Legal Residence and Physical Presence: The Law and Practice of Naturalization in EU Jurisdictions

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Abstract

This paper explores the relationship between two of the most common legal concepts in European migration and nationality laws: legal residence and physical presence. While the contemporary citizenship debate often assumes that citizenship is awarded to persons who have a 'genuine link' to the state awarding citizenship, our study interrogates this assumption by studying what is required of applicants in terms of legal residence and physical presence. We do so by studying the law as well as the practice of the law's application. Our study reveals that not all naturalization schemes require legal residence and that many schemes do not require (extensive) physical presence. Moreover, the disconnect between legal residence and physical presence is often quite substantial. First, while legal residence is a requirement to be met for persons who seek to obtain citizenship through ordinary naturalisation procedures, it is not for many who can obtain citizenship through preferential naturalisation—often the most popular method of naturalising in the EU. Second, legal residence does not coincide with physical presence, either in EU law or in national law. When required, the duration of physical presence is always shorter than that of legal residence, often considerably shorter, or, not infrequently, absent altogether. Third, national authorities often do not examine whether applicants for naturalisation meet the physical presence requirements, and indeed cannot easily examine this in a Union where internal borders have largely disappeared.

Contents

Introduction 4
Legal residence and physical presence in EU Member State nationality laws 7
Physical presence in practice 18
Physical presence in EU law and practice 23
Conclusion 29

Introduction

Legal residence and physical presence—two of the most common legal concepts in European migration and nationality laws. The relationship between both concepts may seem simple, but anyone who has followed the disputes over national and European residency requirements before the Court of Justice of the European Union (CJEU) knows otherwise. It was recently examined whether third-country nationals lose their right to reside as long-term residents if their presence on EU territory is limited to a few days per year. Ruling against Austria, the Court found that such a short presence is sufficient to prevent the loss of long-term residence.[1] Moreover, and politically more interesting, the European Commission has initiated infringement proceedings against Malta for awarding national and EU citizenship to wealthy investors 'absent any genuine link to the country or its citizens'.[2] The Maltese scheme places an obligation of one year of legal residence on those who want to obtain Maltese nationality by means of investment, but it does not demand any physical presence on the territory of Malta. The European Commission claims that Member States should not award their citizenship to persons without a genuine connection to their society,[3] by which it explicitly thinks of 'residence-based naturalization'.[4]

While scholars have debated whether naturalization must be conditional on the existence of such a connection, as well as whether it can be required under EU law that such a connection exists,[5] less attention has been paid to the empirical side of the Commission's claim. How rare is it that states allow naturalization without a requirement of legal residence or physical presence? And

[1] Case C-432/20 *ZK*, ECLI:EU:C:2022:39.

[2] European Commission Press Release, 'Investor Citizenship Schemes: European Commission opens infringements against Cyprus and Malta for "selling" EU citizenship' (20 October 2020) available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925

[3] *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Investor Citizenship and Residence Schemes in the European Union, Brussels* COM(2019) 12 final (23.01.2019) https://ec.europa.eu/info/sites/default/files/com_2019_12_final_report.pdf

[4] Annex III to the Commission Report COM (2019) 12 final.

[5] Martijn van den Brink, 'Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?' (2022) 23 German Law Journal 79. Cf. Hans Ulrich Jessurun d'Oliveira, 'Golden Passports: European Commission and European Parliament Reports Built on Quicksand', *COMPAS Working Paper* WP-23-162 (University of Oxford) 2023; Daniel Sarmiento and Martijn van den Brink, 'EU Competence and Investor Migration' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023); Petra Weingerl and Matjaž Tratnik, 'Relevant Links: Investment Migration as an Expression of National Autonomy in Matters of Nationality' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023); Dimitry Kochenov, 'Genuine Purity of Blood: The 2019 Report on Investor Citizenship and Residence in the European Union and Its Litigious Progeny' [2020] LEQS Paper No. 164/2020 (London School of Economics).

how connected are both concepts in the law and practice of naturalization in Europe? These questions have been little discussed despite their relation to and relevance for the normative and conceptual debate about the conditions for the acquisition and loss of both citizenship and the right to reside, either temporary or permanent. What does it mean that someone needs to 'reside' somewhere for several years to have a right to naturalize? How much overlap can one observe between residence and presence? Our aim is to expose the complexity of the relationship between two of the most basic terms used in naturalization laws on the European continent, which we do by disentangling the meaning of 'legal residence' and 'physical presence' in these laws and the practice of their application in the EU Member States. We will do the same for similar rules at the supranational level. To this end, we studied the relevant legal material together with documents, statements, and explanations given by the competent institutions on this material's application.

Our study reveals that the disconnect separating legal residence from physical presence is not nearly as exceptional as one could think. First, and unsurprisingly, the requirements of legal residence and physical presence hardly ever overlap fully: short periods away from the territory do not normally interrupt the continuity of legal residence. Second, and more interestingly, the disconnect between legal residence and physical presence in both national and EU law is often quite substantial—as is observable in the law itself, through the practice of the law's application by the competent authorities, or both. The relevant legal requirements vary widely across the EU, in terms of both the duration of legal residence required to be able to naturalise and the period of physical presence to be met to fulfil the conditions of legal residence. However, when examining whether the required period of legal residence is met, the competent authorities are concerned mainly with the *continuity* of legal residence – i.e. the uninterrupted enjoyment of the right to be physically present – and less so with physical presence in the territory, i.e. the actual exercise of the legal right. That is, most Member States ask for proof of legal residence, such as an address in the country, registration in the municipality of legal residence, or an employment contract with a local undertaking; they do not measure physical presence *per se*.

