investment-schemes-to-circumvent-the-common-reporting-standard.pdf>>, archived at <<https://perma.cc/U5JK-ZTAL>>.

'IIP').<sup>59</sup> Two resolutions addressing concerns regarding investment schemes were adopted in 2014 and 2019 by the European Parliament.<sup>60</sup> Additionally, a report was produced by the European Commission in 2019 ('2019 European Commission Report').<sup>61</sup> In April 2020, the Commission reiterated its concerns by urging Member States to phase out their schemes.<sup>62</sup> In the same year, infringement procedures were initiated against Malta and Cyprus,<sup>63</sup> and in March, following another report of the European Parliament in February 2022,<sup>64</sup> a resolution was adopted with proposals to the Commission on citizenship and residence by investment schemes in the EU.<sup>65</sup> On 28 March 2022, the Commission presented its Recommendation,<sup>66</sup> before referring Malta to the Court of Justice of the European Union ('CJEU') in September 2022.<sup>67</sup>

As noted above, the European Commission presented a report on RBI and CBI schemes in 2019.<sup>68</sup> A number of risks inherent to residence and citizenship schemes were identified, for instance, in regard to criminal activities, fraud,

---

<sup>59</sup> See European Parliament Resolution 2013/2995(RSP) of 16 January 2014 on EU Citizenship for Sale [2014] OJ C 482/117 (23 December 2016) ('Resolution 2013/2995(RSP)'); European Parliament Resolution 2019/2954(RSP) of 18 December 2019 on the Rule of Law in Malta Following the Recent Revelations Surrounding the Murder of Daphne Caruana Galizia [2019] OJ C 255/22 (29 June 2021) ('Resolution 2019/2954(RSP)'); 'EESC Demands an End to All Investor Citizenship and Residence Schemes in EU', *SchengenVisaInfo* (online, 27 November 2019) <<https://www.schengenvisa.info.com/news/eesc-demands-an-end-to-investor-citizenship-and-residence-schemes>>, archived at <<https://perma.cc/8YXD-RX3Y>>; 'EU Citizenship Should not be for Sale at Any Price, Says European Parliament', *European Parliament* (Press Release, 16 January 2014) <<https://www.europarl.europa.eu/news/en/press-room/2014-01-10IPR32392/eu-citizenship-should-not-be-for-sale-at-any-price-says-european-parliament>>, archived at <<https://perma.cc/4386-VMHP>>; Maria Margarita Mentzelopoulou and Costica Dumbrava, 'Acquisition and Loss of Citizenship in EU Member States: Key Trends and Issues' (Briefing No PE 625.116, European Parliamentary Research Service, July 2018) 8–9.

<sup>60</sup> Resolution 2013/2995(RSP) (n 59); Resolution 2019/2954(RSP) (n 59).

<sup>61</sup> *European Commission Report 2019* (n 3).

<sup>62</sup> 'Investor Citizenship Schemes: European Commission Opens Infringements against Cyprus and Malta for "Selling" EU Citizenship', *European Commission* (Press Release, 20 October 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1925](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925)>, archived at <<https://perma.cc/UM5A-8AGE>>.

<sup>63</sup> *ibid.*

<sup>64</sup> European Parliament, *Report with Proposals to the Commission on Citizenship and Residence by Investment Schemes (2021/2026(INL))* (Report No A9-0028/2022, 16 February 2022) <[https://www.europarl.europa.eu/doceo/document/A-9-2022-0028\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/A-9-2022-0028_EN.pdf)>, archived at <<https://perma.cc/6YY6-GMZH>> ('*European Parliament Report 2022*').

<sup>65</sup> European Parliament Resolution of 9 March 2022 with Proposals to the Commission on Citizenship and Residence by Investment Schemes (2021/2026(INL)) [2022] OJ C 347/97 (9 September 2022) ('Resolution 2021/2026(INL)').

<sup>66</sup> 'Commission Urges Member States to Act on "Golden Passports" and "Golden Residence Permits" Schemes, and to Take Immediate Steps in the Context of the Russian Invasion of Ukraine', *European Commission* (Press Release, 28 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_1731](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1731)>, archived at <<https://perma.cc/MKL8-CV76>>; European Commission Recommendation of 28 March 2022 on Immediate Steps in the Context of the Russian Invasion of Ukraine in Relation to Investor Citizenship Schemes and Investor Residence Schemes [2022] C(2022) 2028 final ('Commission Recommendation C (2022) 2028 final').

<sup>67</sup> 'Investor Citizenship Scheme: Commission Refers MALTA to the Court of Justice', *European Commission* (Press Release, 29 September 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_5422](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5422)>, archived at <<https://perma.cc/6APS-NGC8>> ('Commission Refers Malta to the Court of Justice'); 'Scandalous Maltese Golden Passport Schemes Goes to Court; EU-wide Solution Still Needed', *Transparency International* (online, 30 September 2022) <<https://www.transparency.org/en/press/scandalous-maltese-golden-passport-scheme-goes-to-court-eu-wide-solution-still-needed>>, archived at <<https://perma.cc/TF7T-RH6L>>.

<sup>68</sup> *European Commission Report 2019* (n 3).

security issues, money laundering, tax evasion, financing of terrorist activities and corruption.<sup>69</sup> The lack of transparency, monitoring, effective supervision and reporting systems as well as insufficient security checks were identified as key issues. States were advised to apply, among other measures, tools available at the EU level, such as the Schengen Information System ('SIS')<sup>70</sup> or the Anti-Money Laundering Directive<sup>71</sup> and bear in mind their obligations under EU law, such as obligations relating to the principles of sincere cooperation and preserving the integrity of the internal market.<sup>72</sup>

It is apparent that numerous regulations in most investment schemes seem to be inconsistent with EU law. For instance, the Directive on Long-Term Residents provides for a five year period of 'legal residence' — ie, continuous physical presence — before obtaining permanent residence status, subject to exceptions outlined in art 3(2).<sup>73</sup> The Directive does not harmonise national and EU regulations that define legal residency as a prerequisite for obtaining long-term resident status. Rather, it builds upon them. The Directive seems to establish a minimum standard for the prescribed period of time before which a third country national can obtain permanent residence status.<sup>74</sup> As referred to in Parts II and III of the article, numerous RBI schemes seem to be in line with this requirement, while other investment schemes, mainly CBI programmes, seem to circumvent this requirement, and provide for a fast-tracked route to EU citizenship.

The problematic nature of the selling of residence and citizenship by Member States is evident in the fact that, in the EU, a country's national laws and administrative decisions can easily affect the security and interests of other states, while nationality matters remain within the exclusive competence of states as long as they are compatible with 'international law and principles of law generally recognised with regard to nationality'.<sup>75</sup> Those who gain citizenship in one EU Member State will automatically hold the citizenship of the Union.<sup>76</sup> Consequently, they shall enjoy inter alia 'the right to move and reside freely within the territory of the Member States'.<sup>77</sup>

In 2014, the European Parliament made its first resolution in accordance with arts 4, 5, 9 and 10 of the *Treaty on European Union* ('TEU') and art 20 the *Treaty on the Functioning of European Union* ('TFEU') (collectively referred to as 'the Treaties'), calling upon Member States to fulfil their obligations of 'safeguarding

---

<sup>69</sup> *ibid* 2, 9–10.

<sup>70</sup> *ibid* 10.

<sup>71</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing [2015] OJ L 141/73 (5 July 2015).

<sup>72</sup> Transparency International and Global Witness, *European Getaway* (n 41) 49.

<sup>73</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the Status of Third-country Nationals who are Long-term Residents [2003] OJ L 16/44 (23 January 2004) ('Council Directive 2003/109/EC'); European Union Agency for Fundamental Rights, *Handbook on European Law relating to Asylum, Borders and Immigration* (Publications Office of the European Union 2014) 51.

<sup>74</sup> Member States may grant permanent or unlimited residence permits on more liberal terms than those specified by the Directive, however, as stated in Chapter III, these residency permits do not grant the right to reside in other Member States within the EU: Council Directive 2003/109/EC (n 73) art 4(1).

<sup>75</sup> See *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000) art 3 ('ECN').

<sup>76</sup> *Consolidated Version of the Treaty on the Functioning of the European Union*, signed 13 December 2007, OJ C 115/01 (entered into force 1 December 2009) art 20(1) ('TFEU').

<sup>77</sup> *ibid* art 20(2a).

the values and objectives of the Union'.<sup>78</sup> It reiterated that art 4(3) TEU 'enshrines the principle of "sincere cooperation" between the Union and the Member States' which are to assist each other in fulfilling the objectives of the Treaties.<sup>79</sup> Those voices were further echoed by subsequent developments from the Commission and the Parliament at EU level. Additionally, the European Economic and Social Committee ('EESC') urged Member States to terminate their schemes,<sup>80</sup> while other states were advised to consider carrying out risk assessments of existing investment schemes, following Germany's example, which recognised CBI and RBI schemes — especially those in Malta and Cyprus — as money laundering risks for Germany.<sup>81</sup>

On 16 September 2020, President Ursula von der Leyen, in the State of the Union Address, stated that 'EU values are not for sale'.<sup>82</sup> The Commission then launched infringement proceedings against Cyprus and Malta on 20 October 2020 by issuing letters of formal notice,<sup>83</sup> and wrote again to Bulgarian authorities requesting further information about the developments regarding the Bulgarian investment programme.<sup>84</sup> The grounds for finding potential breaches under EU law were linked to the argument that selling EU citizenship 'for a predetermined payment or investment and without a genuine link to Member States concerned'<sup>85</sup> is incompatible with the principle of sincere cooperation.<sup>86</sup> Additionally, it was argued that such practices undermine the integrity of the status of EU citizenship.<sup>87</sup>

Numerous works and reports have been devoted to the analysis of existing schemes, looking into their classification, risks and effects on the EU as a whole.<sup>88</sup> The commonly identified risks associated with such schemes include criminal activities, corruption, fraud, tax evasion and the financing of terrorist groups.<sup>89</sup> Various scandals and allegations have been identified, only further providing evidence pointing to inherent risks that investment schemes carry.<sup>90</sup> In June 2021, the Commission sent an additional letter of further notice to Malta and a reasoned

---

<sup>78</sup> Resolution 2013/2995(RSP) (n 59).

<sup>79</sup> *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C115/13 (entered into force 1 November 1993) art 4(3) ('TEU').

<sup>80</sup> European Economic and Social Committee ('EESC') Rapporteur Jean-Marc Roirant, *Investor Citizenship and Residence Schemes in the European Union* (Report, Referral No COM(2019) 12 final, Reference No SOC/618-EESC-2019, 30 October 2019).