Furthermore, long absences from the national territory are often expressly permitted under national legislation. In some Member States, most citizenship acquisitions even proceed through procedures that impose either minimal to no requirements of legal residence or physical presence for those who want to naturalize. On top comes the reality of open internal borders within the EU, which creates a very specific context that needs to be taken into account. It is doubtful whether or to what extent physical presence is measurable in this context. Our study of national practices suggests that most Member States hardly assess whether the conditions for

physical presence are met. Of course, the cases discussed in this work—the naturalisation of foreigners—are in themselves a minority: the vast majority of individuals with a European nationality acquired this status at birth. Yet the acquisition of nationality at birth is not the subject of our study.

Our analysis of the requirements of legal residence and physical presence in EU as opposed to national law leads to very similar conclusions. Following established approaches in national law and practice, EU legislation on the position of third-country nationals and the free movement of EU citizens also distinguishes between legal residence and physical presence. Even if EU law provides a uniform legal framework, its implementation in practice allows for significant national variation. This is, first, because EU legislation offers Member States flexibility regarding the implementation of the provisions on physical presence, but also because the enforcement of these provisions happens in accordance with national standards, policies, and practices.

Regarding the scope of our study, two clarifications are in order. First, to obtain citizenship or permanent residence, foreigners must usually meet multiple requirements, ranging from proof of a clean criminal record, of financial self-sufficiency, or of language proficiency. These criteria vary from one Member State to another but will not be discussed in this work. Second, we will not address the normative question of whether physical presence should play a (greater) role in the context of naturalisation and acquisition of permanent residence. Instead, our aim is to provide a clearer picture of the current state of the law on legal residence in the EU. We will not discuss all national legislation in equal detail, however, as some Member States provide more guidance on the implementation of their laws than others and, hence, offer more useful insights in respect of the interaction between legal residence and physical presence. Existing legal rules and practices will be discussed to the extent necessary to offer a good illustration of the legal diversity and practical complexity when it comes to rules requiring legal residence and physical presence, as well as their enforcement.

This contribution is structured as follows: Section B discusses our findings regarding the requirements of legal residence and physical presence in the nationality laws of the Member States. Section C examines the implementation of these laws by the responsible national authorities. Section D examines the provisions on legal residence and physical presence and their interpretation in EU legislation on the right of long-term residence of third-country nationals and of the right of permanent residence of EU citizens. In the conclusion, we summarise our findings and consider their broader relevance.

Legal residence and physical presence in EU Member State nationality laws

This section examines the requirements of legal residence and physical presence in the national citizenship codes of EU Member States. Naturalisation is defined as 'all modes of acquisition after birth other than those for which birth in the territory or to citizen parents is a condition'.[6] As is well known, Member States regulate naturalisation in very different ways, and there is variation not only between, but also within, them: national laws on the acquisition of citizenship distinguish between different categories of persons and the requirements for naturalisation are tailored to these categories. Thus, the same Member State may impose different naturalisation requirements for different categories of individuals, including different requirements of legal residence and physical presence.

In what follows, we offer a comparative overview of these requirements. We first discuss ordinary naturalisation procedures, which is followed by an analysis of the preferential regimes Member States have established. The ordinary naturalisation procedure is the default procedure for foreigners who do not qualify for any of the more preferential regimes. It is important to note, however, that the ordinary procedure is not necessarily the procedure that most individuals use to naturalise. On the contrary, most citizenship acquisitions may take place under preferential procedures. Thus, while we will, in accordance with common terminology, use the term ordinary procedure for the national default procedures, we are aware that these procedures may provide a far less popular path to citizenship than preferential procedures.

Ordinary Naturalisation

Ordinary naturalisation procedures usually require applicants to have resided legally in the country for a certain period before they are eligible to apply for nationality. The periods of legal residence required by the Member States vary considerably, but in most cases are between five[7] and ten years.[8] Legal residence implies a continued possession of a right to be present in the

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[6] The Globalcit Glossary on Citizenship and Electoral Rights https://cadmus.eui.eu/bitstream/handle/1814/67362/RSCAS_GLOBALCIT_Glossary_2020.pdf?sequence=1&isAllowed=y (last visited: 11-05-2023).
[7] Article 13(2)(a) of the Nationality Law of Finland; Article 21-17 of the French Civil Code; Article 12(1)(1) of the Latvian Nationality Law; Article 8(1) of the Nationality Law of the Netherlands; Section 11(4)(c) of the Nationality Law of Sweden; Article 12bis of the Nationality Law of Belgium.
[8] Article 10 of the Austrian Nationality Law; Article 9(1)(f) of the Italian Nationality Law; Article 18(1) of the Lithuanian Nationality Law; Article 22(1) of the Spanish Civil Code.

territory in accordance with the terms of validity of a residence permit. In many countries, the period of validity of temporary residence permits also counts toward the residence requirements for naturalisation, but some Member States expect foreigners to hold a permanent residence permit, and sometimes to have held it for a number of years, before they can apply for naturalisation.[9] The practical implication of such a requirement to have permanent residence status before one can apply for naturalisation is that the periods of residence required for naturalisation can be (much) longer than a cursory reading of the different nationality laws would suggest. For example, a person who is not a Bulgarian citizen can obtain Bulgarian citizenship if he or she has held a permanent residence permit for five years on the date of application.[10] But since a foreigner must have been a legal residence for a period of (at least) five years before he can obtain a permanent residence permit,[11] he must have been legally resident for at least ten years before an application can be successfully made to become a Bulgarian citizen.