<sup>81</sup> Global Witness, 'Europe's Golden Doors' (n 2) 11.

<sup>82</sup> Ursula von der Leyen, 'Building the World We Want to Live in: A Union of Vitality in a World of Fragility' (State of the Union Address, European Commission, 16 September 2020) 21; 'Investor Citizenship Schemes: European Commission opens Infringements against Cyprus and Malta for "Selling" EU Citizenship', *European Commission* (Press Release, IP/20/1925, 20 October 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1925](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925)>, archived at <<https://perma.cc/RCA2-L9LD>> ('EC Opens Infringements against Cyprus and Malta').

<sup>83</sup> 'EC Opens Infringements against Cyprus and Malta' (n 82).

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> TEU (n 79) art 4(3).

<sup>87</sup> TFEU (n 76) art 20.

<sup>88</sup> See, eg, Transparency International and Global Witness, *European Getaway* (n 41).

<sup>89</sup> Madeleine Sumption and Kate Hooper, Migration Policy Institute, *Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration* (Report, October 2014) 17; OECD (n 33) 6–8.

<sup>90</sup> Amandine Scherrer and Thirion (n 31) 20–32; Andres Knobel and Frederik Heitmüller, 'Citizenship and Residency by Investment Schemes: Potential to Avoid the Common Reporting Standard for Automatic Exchange of Information' (Paper, Tax Justice Network 12 March 2018).

opinion to Cyprus.<sup>91</sup> Following Cyprus and Bulgaria withdrawing their CBI schemes, there is currently only one Member State operating a ‘pure’ investor citizenship programme which can be classified as CBI.

In March 2022, the European Parliament called for a ban of ‘golden passports’ and for the provision of EU rules governing ‘golden visas’:<sup>92</sup>

Golden passports’ are objectionable ethically, legally and economically and pose several serious security risks. ‘Golden visas’ need to be regulated and should be levied at EU level. Third-countries with visa-free access to the EU should also end their ‘golden passports’ schemes.<sup>93</sup>

Having adopted the report commenced by legislative initiative, the Committee on Civil Liberties, Justice, and Home Affairs (‘LIBE’) demanded that the European Commission submit a proposal by the end of its mandate to completely phase out CBI schemes in accordance with arts 21(2), 79(2), 114 and 352 TFEU.<sup>94</sup> In order to harmonise standards and procedures, the report also requested that the Commission adopt a regulation to supervise various aspects of RBI schemes.<sup>95</sup> This legislation could be based on arts 79(2), 80, 82, 87 and 114 TFEU.

The European Commission called upon Member States to revoke citizenships and residencies granted under investment schemes to sanctioned individuals<sup>96</sup> and issued a recommendation<sup>97</sup> to take immediate steps in the context of the Russian invasion of Ukraine in relation to these schemes.<sup>98</sup> Malta suspended Russian and Belarusian applicants from their CBI and RBI programmes upon citing an inability to conduct effective due diligence checks.<sup>99</sup> Portugal and Greece also joined in on

<sup>91</sup> ‘June Infringements Package: Key Decisions’, *European Commission* (online, 9 June 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_2743](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743)>, archived at <<https://perma.cc/HML6-S5N6>>.

<sup>92</sup> ‘MEPs Call for a Ban on “Golden Passports” and EU Rules for “Golden Visas”’, *European Parliament* (Press Release, 15 February 2022) <<https://www.europarl.europa.eu/news/en/press-room/20220211IPR23114/meps-call-for-a-ban-on-golden-passports-and-eu-rules-for-golden-visas>>, archived at <<https://perma.cc/2DTL-E9ZM>> (‘MEPs Call for Ban on Golden Passports’).

<sup>93</sup> European Parliament, ‘European Citizenship’ (n 19).

<sup>94</sup> The report was adopted with 595 votes for, 12 against and 74 abstentions: European Parliament, ‘MEPs Demand a Ban on “Golden Passports” and Specific Rules for “Golden Visas”’ (Press Release 20220304IPR24787, 9 March 2022); Resolution 2021/2026(INL) (n 65) para 21.

<sup>95</sup> *European Parliament Report 2022* (n 64) 11–2 [21].

<sup>96</sup> Christian H Nesheim, ‘Eur. Commission Urges CIPs to Revoke Citizenships, Residencies of Sanctioned Individuals’, *Investment Immigration Insider* (online, 28 March 2022) <<https://www.imidaily.com/program-updates/eur-commission-urges-cips-to-consider-revoking-citizenships-residencies-of-sanctioned-individuals>>, archived at <<https://perma.cc/UZ4K-KZ2Z>>.

<sup>97</sup> Commission Recommendation C(2022) 2028 final (n 66); ‘Commission Urges Member States to Act on “Golden Passports” and “Golden Residence Permits” Schemes, and to Take Immediate Steps in the Context of the Russian Invasion of Ukraine’, *European Commission* (Press Release, 28 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1731](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1731)>, archived at <<https://perma.cc/WGJ5-6G6R>>.

<sup>98</sup> Commission Recommendation C(2022) 2028 final (n 66).

<sup>99</sup> Mark Battersby, ‘Malta is Latest Country to Block Russians over Golden Visas Citing Diligence Unease’, *International Investment* (online, 3 March 2022) <<https://www.internationalinvestment.net/news/4045876/malta-country-block-russians-golden-visas-citing-diligence-unease>>, archived at <<https://perma.cc/C636-TSHC>>; Bertrand Borg and Ivan Martin, ‘Russian Stripped of Maltese Citizenship after Being Named on US Sanctions List’, *Times of Malta* (online, 1 April 2022) <<https://timesofmalta.com/articles/view/russian-stripped-of-maltese-citizenship-after-being-named-on-us.945420#.Ykbxu112wWg.twitter>>, archived at <<https://perma.cc/4SEZ-PC9Y>>.

sanctioning 'golden visas' for Russian applicants.<sup>100</sup> Greece, however continues to advertise its 'golden visas' schemes, claiming that they are safe due to background and security checks, among others features.<sup>101</sup> Cyprus has since revoked over 222 passports granted under its CBI scheme following the release of the Cyprus Papers on *Al Jazeera*.<sup>102</sup> However, the first criminal court ruling on CBI in Cyprus resulted in nine defendants being cleared of all charges relating to the unlawful grant of passports under the scheme.<sup>103</sup>

The access to visa-free travel of all Maltese citizen could be impacted by the increase in the number of CBI applicants in Malta.<sup>104</sup> For instance, on 3 March 2022, Burgess Owens and Steve Cohen, representatives in the US Congress, introduced the 'Travel Ban for Traffickers Bill'.<sup>105</sup> One of the aims of the Bill was to revoke a country's participation in the US Visa Waiver Program if it runs CBI programs. If Maltese authorities do not abolish their program, Maltese citizens may no longer be eligible to travel to the US without a visa in the future.<sup>106</sup>

Transparency International has outlined key solutions to the problem of investment migration in the EU in its endorsement of the European Parliament's proposal of March 2022.<sup>107</sup> These solutions include requiring public authorities to conduct enhanced due diligence on applicants and their money, requiring private sector intermediaries to adhere to anti-money laundering obligations and harmonising rules across the EU to prevent a 'race to the bottom' in terms of standards.<sup>108</sup> Máira Martini, a research and policy expert for Transparency International, has correctly stated that the Commission 'has long acknowledged the problems with such schemes, but has failed to take decisive action. Now is the

---

<sup>100</sup> Salman Siddiqui, 'Golden Visa Programs Join in on the Russian Sanctions', *Ugloal* (online, 4 March 2022) <<https://www.uglobal.com/en/immigration/posts/golden-visa-programs-join-in-on-the-russian-sanctions>>, archived at <<https://perma.cc/JVQ2-FWX8>>.

<sup>101</sup> 'The Greek Golden Visa's Safe, Tax-Efficient and Passive Alternative to Real Estate Investment', *Investment Immigration Insider* (online, 10 March 2022) <<https://www.imidaily.com/sponsored-feature/the-greek-golden-visas-safe-tax-efficient-and-passive-alternative-to-real-estate-investment>>, archived at <<https://perma.cc/97UH-BGGF>>.

<sup>102</sup> 'Four Charged over Cyprus "Cash-for-passports" Scheme', *Al Jazeera* (online, 16 July 2022) <<https://www.aljazeera.com/news/2022/7/16/four-charged-over-cyprus-cash-for-passports-scheme>>, archived at <<https://perma.cc/R59D-CX5F>>; 'Cyprus Has Revoked 222 Passports Granted through Golden Passport Scheme so Far', *SchengenVisaInfo* (online, 19 January 2023) <<https://www.schengenvisa.info.com/news/cyprus-has-revoked-222-passports-granted-through-golden-passport-scheme-so-far>>, archived at <<https://perma.cc/9RF2-3RPJ>>.

<sup>103</sup> '9 Defendants Cleared of All Charges in First Cyprus Golden Passports Trial', *SchengenVisaInfo* (online, 7 November 2022) <<https://www.schengenvisa.info.com/news/9-defendants-cleared-of-all-charges-in-first-cyprus-golden-passports-trial>>, archived at <<https://perma.cc/54DR-ETTJ>>.

<sup>104</sup> 'Enormous Increase of Applicants to Malta's Residence by Investment Scheme, Minister of Home Affairs Confirms', *SchengenVisaInfo* (online, 6 September 2022) <<https://www.schengenvisa.info.com/news/enormous-increase-of-applicants-to-maltas-residence-by-investment-scheme-minister-of-home-affairs-confirms>>, archived at <<https://perma.cc/4QJD-J5XJ>> ('Enormous Increase of Applicants to Malta's Residence by Investments Schemes'); 'Malta Citizenship by Investment Program under Fire but Investor Demand Continues to Rise', *Investment Immigration* (online, 2 December 2022) <<https://www.investmentimmigration.com/malta-citizenship-by-investment-program-under-fire-but-investor-demand-continues-to-rise>>, archived at <[perma.cc/B29F-WP9Z](https://perma.cc/B29F-WP9Z)>.

<sup>105</sup> *No Travel for Traffickers Act of 2022* (2022) HR 6911, 117<sup>th</sup> Congress (USA).

<sup>106</sup> 'Enormous Increase of Applicants to Malta's Residence by Investment Scheme' (n 104).

<sup>107</sup> European Parliament, 'MEPs Call for Ban on Golden Passport' (n 92); Resolution 2021/2026(INL) (n 65).

<sup>108</sup> Transparency International and Global Witness, *European Getaway* (n 41) 48.

time to close the door to kleptocrats and their money.’<sup>109</sup> The Parliament has made six proposals:<sup>110</sup> a Union-wide gradual phasing out of CBI schemes by 2025; a comprehensive regulation covering all RBI schemes in the Union; a new category of the Union’s own resources, consisting of a ‘CBI and RBI adjustment mechanism’; a targeted revision of legal acts in the area of anti-money laundering and countering the financing of terrorism; a targeted revision of the Long-Term Residence Directive, and ensuring that third countries do not administer harmful RBI and CBI schemes.

In March 2022, EU Commissioner, Didier Reynders, stated that the Parliament’s request for legislation to phase out CBI schemes in the EU required an assessment of the legal and political feasibility first.<sup>111</sup> A commentary that followed the events of the past year (2023) correctly observed that the legislative process can be long, and could still take many months, if not years, from its current stage.<sup>112</sup> Further action is anticipated and linked to the European Commission’s report in February 2022, with proposals to the Commission on citizenship and residence by investment schemes expected. LIBE has already considered a few proposals, based on the Initiative under r 47 of the *Rules of Procedure*,<sup>113</sup> as previously outlined.<sup>114</sup>

Having sent a reasoned opinion to Malta on 6 April 2022,<sup>115</sup> the Commission referred the case to the CJEU under art 258(2) TFEU on the basis of a violation of art 4(3) TEU and for undermining the concept and character of EU citizenship as enshrined in art 20 TFEU.<sup>116</sup> Shortly after, a meeting of a Group of Member States’ Experts was held on investor citizenship and residence schemes in the EU.<sup>117</sup> Although the focus of the meeting was on investor residence schemes, the Group explained that this meeting was only part of a larger effort involving future initiatives concerning investment migration in the EU.<sup>118</sup>

<sup>109</sup> ‘Curbing Corrupt Abuse of EU Golden Passports & Visas: European Commission Must Heed Parliament’s Proposals’, *Transparency International* (Web Page, 10 March 2022) <<https://www.transparency.org/en/press/eu-golden-passports-visas-corruption-european-commission-must-heed-parliament-proposals>>, archived at <<https://perma.cc/QHR5-77LQ>>.

<sup>110</sup> *European Parliament Report 2022* (n 64).

<sup>111</sup> European Parliament — 2021–2022 Session — Sitting 7 to 10 March 2022 — Strasbourg — Verbatim Reports of Proceedings, 13. *Citizenship and Residence by Investment Schemes (Debate)* [2022] CRE 07/03/22–13 <[https://www.europarl.europa.eu/doceo/document/CRE-9-2022-03-07-ITM-013\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-9-2022-03-07-ITM-013_EN.html)>, archived at <<https://perma.cc/V235-GSKW>> (‘Debate of 7 March 2022’).

<sup>112</sup> Stephane Tajick, *The Fate of Investment Migration in Europe — What Happens Next* (Report, Investment Immigration Insider, 22 March 2022) <<https://www.imidaily.com/program-updates/special-report-the-fate-of-investment-migration-in-europe-what-happens-next>>, archived at <<https://perma.cc/B8XW-KZWT>>.

<sup>113</sup> European Parliament, *Rules of Procedure* (adopted December 2019) r 47; *European Parliament Report 2022* (n 64).

<sup>114</sup> Third country CBI should be included in Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 Listing the Third Countries whose Nationals Must be in Possession of Visas when Crossing the External Borders and those whose Nationals are Exempt from that Requirement [2018] OJ L 303/39 (28 November 2018), and new provisions should be added to Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 concerning a Community Code on Visas [2009] OJ L 243/1 (15 September 2009).

<sup>115</sup> ‘“Golden Passport” Schemes: Commission Proceeds with Infringement Case against MALTA’, *European Commission* (Press Release, 6 April 2022) <[https://ec.europa.eu/commission/presscorner/detail/EN/IP\\_22\\_2068](https://ec.europa.eu/commission/presscorner/detail/EN/IP_22_2068)>, archived at <<https://perma.cc/Z249-SKJT>>.

<sup>116</sup> European Commission, ‘Commission Refers Malta to the Court of Justice’ (n 67).

<sup>117</sup> European Commission, ‘Meeting of the Group of Member State Experts on Investor Citizenship and Residence Schemes in the EU: Focused on Investor Residence Schemes’ (Meeting Minutes, Ref No Ares(2022)7878747 – 11/112022, 23 June 2022).

<sup>118</sup> See generally *ibid*.

VI INVESTMENT MIGRATION AND THE EU: EXTERNAL DIMENSIONS

Among recent developments in the CBI market in the EU and in countries enjoying visa-free access to the Schengen Area, media outlets have reported on the issue of individuals with questionable or even criminal backgrounds purchasing Vanuatu passports and, therefore, gaining access to the EU and UK due to visa waiving agreements.<sup>119</sup> Vanuatu has now had its visa waiver agreement with the EU suspended due to flaws and risks identified in the CBI programme in which individuals can obtain a passport without ever setting a foot in Vanuatu.<sup>120</sup>

As Reyders explains, the EU position on CBI is exemplified by the Joint G7 statement of 26 February 2022 on economic measures taken in the context of the Ukrainian crisis.<sup>121</sup> The joint statement also includes the making of a commitment to take certain measures aimed at limiting the sale of citizenship and was signed by the Commission, France, Germany, Italy, the UK, Canada and the US. Ylva Johansson, Member of the European Commission, expressed a similar attitude towards the sale of CBI by third countries, especially if those countries enjoy visa waivers with the EU.<sup>122</sup> This became clear when an agreement was suspended with Vanuatu for its sale of passports. The position of both the Commission and its President, as well as the Parliament, seems to be rather strong and negative towards CBI. The Commission has already referred Malta to the CJEU, and the country seems to now be under additional pressure from the US, which has the ability to exclude the Member State from their Electronic System for Travel Authorization regime.<sup>123</sup> Similarly, towards third countries such as those in the Caribbean, the Commission made its position clear once again on 22 March 2022, when they repeated that 'in case of an increased risk for the internal security of Member States, the exemption from the visa requirement is temporarily suspended'.<sup>124</sup>

---

<sup>119</sup> Ward and Lyons, 'Citizenship for Sale' (n 50).

<sup>120</sup> European Commission Directorate-General Migration and Home Affairs, *Proposal for a Council Decision on the Partial Suspension of the Application of the Agreement between the European Union and the Republic of Vanuatu on the Short-stay Visa Waiver* (Non-Legislative Procedure, Procedure No 2022/0001(NLE), Referral No COM(2022) 6 final, Document No 52022PC0006, 12 January 2022); Council of the European Union, 'Vanuatu: Council Partially Suspends Visa Waiver Agreement due to Risks Posed by Golden Passport Schemes' (Press Release 166/22, 3 March 2022); Christian Henrik Nesheim, 'EU Tells Vanuatu to Get its CBI House in Order by February 2023 or See Visa-Waiver Suspension Extended', *Investment Migration Insider* (Web Page, 8 June 2022) <<https://www.imidaily.com/asia-pacific/eu-tells-vanuatu-to-get-its-cbi-house-in-order-by-may-2023-or-see-visa-waiver-suspension-extended>>, archived at <<https://perma.cc/HM5J-6Q62>>. On 1 February 2023, Vanuatu was granted an extra 18 months by the EU to reform its CBI program before implementing a full suspension of its visa waiver program, which was to take effect on 4 February 2023: 'Vanuatu: EU Allows 18 Months Extension to Vanuatu', *Investment Migration Council* (online, 6 February 2023) <<https://investmentmigration.org/news/vanuatu-eu-allows-18-months-extension-to-vanuatu>>, archived at <<https://perma.cc/ZXA3-A32C>>.

<sup>121</sup> European Commission, 'Joint Statement on Further Restrictive Economic Measures' (Statement 22/1423, 26 February 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/statement\\_22\\_1423](https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1423)>, archived at <<https://perma.cc/HC98-SPP2>>.

<sup>122</sup> Debate of 7 March 2022 (n 111) (Ylva Johansson).

<sup>123</sup> Tajick (n 112).

<sup>124</sup> Commission Implementing Regulation (EU) 2022/693 of 27 April 2022 on the Temporary Suspension of the Visa Exemption for Nationals of Vanuatu [2022] OJ L 129/18 (3 May 2022) [4].



## VII EU LAW PERSPECTIVE

Malcolm Shaw has observed that no state is an island detached from the rest of the world and that the

[i]nterdependence and the close-knit character of contemporary international commercial and political society ensures that virtually any action of a state could well have profound repercussions upon the system as a whole and the decisions under consideration by other states.<sup>125</sup>

These considerations led to a growing ‘interpenetration’ of international, regional and domestic law in a number of fields.<sup>126</sup> The phenomenon is even more visible in the context of the unique EU legal order and its internal market, where virtually any action of one of the Member States can have profound repercussions for the rest of the community.

Some scholars have observed shortcomings in affecting the strength of the Commission’s legal argument against CBI in the EU. Hans d’Oliveira, in reference to the state of affairs up until June 2022, writes that the two main arguments on which the Commission and the Parliament have been standing are the theory of a ‘genuine link’ (from the *Nottebohm* case) and the ‘sincere cooperation’ obligation of Member States — both of which are ‘built on quicksand’.<sup>127</sup> d’Oliveira provides a fair analysis of the Commission’s drawing of differences between ‘ordinary naturalisation procedures’ and ‘discretionary naturalisation procedures’; the latter being based on ‘the national interest’ and ‘highly individualized’.<sup>128</sup> While the work makes insightful comments on quite a few aspects of the issue, it fails to acknowledge the dominant norms and practices of Member States concerning ordinary and discretionary naturalisation in contrast with the distinct requirements under CBI schemes, which require little but an investment and some evidence of a physical presence in the country. Furthermore, the fact remains that there has been some sort of scandal, leak of highly concerning documents, and proven or suspected fraud in connection to almost every single scheme to date, including but not limited to the controversies connected to Malta and Cyprus.<sup>129</sup> These occurrences are further evidence of the validity of concerns, as well as the risks identified, in a variety of reports. Lastly, it has to be recognised that the analysis of a state’s sovereignty, their regulation of nationality laws, as well as the assessment of the implications of such practices will differ greatly when analysing third countries as contrasted with EU Member States. The cross-border nature of CBI is much more prominent because of the unique character of the internal market (lacking border controls), which is based on the principles of sincere cooperation and Member States acting in good faith, and also in respect of overarching EU law and EU citizenship. Thus, from a legal or socio-political perspective, investment migration in the context of the EU cannot be treated the same as when speaking of CBI on a global scale.