In most Member States, the period of legal residence must be continuous. An important exception to this rule is Germany, which allows previous periods of residence to be taken into consideration.[12] However, continuous legal residence does not imply continuous physical presence. In some respect, this is both unexpected and entirely logical: otherwise, very few foreigners would ever be eligible for citizenship, since periods of presence are often interrupted by periods abroad for reasons related to work, health, study, family, or vacation. Moreover, in a world of increasing mobility, some people cross borders with high frequency, sometimes *de facto* and/or *de iure* residing in two or more different countries at the same time. Not surprisingly, many Member States make an explicit distinction between the requirements of legal residence and physical presence in order to allow for such travel, including those without such an explicit distinction in their legislation. For example, while the Spanish nationality law requires residence to be 'legal, continuous and immediately before the application',[13] without specifying whether absences are allowed, the Spanish Supreme Court has ruled that short trips abroad do not interrupt the continuity of residence.[14]

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[9] Article 12(1)(1) of the Latvian Nationality Law; Article 12(2) of the Nationality Law of Bulgaria; Article 8 of the Nationality Law of Croatia; Article 6(1)(2) of the Nationality Law of Estonia; Article 18(1) of the Lithuanian Nationality Law.
[10] Article 12(2) of the Nationality Law of Bulgaria.
[11] Article 25 of the Foreigners in the Republic of Bulgaria Act.
[12] Article 12(b) of the Nationality Law of Germany.
[13] Article 22(3) of the Spanish Civil Code.
[14] Ruth Rubio-Marín et al., 'Country Report on Citizenship Law: Spain' (EUDO Citizenship 2015) 25.

Between those Member States that do specify how much absence is allowed, there are significant differences. At one end of the spectrum, we find countries like Poland, Denmark, and Hungary, which allow very limited absences from their territory. The Law on Polish Citizenship requires uninterrupted legal residence for a relatively long period of 10 years before a claim to acquire Polish citizenship can be made.[15] Residence is considered uninterrupted, according to Article 30(3) of the same law only if, during this 10-year period, none of the periods spent abroad exceeded six months and all these periods did not exceed 10 months in total. Denmark requires nine years of residence before naturalisation is an option, during which the foreigner must not have been absent from the territory for a total of more than one year.[16] Applicants for citizenship of Hungary must not have left the country for more than six months during the required eight years of continuous residence.[17]

However, these countries appear to be the exception rather than the rule. Most Member States allow foreigners to be absent from their territory for more extended periods. For instance, Estonia and Lithuania require legal and continuous residence for relatively long periods – eight and ten years respectively[18] – but allow absences of around six months per year.[19] The German Nationality Act offers even greater flexibility. Like Estonia and Lithuania, Germany considers ordinary residence to be uninterrupted by stays abroad not exceeding six months.[20] However, for foreigners who exceed this period, Article 12(b)(2) of the German Nationality Act specifies that previous periods of residence may be counted toward the period of residence required for naturalisation, up to a period of five years.

Another example of a Member State that expects foreigners to spend a certain amount of time in the territory before qualifying for permanent residence or nationality, but allows them to leave the country regularly, is Finland. Finnish law allows short periods of absence to be counted toward the continuous period of residence and defines with precision what counts as a short period. According to Section 16(2) of the Finnish Nationality Act, this includes:

1) periods of absence not exceeding a month;
2) a maximum of six periods of absence exceeding one but not exceeding two months;

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[15] Article 30(1)(6) of the Nationality Law of Poland.
[16] Article 9 of the Danish Circular Letter on Naturalisation.
[17] http://cadmus.eui.eu/bitstream/handle/1814/29771/ACIT_Handbook_Hungary_ENGLISH.pdf?sequence=1
[18] Article 6(2) of the Nationality Law of Estonia; Article 18(1) of the Nationality Law of Lithuania.
[19] Article 11 of the Nationality Law of Estonia; Article 2(18) of the Nationality Law of Lithuania.
[20] Article 12(b)(1) of the Nationality Law of Germany.

3) a maximum of two periods of absence exceeding two but not exceeding six months

The same section also provides that temporary absences of more than six months, but less than one year, shall not be counted in the continuous period of residence nor interrupt it. Since, according to Section 13(1)(2) of the Nationality Act, one of the conditions for obtaining Finnish citizenship is that foreigners have resided and domiciled in Finland for five years without interruption, it seems that they may remain outside Finnish territory for considerable periods without being disqualified for Finnish nationality.

Some countries specify in their immigration laws, rather than in their nationality laws, how long applicants may have been abroad. For example, Portugal, which is known for its inclusive citizenship regime,[21] requires six years of legal residence before an application for Portuguese citizenship can be made.[22] Legal residence requires the regularisation of stay in accordance with Portuguese immigration law. This law sets out the conditions under which temporary and permanent residence permits can be obtained or lost. In the case of Portugal, temporary residence is lost when the foreigner is absent for 'six consecutive months or eight interpolated months, within the overall validity of the authorisation'.[23] Permanent residence is lost after an absence of '24 consecutive months or, in a period of three years, 30 interpolated months'.[24] Hence, once obtained, foreigners have the right to leave the country for long periods of time without having their residence permits revoked. This implies that such absences also are also in accordance with the residence requirements for obtaining Portuguese nationality.