<sup>125</sup> Malcolm N Shaw, *International Law* (Cambridge University Press, 9<sup>th</sup> edn, 2021) 110.

<sup>126</sup> Constanze Semmelmann, ‘General Principles in EU Law between a Compensatory Role and an Intrinsic Value’ (2013) 19(4) *European Law Journal* 457, 462–3 n 21.

<sup>127</sup> Hans Ulrich Jessurun d’Oliveira, ‘Golden Passports European Commission and European Parliament Reports Built on Quicksand’ (Working Paper No 162, COMPAS, January 2023) 2 <<https://www.compas.ox.ac.uk/wp-content/uploads/WP-2023-162-Golden-Passports.pdf>>, archived at <<https://perma.cc/B2JH-LCMU>>.

<sup>128</sup> *ibid* 4.

<sup>129</sup> For a more detailed account of associated scandals and controversies to date, see Part IV above.

Given the severity of implications for other Member States and the effect that CBI may have (Malta is one example), the most problematic question remains: can countries in the EU develop any sort of protective shield, such as the right not to recognise the nationality of successful applicants, to deny them entry, or to subject them and their businesses to additional checks and requirements? Following judgments such as *Micheletti v Delegacion del Gobierno en Cantabria* ('*Micheletti*'),<sup>130</sup> the European Court of Justice ('ECJ') stated in *Zhu and Chen v Secretary of State or the Home Department* that, although

[i]t is true that ... the purpose of [Mrs Chen's] ... stay in the United Kingdom was to create a situation in which the child she was expecting would be able to acquire the nationality of another Member State in order thereafter to secure ... a long-term right to reside in the United Kingdom. Nevertheless ... it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality ... it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition.<sup>131</sup>

However, even if the answer to the previously posed question was 'yes', what would be the short and long-term effects for the integrity of the EU internal market and inter-State cooperation within the EU?

Gerard-René de Groot lists, among others, the following situations in which a State may be in violation of EU law due to proposed laws on acquisition and loss of nationality: a) when violating the obligation of solidarity;<sup>132</sup> b) 'if domestic rules on acquisition or loss of nationality violated public international law, especially fundamental rights guaranteed under international law';<sup>133</sup> and c) when violating the fundamental right to free movement within the EU.<sup>134</sup> In the second scenario, de Groot argues that:

[i]f a person has acquired the nationality of a Member State as a result of the application of a rule that violates international law, other Member States are entitled to treat that person as not possessing that nationality and, consequently, as a non-European citizen. This conclusion is in line with the general reaction to attribution of nationality in violation of international law.<sup>135</sup>

---

<sup>130</sup> *Micheletti v Delegacion del Gobierno en Cantabria* (C-369/90) [1992] ECR I-4239 ('*Micheletti*').

<sup>131</sup> *Zhu and Chen v Secretary of State for the Home Department* (C-200/02) [2004] ECR I-9951 [36]–[37], [39] ('*Zhu and Chen*'). See also *Micheletti* (n 130) [10].

<sup>132</sup> This, in de Groot's mind, can happen if a Member State 'were to grant its nationality to an important part of the population of a non-EU Member State, without prior consultation with Brussels' under art 10 of the *Treaty Establishing the European Community* [1992] OJ C 224/6 (31 August 1992) ('EC'): Gerard-René de Groot, 'Towards a European Nationality Law' (2004) 8(3) *Electronic Journal of Comparative Law* 1, 12. See also Stephen Hall, *Nationality, Migration Rights and Citizenship of the Union* (Martinus Nijhoff, 1995) 66–7, which discusses the procedures that need to be followed if the duties imposed under art 10 are violated.

<sup>133</sup> de Groot (n 132) 14. See also Stephen Hall, 'Loss of Union Citizenship in Breach of Fundamental Rights' (1996) 21(2) *European Law Review* 129.

<sup>134</sup> de Groot (n 132) 15 notes that:

The fundamental right of free movement ... may be violated if a national of a Member State would lose his nationality — and therefore the status of citizen of the Union — if he lived abroad in another Member State during a certain period of time. The use of the right of free movement guaranteed by the EC Treaty in conjunction with such a regulation would cause loss of nationality and as a result — in some cases — loss of the status of European citizen. Such a national rule is incompatible with Community law.

<sup>135</sup> *ibid* 14.

Although de Groot's argument is persuasive as a general proposition, it is a dangerous point in light of recent efforts to combat statelessness as well as the complexity of interrelations between EU law and public international law, including the Council of Europe's *European Convention on Nationality* ('ECN') and international human rights regime.<sup>136</sup> If these notions were applied rigorously by Member States, in light of any violation by other Member States of international law, the implications could be catastrophic for individuals stripped of their status and rights. Not all Member States are party to the *1961 Convention on the Reduction of Statelessness*;<sup>137</sup> many of those who are parties have made reservations.<sup>138</sup> Furthermore, the Preamble to the ECN makes references to the need for the observance of certain measures and the adoption of mechanisms under international law that would avoid cases of statelessness as far as possible. The ECN provides, as one of the principles upon which the nationality rules of each State Party must be based, that 'statelessness shall be avoided',<sup>139</sup> and refers to cooperation between State Parties, including through providing the Secretary General of the Council of Europe with information about instances of statelessness.<sup>140</sup> However, as mentioned above, many EU Member States have not ratified the ECN. At the supranational level, the EU's Justice and Home Affairs Council have required that the European Migration Network ('EMN' or 'the Network') establish a platform for the exchange of information and good practices concerning the prevention of statelessness within the EU.<sup>141</sup> The first step involves the implementation of a mapping exercise to identify stateless persons in Member States who are particularly vulnerable, and subsequently expanding this activity to other stateless persons. This exercise is coordinated by the Network with non-governmental organisations ('NGOs') and other international organisations, such as the United Nations High Commissioner for Refugees ('UNHCR') and the United Nations Children's Fund ('UNICEF').<sup>142</sup> By taking this action, UNHCR, UNICEF and NGOs will have the opportunity to speak with the relevant Member

---

<sup>136</sup> *ibid*; ECN (n 75). See generally Ashley Mantha-Hollands and Jelena Džankić, 'Ties that Bind and Unbind: Charting the Boundaries of European Union Citizenship' (2022) *Journal of Ethnic and Migration Studies* 1.

<sup>137</sup> *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

<sup>138</sup> '4. Convention on the Reduction of Statelessness', *UN Treaties Collection* (Web Page) <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf>>, archived at <<https://perma.cc/T2Z8-4JRV>>.

<sup>139</sup> ECN (n 74) art(b). It is further reiterated in art 18(1).

<sup>140</sup> *ibid* art 23.

<sup>141</sup> The European Migration Network ('EMN') was established in 2008 by Council Decision of 14 May 2008 establishing a European Migration Network (2008/381/EC) [2008] OJ L 131/7 (21 May 2008) and amended by Regulation (EU) No 516/2014 of the European Parliament and of the Council of 20 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and Repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC [2014] OJ L 150/168 (20 May 2014). It is coordinated by the Directorate-General for Migration and Home Affairs of the European Commission.

<sup>142</sup> See, eg, 'Statelessness in the EU' (EMN Inform Series, 11 November 2016) <[https://home-affairs.ec.europa.eu/system/files/2020-09/emn-informs-00\\_inform\\_statelessness\\_final.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/emn-informs-00_inform_statelessness_final.pdf)>, archived at <<https://perma.cc/H7EV-LEAZ>> ('Statelessness in the EU'); Magnus Ovilius and Adolfo Sommaribas, 'Building Impetus with the EMN Platform on Statelessness', *European Network on Statelessness* (Blog Post, 25 January 2017) <<https://www.statelessness.eu/updates/blog/building-impetus-emn-platform-statelessness>>, archived at <<https://perma.cc/5SN8-WB8V>>.

States' authorities directly about the legal situations of identified persons.<sup>143</sup> Therefore, in considering enabling measures for Member States in addressing challenges posed by CBI and a potential 'right' to refuse to recognise 'investor-nationals', Member States have to consider whether the newly purchased citizenship is, or will become, the only citizenship of that person, and any relevant statelessness concerns and limitations. Such a detailed analysis, however, is outside the scope of this particular work.

Taking the arguments outlined by the European Commission and the European Parliament further, admittedly, the 'genuine link' in *Nottebohm* comes with its own problems. However, it is proposed that the idea of a genuine connection should be explored separately, specifically in the context of the EU itself, including the naturalisation norms and customs of EU Member States, EU values and its soft law.

For instance, d'Oliveira briefly questions the requirement of a genuine link in the context of its absence for *ius soli* ('the right of soil', or birthright citizenship) or *ius generationis* ('the right of generation').<sup>144</sup> This question, while in need of deeper exploration, should follow a discussion on recognising the differences between naturalisation and the modes of acquisition of citizenship discussed above. There seems to be a long and well-established practice where 'unspoken' agreements concerning the core recognised ways of citizenship conferral — none of which happen to be investment migration.<sup>145</sup> It is quite possible that those assumptions and silent understandings are at the heart of many agreements themselves, affecting even the willingness of Member States to open up their internal borders within the EU, trusting that these arrangements would not be abused or exploited. While not ideal — in the sense that scholars have argued against the notion of genuine link in nationality law — the notion is perhaps an effort of reconciling the traditionally recognised and acceptable modes of acquisition with CBI in terms that would legitimise *ius pecuniae* ('the right of money', or citizenship through investment).<sup>146</sup> The issue may be in how the understanding and recognition of a 'genuine link' has changed and evolved since *Nottebohm*, specifically in the context of contemporary laws and practices. Now, the genuine link is not merely what the International Court of Justice had in mind, or ought to have had in mind at the time of the *Nottebohm* decision, with all the potential implications of modern laws and practices.

## VIII EU CITIZENSHIP AND NATIONALITY LAWS

Article 20 of the TFEU confers the status of an EU citizen upon any individual

---

<sup>143</sup> See 'Platform for Statelessness', *European Commission* (Web Page, 29 October 2016) <[https://home-affairs.ec.europa.eu/pages/page/platform-statelessness\\_en](https://home-affairs.ec.europa.eu/pages/page/platform-statelessness_en)>, archived at <<https://perma.cc/M7VG-87WH>>; 'Statelessness in the EU' (n 142); 'Addressing Statelessness in the European Union, One Year on from the Adoption of European Council Conclusions', *EMN Luxembourg* (online, 18 January 2017) <<https://emnluxembourg.uni.lu/addressing-statelessness-in-the-european-union-one-year-on-from-the-adoption-of-european-council-conclusions>>, archived at <<https://perma.cc/JNC2-UAWS>>.

<sup>144</sup> d'Oliveira (n 127) 6. As contrasted with *ius sanguinis* or other forms of citizenship by descent proposed by scholars — see, for example, the notion of *ius filiationis*: Rainer Bauböck, 'Ius Filiationis: A Defence of Citizenship by Descent' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (IMISCOE 2018) 83.

<sup>145</sup> See *European Commission Report 2019* (n 3) 2; Patrick Weil, 'Access to Citizenship: A Comparison of Twenty-Five Nationality Laws' in T Alexander Aleinikoff and Douglas Klumeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001) 17.

<sup>146</sup> Džankić, *The Global Market for Investor Citizenship* (n 27) 8.

with the nationality of one of the Member States. EU citizenship, as argued by the CJEU, is designed to be a fundamental status of citizens of the Union<sup>147</sup> as well as entail a variety of socio-legal and political rights, such as electoral rights<sup>148</sup> and the enjoyment of the four fundamental freedoms in the common market.<sup>149</sup> Article 17 of the *Treaty Establishing the European Community* makes reference to Union citizenship being ‘complementary’ to national citizenship. Article 20 of the TFEU reads that ‘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’. The implications of the change, however, remain unclear.<sup>150</sup>

The *Preliminary Draft Treaty Establishing a Constitution for Europe* included the provision that ‘every citizen of a Member State is a citizen of the Union; enjoys dual citizenship, national citizenship and European citizenship; and is free to use either, as he or she chooses, with the rights and duties attaching to each’.<sup>151</sup> Declaration 2, as annexed to the *Treaty of the European Union* (more commonly known as the *Treaty of Maastricht*), confirmed Member States’ exclusive competence to regulate on nationality matters, since all references to nationals of Member States in the Treaty are qualified: ‘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.’<sup>152</sup> Nevertheless, the exercise of exclusive competence may still necessitate having due regard to broader EU law as well as the potential limits on such exercise. An interesting question pertaining to the issue of CBI in the EU is whether the cross-border character of the matter, including a possible detriment to other Member States, as well as identified risks and socio-political arguments against the sale of citizenship are enough to merit intervention at EU level, or even from other Member States.<sup>153</sup> In such instances, should states have a protective shield, and if so, then in what form? Further, considerations connect strictly to the legal sphere and whether CBI truly is a matter of purely exclusive competence. If not, a question has to be posed: what is the legal basis for an intervention at EU level?

Disagreements can occur as to the reach of the EU’s competence in various fields as different interpretations of some provisions may lead to a broader or

<sup>147</sup> European Parliament, *Report with Proposals to the Commission* (n 110) 5.

<sup>148</sup> TFEU (n 76) art 22.

<sup>149</sup> TFEU (n 76) art 21.

<sup>150</sup> Jo Shaw, ‘The Treaty of Lisbon and Citizenship’ (European Policy Brief, The Federal Trust, 2008) (‘The Treaty of Lisbon’); Henri de Waele, ‘EU Citizenship. Revisiting its Meaning, Place and Potential’ (2010) 12 *European Journal of Migration Law* 319, 322–3; Heanneke van Eijken, ‘European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals’ (2010) 27(72) *Utrecht Journal of international and European Law* 65, 66 n 1.

<sup>151</sup> Shaw, ‘The Treaty of Lisbon’ (n 150) 2; *Preliminary Draft Treaty Establishing a Constitution for Europe [2002]* CONV 369/02, 9 (28 October 2002). This was omitted in the *Draft Treaty Establishing a Constitution for Europe [2003]* OJ C 169/1 (18 July 2003).

<sup>152</sup> TEU (n 79) 98; van Eijken (n 150) 66.

<sup>153</sup> It is a separate issue at heart, meriting an independent inquiry into particular ways of how it can be achieved. However, one could propose Member States utilising their right to bring infringement proceedings. Such an action is rare, given that Member States tend to avoid undiplomatic behaviour or simply lack interest. It is outside the scope of this work, and planned as a separate research area, to map what other arguments and legal routes Member States could utilise to legitimise intervention from their end when dealing with other Member States selling EU citizenship. When a Member State is believed to be in breach of EU law, an action may be brought in the Court by the European Commission under art 258 TFEU (n 76) and by other Member States under art 259 TFEU (n 76).

narrower scope of competence<sup>154</sup> (with broader interpretations increasing in European case law throughout the years).<sup>155</sup> 'Broadly framed' provisions of the Treaties can lead to the expansion of the EU's power to intervene in formerly purely domestic matters.<sup>156</sup> If the implications of municipal law adversely affect the international community and are not in accordance with EU law, it might be considered within the EU's scope to 'step in', even though Member States have given only partial competence and limited powers to the EU.<sup>157</sup>

What is more, there has arguably been an increasing competence of the EU on nationality matters,<sup>158</sup> as shown by jurisprudence where nationality and immigration laws were found in violation of the Union's legal order.<sup>159</sup> With time, questions arose as to what extent the EU can intervene in matters which are within Member States' competence, in respect of matters which adversely affect the whole Union and other Member States. Such instances have cross-border implications, which have raised debate on whether some domestic matters should remain purely internal.<sup>160</sup>

In the 1992 case of *Micheletti*, a preliminary reference was made to the CJEU concerning Member States' competence on regulating nationality matters, as well as the States' mutual respect and recognition of one another's nationals and domestic nationality rules.<sup>161</sup> Exclusive competence under international law was confirmed, albeit with 'due regard' to Community law.<sup>162</sup> Derivative from that is the conclusion that 'whenever a national provision governing nationality restricts the Union citizen without a legitimate interest and/or in a disproportionate manner, this provision shall have to be put aside by the national court.'<sup>163</sup>

---

<sup>154</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 6<sup>th</sup> edn, 2015) 73.

<sup>155</sup> See, for example, the case of *Janko Rottmann v Freistaat Bayern* (C-135/08) [2010] ECR I-1449 ('*Rottmann*') and the general principle of proportionality, confirmed later in *JY v Wiener Landesregierung* (Court of Justice of the European Union, C-118/20, 18 January 2022) ('*JY*') (Opinion of Advocate General Spuzar), or the criticism concerning the CJEU and whether it respects the 'limits' of the EU's competence (albeit these limits are rather blurred and moving with the times through judicial interpretation, in light of new challenges to the internal market. See Roland Flamini, 'Judicial Reach: The Ever-Expanding European Court of Justice' (2012) 175(4) *World Affairs* 55; Vilija Velyvytė, 'Does the Court of Justice of the European Union Respect the Limits of EU Competence?', *EU Law Analysis* (Blog Post, 18 December 2022) <<http://eulawanalysis.blogspot.com/2022/12/does-court-of-justice-of-european-union.html>>, archived at <[perma.cc/VY6K-NNAG](http://perma.cc/VY6K-NNAG)>.

<sup>156</sup> See Koen Lenaerts and José Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2014) 20(2) *Columbia Journal of European Law* 1, 32–6; Peter Van Elsuwege and Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 *European Constitutional Law Review* 8.

<sup>157</sup> Lorna Woods, Philippa Watson and Marios Costa, *Steiner and Woods EU Law* (Oxford University Press, 13<sup>th</sup> edn, 2017) 555.

<sup>158</sup> Chris Turner et al, *EU Law: Key Cases* (Hodder Education 2006) 89–93.

<sup>159</sup> See generally *Micheletti* (n 130); *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (C-184/99) [2001] ECR I-6193 ('*Grzelczyk*'); *Baumbast v Secretary of State for the Home Department* (C-413/99) [2002] ECR I-7091; *Zhu and Chen v Secretary of State for the Home Department* (C-200/02) [2004] ECR I-9925.

<sup>160</sup> Steve Peers, *EU Justice and Home Affairs Law* (Oxford University Press, 3<sup>rd</sup> edn, 2011) 607–18; Steve Peers, 'Want to be an EU Citizen? Show me the Money!', *EU Law Analysis* (Blog Post, 28 January 2014) <<http://eulawanalysis.blogspot.com/2014/01/want-to-be-eu-citizen-show-me-money.html>>, archived at <<https://perma.cc/6KR3-TXT8>> ('*Want to be an EU Citizen?*').

<sup>161</sup> This case, while primarily concerned with private international law, is relevant to the discussion on nationality matters and the scope of the 'absolute' character of Member States' exclusive competence.

<sup>162</sup> *Micheletti* (n 130) [10].

<sup>163</sup> van Eijken (n 150) 69.

*Rottmann v Freistaat Bayern* ('*Rottmann*') concerned whether provisions regarding EU citizenship (Union citizenship) were capable of having the effect of restricting or qualifying the exercise of such competence by Member States. In the ECJ's jurisprudence on EU citizenship,

the substantive rights of European citizens have been linked to equality and the exercise of free movement rights ... [while] any restriction of the exercise of free movement by Union citizens should be objectively justified by the Member States.<sup>164</sup>

As a derivative of such, Hanneke van Eijken correctly identifies the legal problem of what this means for Member States' competence of the conferral and revocation of citizenship. The Court was to perform a careful balancing task, giving due regard to the two conflicting interests of state sovereignty and upholding relevance of protection and rights granted to Union citizens under EU citizenship. In previous case law, such as *Avello v État belge*,<sup>165</sup> concerning governance of surnames in Member States, or *Schempp v Finanzamt München V*,<sup>166</sup> relating to tax provisions, the ECJ has already looked into the effect of EU citizenship in some areas where Member States traditionally enjoy legislative competence. The issues concerning regulation of nationality matters, however, are '(more) explicitly'<sup>167</sup> excluded from the scope of EU competence.<sup>168</sup> The Court then went on to answer the question of whether, in the case of *Rottmann*, nationality matters could fall within the scope of EU law:

It is clear that the situation of a citizen of the Union who ... is faced with a decision withdrawing his naturalization, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.<sup>169</sup>

At the same time, the ECJ accepted that, subject to the test of proportionality, Member States 'may legitimise the revocation of nationality and its consequences for the status of EU citizens for the protection of their special relationship with their nationals'.<sup>170</sup> This notion was based on 'solidarity and good faith, and the reciprocity of rights and duties, which forms the bedrock of the bond of nationality'.<sup>171</sup> When applying the principle of proportionality, the following have to be taken into account by a domestic court:

the specific circumstances of the case, weigh the gravity of the offence against the consequences of the loss of the status of Union citizenship, the lapse of time between the naturalisation decision and the decision to withdraw the nationality, as well as ... whether it is possible to recover the nationality of origin.<sup>172</sup>

---

<sup>164</sup> *ibid* 66.