In addition to these standard rules for authorised absences, some Member States allow longer periods of absence in the event of special circumstances. Germany allows longer absences if the foreigner has to perform military service in the country of origin.[25] Under Danish law, periods spent abroad can be twice as long as under the default rules in case of education or training, military service in the applicant's country of nationality, or visits to close family due to serious

[21] Migration Policy Group, 'Access to Citizenship and Its Impact on Immigrant Integration – Handbook for Portugal' (EUDO Citizenship). Available at http://cadmus.eui.eu/bitstream/handle/1814/29770/ACIT_Handbook_Portugal_ENGLISH.pdf?sequence=1 (last visited: 11-05-2023).
[22] Article 6 of the Portuguese Nationality Act.
[23] Article 85(2)(a) of Act 23/2007 of July 4, amended by Act 29/2012, on the conditions and procedures on the entry, stay, exit and removal of foreign citizens from Portuguese territory, as well as the long-term resident status.
[24] Article 85(2)(b) of Act 23/2007 of July 4, amended by Act 29/2012, on the conditions and procedures on the entry, stay, exit and removal of foreign citizens from Portuguese territory, as well as the long-term resident status.
[25] Article 12(b)(1) of the German Nationality Law.

illness in the family.[26] Likewise, the Netherlands does not consider that the foreigner has changed his residence when he stays abroad for military service, work, or education.[27]

Yet another group of Member States provides that persons applying for citizenship must have been both legally resident and domiciled there for a certain period.[28] Domicile is the place where a person has his or her main or habitual residence, i.e., the place where the person and his or her family usually reside. Legal residence and domicile are, of course, not separate issues. Under Belgian law, for example, a person is habitually resident if she has established part of her life there.[29] This requires, among other things, that she is legally resident.[30] Likewise, the immigration authorities of the Netherlands stipulate that legal residence is lost if a person moves her main residence to another country.[31] That said, it is possible to be legally resident but not be habitually resident. This is certainly the case for EU citizens, who can have a right of residence under EU law without having a residence permit.[32] Thus, absences from the territory that entail the loss of habitual residence need not automatically entail the end of legal residence.

More important for our purpose is the relationship between domicile and physical presence. These, too, are not entirely separate. For example, the German nationality law provides that the '*gewöhnliche Aufenthalt*' is not interrupted by stays abroad not exceeding six months.[33] Longer periods abroad may affect one's domicile. Likewise, according to the Dutch immigration authorities, longer periods abroad affect a person's main residence. When a person holds a temporary or permanent residence permit, she may stay outside the Netherlands for up to 6 consecutive months. Students, highly skilled migrants, and investors may stay abroad for longer periods.[34] At the same time, domicile is often about more than just physical presence, and a person's principal residence need not be affected by regular stays abroad. For example, the Dutch

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[26] Article 9(ii) of the Danish Circular Letter on Naturalisation.
[27] https://zoek.officielebekendmakingen.nl/stcrt-2014-18053.html (last visited: 11-05-2023).
[28] In addition to the Member States discussed here, see also: Article 11 of the Nationality Law of Sweden; Article 8 of the Nationality Law of Romania.
[29] Article 3 of Loi relative aux [registres de la population, aux cartes d'identité, aux cartes d'étranger et aux documents de séjour] et modifiant la loi du 8 août 1983 organisant un Registre national des personnes physiques. Available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1991071931&table_name=loi (last visited: 11-05-2023).
[30] Article 7bis of the Nationality Law of Belgium.
[31] The Dutch authorities explain the consequences of moving one's main residence for legal residence here: https://ind.nl/en/Pages/main-residence.aspx (last visited: 11-05-2023).
[32] According to the Court of Justice of the European Union, residence permits only have a declaratory character. Case C-325/09 *Dias*, ECLI:EU:C:2011:498, para 54.
[33] Article 12(b) of the Nationality Law of Germany.
[34] https://ind.nl/en/Pages/main-residence.aspx (last visited: 11-05-2023).

authorities hold that someone's main residence is not interrupted if, on the basis of the correct legal residence permits, she moves abroad for work.[35] Moreover, domicile is often determined by much more than physical presence alone. Other considerations include having paid taxes, registration with local authorities, and having a bank account or real estate in the country.[36] Domicile and physical presence should therefore not be confused. Even in countries where domicile is required, continuous legal residence does not require continuous presence.

Preferential Naturalisation

All Member States have important exceptions to the default naturalisation rules described above. Their preferential naturalisation procedures allow foreigners to obtain citizenship with much shorter and sometimes no legal residence or physical presence requirements. We focus on three important exceptions that allow accelerated naturalisation for specific categories of foreigners with expedited naturalisation: the exceptions for family members, individuals with special historical ties to the state awarding citizenship, and those that can make a contribution deemed valuable by the state in question. Such procedures are proving very popular in some countries, which may mean that many of the new citizens have hardly resided in the territory legally or physically. The Italian and Hungarian examples that we will explore demonstrate this quite clearly: hundreds of thousands of newly naturalised Europeans have in fact never lived in the EU; many of these EU citizens have never been to Europe.

Family ties

It is common for countries to facilitate the naturalisation of relatives of those who already possess or apply for nationality. This applies to the children and the partner/spouse of the citizen, who can obtain citizenship under preferential conditions and after a simplified process in most of the Member States. In the past, citizenship was often transferred from the husband to his spouse, but those rules have disappeared.[37] Instead, partners of both sexes can obtain citizenship under preferential conditions in most Member States.

[35] Article 6.2.1. of the Vreemdelingencirculaire.
[36] See for some criteria: https://ind.nl/en/Pages/main-residence.aspx (last visited: 11-05-2023).
[37] Rainer Bauböck and Sarah Wallace Goodman, 'Naturalisation' (EUDO Citizenship Policy Brief No 2). Available at: https://cadmus.eui.eu/bitstream/handle/1814/51625/RSCAS_EUDO_CIT__PB_2011_02.pdf?sequence=1&isAllowed=y (last visited: 11-05-2023).