<sup>165</sup> *Avello v État belge* (C-148/02) [2003] ECR I-11635.

<sup>166</sup> *Schempp v Finanzamt München V* (C-403/03) [2005] ECR I-6435.

<sup>167</sup> van Eijken (n 150) 67.

<sup>168</sup> TFEU (n 76) art 21; *Treaty on European Union — Declaration on Nationality of a Member State* [1992] OJ C 191/98 (29 July 1992).

<sup>169</sup> *Rottmann* (n 155) 1487 [42]. Note that art 17 EC (n 132) became art 20 TFEU (n 76) after the *Treaty of Lisbon: Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community*, adopted 13 December 2007, OJ C 306/1 (entered into force 1 December 2009).

<sup>170</sup> van Eijken (n 150) 67.

<sup>171</sup> *Rottmann* (n 155) [51].

<sup>172</sup> van Eijken (n 150) 68.

Should, therefore, the same considerations and balancing task be employed when assessing the use of exclusive competence for the purposes of CBI?

Academics argue that, based on *Micheletti* and *Rottmann*, the ECJ can be seen as the final instance that scrutinises domestic nationality laws and whether they comply with EU law. The idea, however, that Member States are the ‘ultimate gatekeepers’<sup>173</sup> of EU citizenship is perhaps more complex and not entirely accurate. In *Rottmann*, even though the Court left the task of balancing factors and assessing proportionality to the domestic court, it made very strong suggestions, if not prescriptions, regarding which factors are to be taken into account. Arguably, the principle of proportionality provides for due regard be given to the issue of Member States’ sovereignty and legislative competence; ‘only measures that are exercised in a manner that exceeds the principle of proportionality are “caught” by Union law’ when assessing sensitive policy areas.<sup>174</sup> Arguably, investment migration would be an example of just that, given its cross-border implications.

Eleanor Sharpston, a former Advocate General of the CJEU, pleads ‘for application of Union citizenship connected with fundamental rights, independent of cross-border activities’<sup>175</sup> and noted that: ‘Article 20 TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’.<sup>176</sup> Thus, it would be an oversimplification to state that nationality matters fall outside of the scope of EU competence entirely. Case law has shown a gradual development of the areas and circumstances in which the exercise of Member States’ competence on nationality matters and its implications may encroach onto the field of EU concern.

Steve Peers provides a helpful account of the core considerations concerning whether there is ‘international law on citizenship’.<sup>177</sup> While analysing *Rottmann*,<sup>178</sup> Peers noted that the CJEU referred to the *ECN* when considering the limits of Member States’ power to introduce rules and qualifications on the loss of nationality. Each Member State can determine under its own legal order who its nationals are; however, such laws will be accepted by other Member States only insofar as they are compatible with existing international law and general principles recognised in regard to nationality. Not all Member States, however, have ratified the *ECN*, and international law — while relevant to the EU legal order — does not offer much help either.<sup>179</sup> Peers made a crucial observation, however, that since Member States are forced to recognise each other’s nationalities, they have at least ‘some’ interest in what other countries decide regarding their nationality laws.<sup>180</sup> Given the fact that there are no internal border controls and that EU citizens are enjoying freedom of movement within the internal market, the point of having a genuine interest in other Member States’ laws is even more visible. Peers quite accurately points to the fact that it is impossible to definitively conclude that

---

<sup>173</sup> *ibid* 69.

<sup>174</sup> *ibid*.

<sup>175</sup> *ibid* 69 n 20.

<sup>176</sup> *Zambrano v Office national de l’emploi (ONEm)* (C-34/09) [2001] ECR I-1232 [42].

<sup>177</sup> Steve Peers, *EU Justice and Home Affairs Law* (Oxford University Press, 3<sup>rd</sup> edn, 2011) 607–18; Peers, ‘Want to be an EU Citizen?’ (n 158).

<sup>178</sup> *Rottmann* (n 155).

<sup>179</sup> Petra Weingerl and Matjaž Tratnik, ‘Citizenship by Investment Programs from the Perspective of International and EU Law’ (2019) 11(2) *LeXonomica* 95, 109–11.

<sup>180</sup> Peers, ‘Want to be an EU Citizen?’ (n 158).



the EU has nothing to do with Member States' laws on the acquisition of citizenship, however, it is doubtful whether the EU would be willing to accept a far-stretched variant of *jus argentum* (citizenship by investment as described by Peers, or literally 'the right of silver').<sup>181</sup>

As noted above, the exercise of Member States' exclusive competence in nationality matters does not exempt them from respecting general EU law and its other principles — this should come as no surprise. d'Oliveira has speculated that:

given the reluctance of the Member States to see their laws on nationality, considered to belong to their reserved domain, as acknowledged by the EP, subjected to Union law and principles, legislative initiatives, if at all launched by the Commission, in all probability will not be embraced by the Council.<sup>182</sup>

It will be interesting to see the outcome from the CJEU on the matter, especially given its past jurisprudence, which has concluded that the exercise of competence on nationality matters may come with its own limitations dependent on the facts and circumstances of a case.<sup>183</sup> d'Oliveira notes a certain shift and development observable in *Rottman*,<sup>184</sup> *Tjebbes v Minister van Buitenlandse Zaken*<sup>185</sup> and *JY v Wiener Landesregierung*,<sup>186</sup> in which the ECJ has demanded that Member States' nationality laws comply with EU law, such as the principle of proportionality.<sup>187</sup>

Turning to the Commission Recommendation from March 2022, d'Oliveira analyses the principle of sincere cooperation. The scholar argues that this is a potentially dangerous shift from established case law mandating Member States to respect EU law, most notably, the principle of proportionality, to a duty to give due regard to a 'whole bulk of Union laws' linked to art 4(3) TEU.<sup>188</sup> d'Oliveira provides an interesting account of the interplay between the genuine link criterion and the principle of sincere cooperation. This author, however, would argue that a more detailed consideration is needed while analysing the nuances of the EU legal order and its peculiarities for the employed reading of the aftermath of *Nottebohm*, as well as its use in the context of CBI and sincere cooperation in the EU. It cannot be denied that the criterion has its own conceptual troubles, but perhaps a different angle should be taken to assess the principle of sincere cooperation by analysing it separately from the genuine link. It is somewhat correct to note that:

If indeed 'due regard to EU law', including the obligation to cooperate loyally and the principle of proportionality, would oblige states to introduce a genuine link criterion into their laws on nationality, and that is clearly the position of the Commission as shown in the infringement procedures, this would not only require an enormous overhaul of the codes on nationality of the Member States, but also a spectacular inroad into the identity of the Member States, as guaranteed in art 4(2) of the TEU.<sup>189</sup>

<sup>181</sup> *ibid.*

<sup>182</sup> d'Oliveira (n 127) 7.

<sup>183</sup> *Rottmann* (n 155), for example, concludes that '[i]t is clear that the situation of a citizen of the Union who [is] ... like the applicant ... by reason of its nature and consequences, falls within the ambit of European law': at [42]. See similarly, *JY* (n 155) [24], [39]–[40] ('*JY*'); *Tjebbes v Raad van State* (Court of Justice of the European Union, Case C-221/17, 12 March 2019) [32] ('*Tjebbes*').

<sup>184</sup> *Rottmann* (n 155).

<sup>185</sup> *Tjebbes* (n 183) 11 [50].

<sup>186</sup> *JY* (n 155) 15 [75].

<sup>187</sup> d'Oliveira (n 127) 16.

<sup>188</sup> *ibid* 15.

<sup>189</sup> *ibid* 20.

It is possible for the Commission to find a stronger and more legally sound argument to legitimise intervention in the context of EU investment migration. As previously noted, one possibility would be to reformulate the sincere cooperation duty and link it to other considerations, not the criterion of the 'genuine link'. Furthermore, utilising the obligation to give due regard to EU law including, most notably, the principle of proportionality — conflicting interests as well as other policy, security, economic and legal considerations should be all weighed against one another in an effort to define what art 4(3) should truly mean in the context of CBI.

## IX PUBLIC INTERNATIONAL LAW

Citizenship is traditionally understood as a form of defining national identity with an unwritten agreement among states that, for the granting of such identity, some form of a link or connection should be found between an individual and the country in question.<sup>190</sup> Such reasoning was also mentioned in the commonly cited *Nottebohm* case.<sup>191</sup> It might be an overstatement to imply a clearly distinguishable custom. Nonetheless, there are some traditionally practised and recognised methods of citizenship acquisition, three of which include *jus sanguinis* ('the right of blood', or citizenship by descent), *jus soli* and naturalisation.<sup>192</sup> While RBI is outside the scope of this work, it is an example which would arguably align closely with naturalisation as a mode of acquisition, as applicants are only granted permanent residence status after several years and after meeting several requirements before they can apply for citizenship itself.<sup>193</sup> However, *ius pecuniae*, particularly the sale of citizenship, does not seem to be a well-established or necessarily welcome practice among modern European states. There are numerous examples of 'failed' schemes.<sup>194</sup>

Nevertheless, the making of nationality laws, and in particular, the acquisition and loss of citizenship, remains an exclusive attribute of states. The *1930 Convention on Certain Questions relating to the Conflict of Nationality Laws* ('*1930 Hague Convention*') specified that each contracting state has the right to determine its nationals and that the nationality laws of that state must be respected by other countries as long as its compatible with 'international conventions, with international customs and the principles of general law recognized with regard to nationality'.<sup>195</sup> However, increasing globalisation and 'erosion of ... identity [and] nationality' have caused certain issues to no longer be a purely domestic matter due to their cross-border implications and effects on relations among states.<sup>196</sup>

Over a century ago, in an Advisory Opinion the Permanent Court of International Justice ('PCIJ') opined that 'the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question'.<sup>197</sup> The relativity

---

<sup>190</sup> Jana Maftai, 'Some Aspects of Citizenship from the Perspective of International Law' (2015) 10 *European Integration — Realities and Perspectives Proceedings* 225, 225–6.

<sup>191</sup> *Nottebohm Case (Liechtenstein v Guatemala) (Judgment)* [1955] ICJ Rep 4, 23.

<sup>192</sup> For more on these different methods of citizenship acquisition, see Mentzelopoulou and Dubrava (n 59) 2; Weil (n 145) 17, 19.