Most Member States have shorter residence requirements for the partner of someone who already is a national. Austria requires six years of continuous legal residence instead of ten,[38] and the partner of a Croatian national must have a permanent residence permit but need not meet the requirement of eight years of continuous residence in Croatia.[39] Similarly, Finland requires four years of continuous legal residence instead of five,[40] and Hungary allows the partner of a national to apply for citizenship after three years of continuous legal residence instead of eight, if the partner has lived in the household of a Hungarian citizen for at least three years in a lawful marriage.[41] Under the previous version of the relevant Italian legislation, spouses could apply for nationality already after six months of residence, in contrast to the ten years required under the ordinary naturalization procedures. Consequently, spousal naturalization became the main procedure used, and it remains popular even if the required legal period of residence for family members has been extended to two years, which is still five times shorter than the period required under the ordinary procedure.[42]

Some Member States do not impose any requirement of legal residence at all for certain family members. Article 3(1)(a) of the Nationality Law of Portugal provides that a foreigner married to a Portuguese citizen for more than three years may acquire Portuguese citizenship by declaration.[43] Italy allows the foreign partner of an Italian citizen to obtain citizenship if he or she has legally resided in Italy for two years after the marriage, but also after three years from the day of the marriage when the foreigner has resided abroad.[44] Likewise, France allows the spouse of a French citizen to acquire French citizenship from two years after the day of the marriage if the spouse has sufficient command of the French language. The duration is three years if the foreigner cannot prove that he or she has continuously resided in France for at least one year since the day of marriage.[45] The Netherlands equally does not require the family to reside in the country before the non-citizen family member applies for naturalisation.[46] Finally, the Slovenian Nationality Act provides that a foreigner married to a Slovenian citizen may be granted nationality after three years of marriage and one year of continuous residence in Slovenia prior to submitting the application. The law adds, however, that the criterion of continuous residence may be fulfilled

[38] Article 11a of the Nationality Law of Austria
[39] Article 10 of the Nationality Law of Croatia.
[40] Article 22(2)(a) of the Nationality Law of Finland.
[41] Article 4(2)(a) of the Nationality Law of Hungary.
[42] Article 5(1) of the Nationality Law of Italy.
[43] Article 3(1) of the Portuguese Nationality Act.
[44] Article 5(1) of the Nationality Law of Italy.
[45] Article 21-2 of the French Civil Code.
[46] Article 8(2) of the Nationality Law of the Netherlands.

even when the person is not physically present, which is to the discretion of the Slovenian government.[47]

'Historical ties'

Many countries offer preferential access to citizenship to persons with special, often historical (and barely existing), ties to the country, in some cases dating back to times predating the country's creation. Such preferential regimes have been set up by Member States with former colonies, with a significant expatriate community, and by those wishing to redress a historic injustice. For example, Bulgaria, Croatia, Greece, Hungary, Ireland, Lithuania, and Portugal all allow individuals that can prove that they are descendants to obtain nationality even if they are not domiciled or resident in the country.[48] Other countries do impose a residency requirement, but usually one that is considerably shorter than the requirement under their ordinary naturalisation procedure. Under Italian law, direct ancestors in the second degree can become Italian citizens after two years of legal residence in Italy and a declaration of intent to become an Italian citizen.[49] Slovenian expatriates and their descendants up to the fourth generation have a right to obtain Slovenian citizenship if they have lived for at least one year in Slovenia before applying for citizenship.[50] Finally, Spain is known for the preferential conditions it has for nationals of Latin American countries, the Philippines, and Equatorial Guinea, who can apply for Spanish citizenship after two years of legal residence, instead of the ten years that the ordinary procedure imposes.[51]

The preferential naturalisation procedure in Spain also covers Sephardic Jews, if they have resided in Spain for at least two years.[52] Spain provides the Sephardic community preferential access to its nationality in order to correct a historical injustice, namely the Inquisition against this community. For this reason, the Spanish authorities have also used the discretionary powers they have under the Spanish Civil Code to grant nationality to Sephardic Jews who did not meet the residency requirements.[53] Portugal follows the Spanish example. It allows Sephardic Jews who

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[47] Article 12 of the Nationality Law of Slovenia.
[48] Article 15(1) of the Nationality Law of Bulgaria; Article 16 of the Nationality Law of Croatia; Article 10 of the Nationality Law of Greece; Article 4(3) of the Nationality Law of Hungary; Article 16 of the Nationality Law of Ireland; Article 10 of the Nationality Law of Lithuania; Article 6(4) of the Nationality Law of Portugal.
[49] Article 4 of the Nationality Law of Italy.
[50] Article 12 of the Nationality Law of Slovenia.
[51] Article 22(1) of the Spanish Civil Code.
[52] Ibid.
[53] The discretionary procedure is laid down in Article 21(1) of the Spanish Civil Code. For further information about the discretionary conferral of citizenship to Sephardic Jews, read: Ruth Rubio-Marín et al. (n 14) 22.

can demonstrate that they belong to a community of Portuguese origin to be naturalised without having to reside in Portugal.[54] Descendants of people who were exiled long ago are thus entitled to both Spanish and Portuguese citizenship without residence there.[55]

Preferential citizenship regimes for those with historical ties have proven extremely popular in some Member States. Statistics show that the vast majority of Spanish citizenship acquisitions are by persons from Latin America.[56] Likewise, the number of foreigners of Greek origin in Greek naturalisation statistics is much higher than the number of foreigners without Greek origin,[57] which suggests that most persons who obtain Greek nationality do so under a procedure that does not require them to have resided in Greece. Finally, the Irish rule, which allows the Minister to grant an application for a certificate of naturalisation 'where the applicant is of Irish descent or Irish associations'[58] has become highly popular after the Brexit referendum, as many British citizens have sought to obtain Irish and EU citizenship through this procedure.[59]

Special achievements and investments

Third, EU Member States have established preferential naturalisation regimes for those who have made or are likely to make a contribution deemed of sufficient value to distinguish such applicants from the general group of applicants for naturalisation. Preferential routes to

[54] For an analysis of the Portuguese as well as Spanish law, read Hans Ulrich Jessurun d'Oliveira, 'Iberian Nationality Legislation and Sephardic Jews: "with due regard to European law"' (2015) *EUConst* 13.
[55] David Lesperance, 'Even for the Super-Rich, Citizenship by Descent Is Extremely Useful: Lessons from Abramovich', *Investment Migration Insider*, 5 January 2022. The simple fact that blood lineages are as irrational a mode of status and rights distribution as one gets revealed anti-Semitic inclinations even among those, who initially supported the remedying of the wrongs vis-à-vis the Sephardic community: when a Portuguese MEP, Ms Gomes, learnt that a Russian-Israeli oligarch, Mr Abramovich, acquired Portuguese citizenship due to Sephardic connections, she apparently concluded that he was the 'wrong Jew' for the Portuguese law, not the kind of Jew she had in mind. She twitted 'Why is Russian kleptocrat #Abramovich not included in #EU sanctions list? Well, now he is … Portuguese!' (1 March 2022).
[56] Ruth Rubio-Marín et al. (n 22) 34.
[57] Dimitris Christopoulos, 'Country Report on Citizenship Law: Greece' (EUDO Citizenship 2013) 14.
[58] Article 16 of the Nationality Law of Ireland also specifies that one is of Irish association if 'related by blood, affinity or adoption to a person who is an Irish citizen or entitled to be an Irish citizen', or 'related by blood, affinity or adoption to a person who is deceased and who, at the time of his or her death, was an Irish citizen or entitled to be an Irish citizen'.
[59] https://www.theguardian.com/world/2016/oct/13/huge-rise-in-britons-applying-for-irish-citizenship-after-brexit-vote (last visited: 11-05-2023).

citizenship have been created for athletes, stellar scientists, and investors. Procedures of this kind have been described as creating a form of 'Olympic citizenship'[60] or investment citizenship.[61]

Member States usually allow discretionary naturalisation for people who have made an outstanding contribution to the country. Croatian law permits the discretionary naturalization of foreigners if this is in the interest of Croatia,[62] and Latvia and Lithuania may grant citizenship to foreigners for achievements of special merit to their society.[63] Other Member States allow for the naturalisation of those who can make a special scientific, cultural, or athletic contribution.[64] Discretionary naturalisation is often also possible for persons without legal residence, but there are exceptions. Romania allows 'internationally famous personalities' to obtain Romanian citizenship if they have been domiciled for half as long as that required under the ordinary naturalisation procedure (four instead of eight years),[65] and Lithuanian law provides that the beneficiary must have integrated into the Lithuanian society.[66]

Some Member States have preferential naturalisation schemes for persons willing to make a substantial financial investment or donation. Until recently Cyprus allowed investors to directly acquire nationality following the investment required by the Cypriot Civil Registry Laws and the acquisition of real estate in the amount of €500.000, plus VAT.[67] Cyprus suspended its scheme following pressure from the European Commission,[68] despite the absence of EU competence in

[60] Ayelet Shachar, 'Picking Winners: Olympic Citizenship and the Global Race for Talent' (2017) *Yale Law Journal* 2088.
[61] Kristin Surak, *The Golden Passport* (Cambridge MA: Harvard University Press, 2023); Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales* (Cambridge: Cambridge University Press, 2023); Christian H Kälin, Ius Doni *in International Law and EU Law* (Leiden and Boston: Brill-Nijhoff, 2019).
[62] Article 12 of the Nationality Law of Croatia.
[63]Article 20(1) of the Nationality Law of Lithuania; Article 13(1) of the Nationality Law of Latvia.
[64] Article 16 of the Nationality Law of Bulgaria; Article 16(1) of the Nationality Law of the Czech Republic; Article 10 of the Nationality Law of Estonia; Article 7(2)(b) of the Nationality Law of Slovakia.
[65] Article 8(2) of the Nationality Law of Romania.
[66] Article 15 of the Lithuanian Nationality Law.
[67] Article 111A of the Civil Registry Law of Cyprus. On the potential breaches of EU free movement of capital law in this context, which obliged a category of naturalized EU citizens to keep investments in a particular country, see Sofia Kudryashova, 'The "Sale" of Conditional Citizenship: The Cyprus Investment Programme under the Lens of EU Law', in Nathan Cambien et al. (eds), *European Citizenship under Stress* (Boston, MA: Brill-Nijhoff), 413.
[68] Jessurun d'Oliveira (n. 5); Dimitry Kochenov and Elena Basheska, 'It's All about the Blood, Baby! The European Commission's Ongoing Attack against Investment Migration in the Context of EU Law and International Law', *COMPAS Working Paper* (University of Oxford) No. 22-161, 2022. Since the less transparent investor citizenship schemes of Austria and Croatia were not challenged, this seems to show that the more economically beneficial the scheme are, the less politically acceptable they are. Madeleine Sumption, 'Can Investor Residence and Citizenship Programmes Be a Policy Success?', in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales* (Cambridge University Press, 2023), 377. See also, Kristin Surak, 'Investment Migration: Empirical Developments in the Field and Methodological

this field.[69] In contrast to Cyprus, where investments were preferred, Malta offers citizenship to those making the required non-refundable donation, acquiring or renting a property of a certain value, and residing legally in the country for 12 months.[70] The requirement of legal residence is not a requirement of physical presence, as investors only have to visit the island once. This requirement is nonetheless more extensive than what, for example, Cyprus, Austria, Croatia, and Latvia require under their Olympic/investment citizenship acquisition schemes, as well as many other preferential naturalization regimes.