<sup>193</sup> *European Commission Report 2019* (n 3) 8.

<sup>194</sup> 'Failed' in the sense that such programmes were ended or suspended due to serious or unresolvable issues, such as the case with Cyprus in 2021 and Bulgaria in 2022.

<sup>195</sup> *Convention on Certain Questions relating to the Conflict of Nationality Laws*, opened for signature 13 April 1930, 179 LNTS 89 (entered into force 1 July 1937) art 1 ('*Convention on Certain Questions relating to the Conflict of Nationality Laws*'); Maftai (n 190) 230.

<sup>196</sup> Maftai (n 190) 226.

<sup>197</sup> *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion No 4)* [1923] PCIJ (ser B) 6, 23–4.

of this question is not only in respect of time, but also in the subject of the question itself. In the context of the EU, the development of certain norms and principles is relevant, as well as the role of the CJEU's jurisprudence regarding them, especially in the context of how and why exclusive competence may be exercised (ie, which considerations are capable of effectively restraining it). A separate detailed analysis is needed to form a basis for any conclusion or assertions on this point.

Kristin Henrad argues that if a state exceeds its discretionary powers, for instance, when the implications gain a cross-border character, other states are not obliged to recognise 'such determinations'.<sup>198</sup> This, however, is a contested view, especially in light of the *ECN* and other international efforts in fighting the issue of statelessness.<sup>199</sup> Even though an individual would not be stripped of their status, their citizenship would not be recognised by other states and, therefore, could affect the exercise of their other rights and their freedom of movement within the EU.<sup>200</sup> Nevertheless, in a vast majority of cases, CBI applicants enjoy dual citizenship. A question could, therefore, be posed regarding whether single or dual citizenship could be a differentiating factor, enabling Member States to develop some sort of a defensive mechanism against the sale of passports by other countries, should the Commission fail to propose effective legislation and the CJEU fail to provide a desirable judgment. On the other hand, as previously mentioned, even if applicants are left with their original, 'non-purchased' nationality, should a Member State not recognise the newly bought passport, such decisions can still affect applicants' exercise of their rights attached to the status of being an EU citizen. Outside of the EU law perspective, international law provides for the duty to recognise foreign nationality laws and consequently, foreign nationals, under art 1 of the *1930 Hague Convention*.<sup>201</sup> It reads:

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

However, the Convention has only been ratified by a few states.<sup>202</sup> Arguably, the notion that the principle has become a norm (or custom) embedded in customary international law and is therefore binding on all states should be explored.<sup>203</sup>

<sup>198</sup> Kristin Henrad, 'The Shifting Parameters of Nationality' [2018] *Netherlands International Law Review* 269.

<sup>199</sup> At the European level, see, eg, Gerard-René de Groot, Council of Europe, *Analysis of Current Practices and Challenges Regarding the Avoidance and Reduction of Statelessness in Europe* (Report, 24 September 2021); Council of Europe, *Statelessness and the Right to a Nationality in Europe: Progress, Challenges and Opportunities* (Final Report, July 2022); 'OHCHR and the Right to a Nationality', *OHCHR* (Web Page) <<https://www.ohchr.org/en/nationality-and-statelessness>>, archived at <<https://perma.cc/LKG6-WWN7>>.

<sup>200</sup> Potential questions could arise regarding an individual's right to freedom of movement and non-discrimination as granted under the status of EU citizenship.

<sup>201</sup> *Convention on Certain Questions relating to the Conflict of Nationality Laws* (n 195).

<sup>202</sup> 'Convention on Certain Questions relating to the Conflict of Nationality', *United Nations Treaty Collection* (Web Page) <<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280046354>>, archived at <<https://perma.cc/FW32-RTWE>>.

<sup>203</sup> This includes EU Member States given that international law is said to be an integral part of the EU legal order. See the doctrine established in *Haegeman v Commission of the European Communities* (*Haegeman I*) (Court of Justice of the European Union, C 96-71, 25 October 1972); *Haegeman v Belgian State* (*Haegeman II*) (Court of Justice of the European Union, C 181/73, 30 April 1974); Mario Mendez, 'The Constitutional Status of EU Agreements: Revisiting the Foundational Questions' in *The Legal Effects of EU Agreements* (Oxford University Press 2013) 61, 63.

Lastly, should all else fail, there is the possibility of the use of informal enforcement mechanisms including political pressure and promote mutual accountability among Member States.<sup>204</sup> These tools are common to any area of public law, and provide for a means of intervention or prevention, addressing the implications of CBI practice promoted by states such as Malta.

## X COMMENTS AND CRITICAL THOUGHTS

Several commentators have argued that the selling of passports has caused the devaluation of citizenship<sup>205</sup> and undermines the principles of democracy, equality, integrity, solidarity and cooperation among states.<sup>206</sup> Ayelet Shachar argues that the dangerous tendency of linking citizenship to a monetary value by offering fast-track routes to privileged individuals may give precedence to the creation of a new world order of individuals “‘buying” their way into’ the most desirable societies, to which undesirable immigrants have no access.<sup>207</sup> What is more, irreparable damage can and has already been done in regard to the vision of citizenship, as well as public trust in institutions. For instance, questions are being raised in the context of supranational citizenship, as in the EU, such as to what extent can a country exploit and abuse its discretionary powers while ‘free-riding’ on the desirability of the Union and other states?<sup>208</sup> The corruptive character of investment schemes, as well as deeply politicised aspects of linking citizenship to monetary value, are at the centre of socio-legal debates on the matter.<sup>209</sup> Concerns have been raised about the possible ‘race to the bottom’ between countries competing to offer the most attractive scheme, which can, and already has, led to the lowering of standards regarding potential immigrants.<sup>210</sup> As Shachar notes, the granting of citizenship is the ‘last bastion of sovereignty’,<sup>211</sup> which makes the issue of whether, and if so, how some aspects of domestic law should be regulated at a regional or international level considerably more controversial.

Dimitry Kochenov argues in favour of investment schemes by pointing out the randomness and hypocrisy of the concept of citizenship in practice by describing the EU’s existing culture of discrimination.<sup>212</sup> However, his argument could be challenged insofar as it might superficially support ‘openness’ in immigration law and ‘access’ to citizenship, and does little to explain the issue of commodification, nor does it address the numerous risks and legally troublesome aspects of such

---

<sup>204</sup> See, eg, ‘The Commission’s General Powers of Enforcement’ in Stine Andersen (ed), *The Enforcement of EU Law* (Oxford University Press 2012) 13, 17–38.

<sup>205</sup> Scherrer and Thirion (n 31) 26.

<sup>206</sup> Rainer Bauböck, ‘Summary: Global, European and National Questions about the Price of Citizenship’ in Rainer Bauböck (ed) *Debating Transformations of National Citizenship* (IMISCOE 2018) 3 (‘Summary’).

<sup>207</sup> Shachar, ‘Dangerous Liaisons’ (n 20) 10.

<sup>208</sup> Bauböck, ‘Summary’ (n 206) 3.

<sup>209</sup> See, eg, Rainer Bauböck, ‘What is Wrong with Selling Citizenship? It Corrupts Democracy!’ in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (IMISCOE 2018) 37.

<sup>210</sup> Vesco Paskalev, ‘If You Do Not Like Selling Passports, Give Them for Free to Those Who Deserve Them’ in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (IMISCOE 2018) 47, 49.

<sup>211</sup> Ayelet Shachar, ‘Coda’ in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (IMISCOE 2018) 69, 69.

<sup>212</sup> Dimitry Kochenov, ‘Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price’ (2018) in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (IMISCOE 2018) 51 (‘Citizenship for Real’).

schemes (such as the cross-border character of the schemes' implications). He rejects the proposition that there is more to the legal debate on the split of competence and therefore turns to other considerations. It remains debatable, however, whether selling citizenship as a tradeable commodity to a select few, wealthy individuals, most of whom being men<sup>213</sup> and most likely coming from a privileged background, is a way of advancing so-called equality for those who may truly need it. It is submitted that, on the contrary, commodification of citizenship, subject to the capitalist norms of defining one's worth and accessing VIP destinations by nothing but their monetary contributions, poses a grave risk to the vulnerable individuals and setting a troublesome trend that now access to desirable locations may be bought and those who cannot afford it would be left behind. One should consider the long-term effects and implications should the CBI situation be normalised and develop further. The schemes strengthen the already visible distinction between 'wanted' and 'unwanted' immigrants and create first and second-class citizens.<sup>214</sup> Jelena Džankić argues that 'citizenship should instantiate a claim of equality' which cannot be done while practising the outright sale of citizenship against EU values.<sup>215</sup> While the concept of citizenship and its roots may raise several objections, the fact remains that, to date, no viable alternative has been proposed which addresses all the legal and socio-political concerns involved.

Timothy Jacob-Owens and Jo Shaw argue that 'in several respects, citizenship law leaves space for "soft law" ideas and principles, encompassing a range of "soft" norms and institutions which operate both within and especially "beyond" the state'.<sup>216</sup> The authors map three spheres of the subject: the right to nationality ('the right to have rights');<sup>217</sup> the regulation of the modes of citizenship acquisition; and multicultural citizenship. The analysis of soft law and emerging norms concerning the modes of acquisition of citizenship, as well as certain aspects of international law in this domain, would be of relevance to the discussion on CBI in the EU. Jacob-Owens and Shaw explain that unwritten and non-legally binding norms, customs and 'laws' play a crucial part not only in our understanding of the contemporary regime, supplementing its interpretation, but also inform the legal community of the potential upcoming changes to the 'hard law' as it develops.<sup>218</sup> The insightful observation is applicable in the context of EU Member States and their common nationality laws practices. Furthermore, one should not be too quick to discard the international law dimensions of the topic given the interrelations between the system and the EU legal order as noted in Part IX of the article.

Jacob-Owens and Shaw recognised the role that soft law can play in multi-level governance and drew on the example of the developments in investment migration in the EU,<sup>219</sup> even though there is no hard law explicitly preventing Member States

<sup>213</sup> See, eg, 'Malta Individual Investor Programme Statistics', *Investment Migration Insider* (Web Page) <<https://www.imidaily.com/datacenter/malta-individual-investor-programme-statistics>>, archived at <<https://perma.cc/8UA2-DQT2>>.

<sup>214</sup> Ayelet Shachar, 'Unequal Access: Wealth as a Barrier and Accelerator to Citizenship' (2021) 25(4) *Citizenship Studies* 543, 545; Ayelet Shachar, 'Beyond Open and Closed Borders: The Grand Transformation of Citizenship' (2020) 11(1) *Jurisprudence* 1, 12–3, 21–5.