In most Member States, foreigners can obtain a residence permit in exchange for an investment.[71] For instance, it is possible to acquire permanent residence in Latvia for five years in exchange for an investment in the equity capital of a company, in state securities, or by making a bank deposit.[72] Investors are not required to be physically present in Latvia for the duration of their permit: legal residence is offered as a right and does not require physical presence. Greece offers visas in exchange for investments in real estate and, like Latvia, does not require physical presence.[73] Spain requires that the investor travels 'to Spain at least once during his or her authorised residence period'.[74] Slightly more demanding is Portugal, where investors must be present for 7 days, continuous or not, during the first year, and for 14 days, continuous or not, during the subsequent two years.[75] However, unlike Greece and Latvia, Portugal allows individuals with an investment residence permit to apply for permanent residence or citizenship later, meaning that those who obtain a residence permit through investment can at some point obtain permanent residence or citizenship without having been physically present in Portugal for a substantial period of time.[76] The Spanish regime also offers more favourable access to

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Issues in Its Study' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales* (Cambridge University Press, 2023), 25.

[69] Sarmiento and van den Brink (n 7).

[70] Individual Investor Programme of the Republic of Malta Regulations, 2013.

[71] Commission Report COM (2019) 12 final.

[72] Section 23(28) of the Immigration Law of Latvia.

[73] Law 4146/2013 of Greece.

[74] Sergio Carrera, 'How Much Does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union?' (2014) CEPS Paper No 64, 16. For a more nuanced take on the nature of EU citizenship and sincere cooperation, see Jessurun d'Oliveira (n 68); Kochenov and Basheska (n 68); Costanza Margiotta, 'Ricchi e poveri alla prova della cittadinanza europea. Annotazioni sulla Relazione della Commissione europea sui programmi di cittadinanza per investitori' (2020) *Ragion Pratica* No 2.

[75] Article 5 of Order n. 11820-A/2012, amended by Order n. 1661-A/2013.

[76] Article 5(3) of Order n. 11820-A/2012, amended by Order n. 1661-A/2013.

citizenship. Holding a Spanish investment visa for ten continuous years is sufficient to obtain the Spanish nationality.[77]

Physical presence in practice

However diverse Member States' rules on the acquisition of nationality are, some important conclusions can be drawn from the discussion in the previous section. First, legal residence is not always an indispensable element in the acquisition of citizenship by naturalisation. In the case of ordinary naturalisation, legal residence for a certain period is a requirement in all Member States, but in the case of preferential naturalisation, this requirement is usually either shortened or abolished altogether. It is not surprising, in this context, that 'ordinary naturalisation' is frequently not the most popular way to naturalize in practice – pointing to a possible misnomer. Second, legal residence only partially coincides with physical residence, and many preferential naturalisation schemes allow naturalisation without a requirement of physical residence. This, however, is only the law on the books. If, in addition, the practical enforcement of the legal requirements of legal residence and physical presence are considered, an additional layer of complexity comes to light. It then becomes apparent that some of the existing legislation seems mostly aspirational in nature.

Because intra-EU border controls have largely disappeared, individuals can cross borders without national immigration authorities being able to verify where they are staying or moving to. And not only have internal border controls disappeared, but external border controls have become less stringent for some persons. Passports of persons with the nationality of an EU/EEA country or Switzerland are not stamped, just like the travel documents of foreigners who enjoy a right of residence as relatives of an EU citizen and who can prove this by presenting a 'residence card of a family member of a Union citizen'.[78] Stamping passports makes a difference, as the Schengen Border Code clarifies: 'Stamping makes it possible to establish, with certainty, the date on which, and where, the border was crossed'.[79] That certainty disappears when stamping disappears. As a

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[77] Carrera (n 74) 16.

[78] See Article 10(2) of Regulation 562/2006/EC of the European Parliament and the Council of 15 March 2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L105/1), in combination with Article 10(1) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OF L229/35).

[79] Recital 9 of Regulation 562/2006/EC of the European Parliament and the Council of 15 March 2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L105/1).

result, Member States can more easily check whether the requirements of legal residence have been met than whether applicants for naturalisation have been physically present for the required period. As we show, the procedures of many national immigration and naturalisation services do not seem designed to establish whether physical presence criteria are met. Also in practice, legal residence is not physical presence.

A study of the supporting documents that applicants must submit with their naturalisation file suggests that only two EU Member States request information on arrival in and departure from the territory. These are Ireland and Cyprus, which, not surprisingly, are both non-Schengen countries, and thus in a position to verify to some extent, on the basis of the documents submitted, that legal requirements of physical presence have been met.[80] This is not to say that both countries can fully verify that applicants of their nationality have met the legal presence requirements, if only because they also have borders porous by law. Ireland has a common travel area with the UK and the Channel Islands that allows travel with minimal immigration controls. Someone with a residence permit for one country can in principle travel to the other.[81] Similarly, the Green Line between the north and south of Cyprus, is normally crossed without a passport stamp to indicate that such a trip has been made. Finally, the restrictions imposed by EU law on stamping travel documents also undermine the ability to verify physical presence based on applicants' travel documents.

Perhaps for this reason, these countries may require EU/EEA and Swiss nationals to present different evidence as part of their nationality application than other foreigners. Ireland illustrates this well. Eligibility for Irish citizenship under the ordinary naturalisation procedure requires applicants to have resided legally in Ireland for five years during the nine years preceding the date of application. Of these five years, the last year must be continuous.[82] In addition, Irish law requires applicants to have accumulated sufficient 'reckonable residence'. Reckonable residence is the period during which applicants have resided in Ireland with the required immigration permits. What evidence must be presented to prove reckonable residence is different for EU/EEA and

[80] The information on the supporting documents to be provided in an application for Cypriot citizenship is published here: http://www.moi.gov.cy/moi/crmd/crmd.nsf/duetoyears_en/duetoyears_en?OpenDocument (last visited: 11-05-2023). Ireland is less clear about this matter but makes a distinction between nationals from EU/EEA countries and other foreigners: https://www.irishimmigration.ie/wp-content/uploads/2023/04/FORM-8-CTZ3-Version-7.0-Apr-23.pdf (last visited: 11-05-2023).
[81] Some exceptions are laid down in 'The Immigration (Control of Entry Through Republic of Ireland) Order 1972'.
[82] Article 15 of the Nationality Law of Ireland.