<sup>215</sup> Jelena Džankić, 'Citizenship with a Price Tag: The Law and Ethics of Investor Citizenship Programmes' (2014) 65(4) *Northern Ireland Legal Quarterly* 387.

<sup>216</sup> Timothy Jacob-Owens and Jo Shaw, 'Soft Law and Citizenship Regimes' (Working Paper No 2023/02, University of Edinburgh School of Law, 2023) 4.

<sup>217</sup> Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich, 3<sup>rd</sup> edn, 1973) 296.

<sup>218</sup> Jacob-Owens and Shaw (n 216) 5–6.

<sup>219</sup> *ibid* 10.

from practising the sale of EU citizenship as a consequence of the exercise of their exclusive competence. The scholars noted that since the orthodox view — portrayed in its 1923 *Nationality Decrees Issued in Tunis and Morocco* Advisory Opinion — of the PCIJ that ‘nationality is not, in principle, regulated by international law’ and ‘domestic citizenship regimes have increasingly been subject to a broader range of constraints “beyond” the state, notably in the form of emerging international human rights norms’.<sup>220</sup> Jacob-Owens and Shaw provide a detailed account of how international norms have also begun to encroach upon specific modes of acquisition in domestic regimes, specifically in the context of non-discrimination. One cannot help but wonder whether a similar argument could be made in the context of the EU, based on the unwritten understandings of when exclusive competence on nationality matters ceases to be a purely internal situation and is subject to external restrictions.

Thus, when assessing CBI in the EU and competence concerning intervention at EU level, a detailed analysis should be devoted to the task of mapping selected norms, practices and the ‘unwritten agreements’ informing our understanding of the dynamics governing nationality laws and the integrity of the internal market within the EU. Jacob-Owens and Shaw rightfully point out that by building

further on its role in the formulation of indicators, soft law can also take on methodological significance when we go beyond the doctrinal analysis of legal sources and develop politically- and sociologically-informed comparative approaches to the study of citizenship regimes.<sup>221</sup>

The practice of selling citizenship does not seem to be in line with most immigration or nationality laws in Member States,<sup>222</sup> both today (with only one Member State offering CBI and three at the time of the European Commission Report in 2019) and at the time of contracting under the relevant treaties.<sup>223</sup> Furthermore, it is no viable means of advancing equality of rights and access or mitigating the argued inequalities flowing from the construct of citizenship and one’s passport strength.<sup>224</sup>

When mapping the origins and development of citizenship as well as modes of acquisition, d’Oliveira links the concept to the history and development of

---

<sup>220</sup> *ibid* 6; Peter Spiro, ‘A New International Law of Citizenship’ (2011) 105(4) *The American Journal of International Law* 694, 710; Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2020) 224.

<sup>221</sup> Jacob-Owens and Shaw (n 216) 13.

<sup>222</sup> See Mentzelopoulou and Dumbrava (n 59) 9.

<sup>223</sup> No pure CBI schemes seem to have been in operation at the time of signing either the treaties establishing the free internal market or the EU in its modern form, or at least no such schemes have been reported in relevant literature, studies or reports to date. See, eg, Jelena Džankić, ‘Immigrant Investor Programmes in the European Union (EU)’ (2018) 26(1) *Journal of Contemporary European Studies* 64.

<sup>224</sup> Kochenov is one of the scholars who argues that the conferral of citizenship more broadly is random and hypocritical: Kochenov, ‘Citizenship for Real’ (n 108) 52; Dimitry Kochenov, ‘“Passport Trade”: A Vicious Cycle of Nonsense in the Netherlands’, *Verfassungsblog: On Matters Constitutional* (Blog Post, 8 June 2020) <<https://verfassungsblog.de/passport-trade-a-vicious-cycle-of-nonsense-in-the-netherlands>>, archived at <<https://perma.cc/9RT5-DB2R>> (‘Passport Trade’); Dimitry Kochenov, ‘Kochenov: EU Report on Investor Citizenship and Residence — When the Commission Misleads’, *Investment Migration Insider* (online, 23 January 2019) <<https://www.imidaily.com/opinion/kochenov-eu-report-on-investor-citizenship-and-residence-when-the-commission-misleads>>, archived at <<https://perma.cc/9KJY-NE6Q>>; Dimitry Kochenov and Kristin Surak, ‘Introduction: Learning from Investment Migration’ in Dimitry Vladimirovich Kochenov (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023) 1, 8–16.

investment migration.<sup>225</sup> In the context of the EU, however, it seems that the accepted and recognised practices among contracting states at the time of signing relevant treaties and the opening their borders to what has today become known as the EU are more relevant perspectives. The origin of citizenship seems to be less of a central issue than before, given that this is unlikely to have been taken into account by contracting Member States in anticipation that one day, select countries could choose to introduce investment schemes commodifying EU citizenship and enable ‘back door entry’ for applicants to circumvent ordinary immigration procedures and nationality laws present in the rest of the EU.

Furthermore, d’Oliveira makes a fair point concerning the long-term implications of expanding the scope of competence between the EU and Member States while blurring the lines in the context of investment migration.<sup>226</sup> The issue remains, however, that CBI have been and always will be prone to the identified, ‘inherent’ risks, including fraud, corruption and Member States authorities themselves playing a role in ‘cheating the system’.<sup>227</sup> As exemplified by numerous failed and shut-down schemes, scandals, leaks and controversies, regulating the matter at a national level<sup>228</sup> does not seem to be a promising option, especially given the unique character of the EU legal order and the vulnerability of other Member States to the potential aftermath of the practice of selling citizenship by some countries. Additional issues arise in respect of anti-money laundering measures, security and background checks, transparency and due diligence, since they all rely on Member States’ efforts and integrity which, by the example of Malta and Cyprus and the agents involved in those countries’ schemes, can be a rather risky expression of trust in itself.

An interesting question may be posed as to the idea of ‘selling’ EU citizenship, and access to the EU itself: with the way such schemes and their benefits are advertised,<sup>229</sup> one could wonder if it is goods or services that are at stake here. If so, should EU citizenship remain within the national domain and should the Member States selling their citizenship be the only ones capitalising on the transaction?

## XI CONCLUDING REMARKS

When contrasted with other modes of acquisition, the merits of selling (and therefore commodifying) EU citizenship can be seen as problematic. However, this criticism arises to the same extent whenever there is a danger of blurring the legal distinction between capital and human capital. While the risks, controversies, scandals and socio-political reservations that have been identified in relation to the commodification of citizenship via investment schemes are perfectly valid, the issue remains as to whether they legitimise intervention and action at EU level.

<sup>225</sup> d’Oliveira (n 127) 23–6.

<sup>226</sup> *ibid* 28–9.

<sup>227</sup> ‘How Golden Passport Providers Cheated the System’, *Online Cyprus Property* (online, 4 May 2021) <<https://onlinecyprusproperty.com/how-golden-passport-providers-cheated-the-system>>, archived at <[perma.cc/DYJ4-W4VN](https://perma.cc/DYJ4-W4VN)>.

<sup>228</sup> See above Parts II and IV, among others. See also *European Commission Report 2019* (n 3) 1; OECD (n 40); Transparency International and Global Witness, *European Gateway* (n 41).

<sup>229</sup> Tatiana Rokou, ‘International Residency & Citizenship Expo in Abu Dhabi 2022 to Highlight Wide Range of Citizenship and Residency Programs’, *TravelDailyNews International* (online, 5 October 2022) <<https://www.traveldailynews.com/regional-news/international-residency-citizenship-expo-in-abu-dhabi-2022-to-highlight-wide-range-of-citizenship-and-residency-programs>>, archived at <<https://perma.cc/DTT4-XPXV>>.

The legal position remains complex, and further research is planned in this area in order to explore the question of the customs and unwritten understandings of Member States which underpin the internal market as well as the core treaties governing the EU legal order, as agreed to by Member States. Future work shall entail attention to the concept of the rule of law, applicable EU mechanisms and CBI. Additionally, potential paths supporting the submission that investment migration should be regulated at EU level to ensure the observance of transparency and unified or harmonised standards across Member States will be considered, given investment migration's cross-border character and unique implications within the EU. Thus, future work shall focus on minimising identified risks, and facilitating applicable cost-benefit sharing among those — all of the Member States as economic actors, and the EU as one of the contemporary hegemon — who make schemes such as the Maltese CBI so desirable to foreign investors. After all, if Member States oppose the impact of such schemes, it should come as no surprise that they may also oppose the countries capitalising on the attractiveness of the EU and some of its most desirable locations.

Malta seems to be fairly confident in its dependence on the notion of state sovereignty and having exclusive competence in regulating nationality matters, as well as the fact that there is no universal consensus regarding the handling of citizenship in international law whatsoever.<sup>230</sup> On the other hand, counterarguments may be made on that precise issue, in that there is no clear line between where Member States' competence starts and the EU's competence ends.

The lines are arguably blurry and their precise coordinates move depending on the particular facts, circumstances and implications of a case, as the CJEU has utilised various interpretative mechanisms to achieve optimal and just results as far as possible. Nevertheless, no matter Member States' competence regarding domestic laws, EU law and its principles have to be given due regard. In addition to the principle of sincere cooperation, current anti-money laundering regulations could be viewed as arguments against investment schemes. It does seem that the CJEU's decision in respect of Malta's CBI would be heavily dependent on the interpretation of the treaties discussed in this article as well as the negative and positive obligations enshrined by the principle of sincere cooperation. It would involve a carefully designed task of mapping those obligations, as well as if and when new ones could emerge in connection to the doctrine.

Regardless of the shortcomings identified in the arguments for and against CBI schemes in the EU from a predominantly legal point of view, it is undeniable that such schemes carry inherent risks and due diligence processes have been proven to have failed on numerous occasions.<sup>231</sup> The schemes are a perfect breeding ground for corruption, compromising the safety and integrity of the internal market and given the implications for the whole Community, should be regulated at a supranational level.

---

<sup>230</sup> Sarah Carabott, 'Malta Prepared to Fight for Passport Scheme in Top EU Court', *Times of Malta* (online, 20 November 2020) <<https://timesofmalta.com/articles/view/malta-prepared-to-fight-for-passport-scheme-in-top-eu-court.833002>>, archived at <<https://perma.cc/U5YM-Z78B>>.

<sup>231</sup> See Transparency International and Global Witness, *European Getaway* (n 41) 19; Global Witness, 'Europe's Golden Doors' (n 81).