Swiss nationals than for other foreign nationals. Those who are not EU/EEA or Swiss nationals must show that they have 1825 or 1826 days of reckonable residence over nine years based on their accumulated permission stamps, including one year of continuous residence immediately prior to the date of application.[83] EU/EEA and Swiss nationals must submit different proof of their residence in Ireland. While the legal residence of other foreign nationals is controlled by passport stamps, those holding the nationality of an EU/EEA country or Switzerland are 'required to reach a score of 150 points in each of the years proof of residency is required. They do this by submitting proofs with a predetermined value'.[84] This may include mortgage or rent agreements, employment or medical details, or proof of tax payments. Such documents do not provide proof of physical presence in the same way as passport stamps.

As for the other EU Member States, we can see considerable variation. Some still attach great importance to physical presence, not only in law but also in practice, while others no longer control this at all. An example of a country that still emphasises the importance of legal residence and actual presence is Austria. Under the old Nationality Act, applications for Austrian citizenship had to meet a condition of continued residence, which meant being registered with the police for the required period. Time abroad was deemed unimportant.[85] However, since the Nationality Act was amended in 2005, applicants must, in accordance with Article 10(1), have lawfully resided in the federal territory for an uninterrupted period of at least ten years, including at least five years as a settled resident. Furthermore, Article 15(1)(3) of the Nationality Act stipulates that applicants must not have resided outside the federal territory for more than 20% of that period.

Both requirements make things more difficult for many persons interested in obtaining Austrian citizenship. Uninterrupted residence requires uninterrupted residence permits, meaning it is interrupted if the applicant is without a residence permit, even for a short period.[86] In addition, the 20% rule may make it more difficult to obtain Austrian citizenship for individuals who need to spend an extended period of time abroad for (say) work or study.[87] However, it remains uncertain

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[83] https://www.irishimmigration.ie/naturalisation-residency-calculator/ (last visited: 11-05-2023).
[84] https://www.irishimmigration.ie/how-to-become-a-citizen/become-an-irish-citizen-by-naturalisation/proofs-of-residence/ (last visited: 11-05-2023).
[85] Joachim Stern and Gerd Valchars, 'Country Report: Austria' (EUDO Citizenship Observatory, 2013) 21. Available at: https://cadmus.eui.eu/bitstream/handle/1814/60232/RSCAS_EUDO_CIT_2013_28.pdf?sequence=1&isAllowed=y (last visited 11-05-2023).
[86] ibid.
[87] Migration Policy Group, 'Access to Citizenship and Its Impact on Immigrant Immigration: Handbook for Austria' (EUDO Citizenship) 13. Available at:

to what extent the competent authorities can verify whether a person has spent the required time in Austria. Applicants for naturalisation must submit extensive documentation as part of their application, including documents authorising their stay in the country. Such documents allow the authorities to determine whether the condition of continuous legal residence is met,[88] but not whether the requirement of physical presence is complied with.

A development opposite to that in Austria is that which has occurred in Finland, which has moved away from the use of residence as an important criterion for access to citizenship. Finnish legislation is very specific regarding periods of absence from Finnish territory that do not interrupt continuous residence,[89] but the latest amendments to the Finnish Nationality Act were introduced partly because residence was not considered essential for integration.[90] Rather, priority was given to language requirements, as an adequate understanding of the Finnish language was considered more important for integration into Finnish society. Applicants for Finnish nationality no longer need to submit proof of continuous legal residence. They only need to submit a valid identity card, a certificate demonstrating language proficiency, and information of the current and previous income.[91]

That countries are not actually interested in the question of how long the applicant has been present in the national territory during the required periods of legal residence is also evident from the way in which the Netherlands applies its legislation in practice. To be eligible for Dutch nationality, the applicant must have been admitted to and have his main residence in the Netherlands.[92] To prove admission, the Dutch authorities require that applications be supported by proof of valid residence. Normally, this is a valid residence permit, but those with the nationality of an EU/EEA country or Switzerland do not need to provide proof of residence; local authorities check how long the applicant has lived in the Netherlands in the municipal personal records database.[93] Using this database, it is assessed whether the applicant has his main residence in

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https://cadmus.eui.eu/bitstream/handle/1814/29828/AccesstoCitizenshipanditsImpactonImmigrantIntegration.pdf?sequence=1 (last visited: 11-05-2023).

[88] Ibid. page 16.

[89] Section 16 of the Nationality Law of Finland.

[90] Sampo Brander, 'The 2011 Amendment of the Finnish Nationality Act' (EUDO Citizenship). Available at https://cadmus.eui.eu/bitstream/handle/1814/19612/RSCAS_EUDO_CIT_2013_5.pdf?sequence=3&isAllowed=y (last visited: 11-05-2023).

[91] Information about an application for Finnish citizenship is available at https://migri.fi/en/citizenship-for-adults (last visited: 11-05-2023).

[92] Article 8(c) of the Nationality Law of the Netherlands.

[93] https://ind.nl/en/dutch-citizenship/Pages/Naturalisation.aspx (last visited: 11-05-2023).

the Netherlands.[94] EU/EEA citizens and Swiss nationals therefore meet the conditions for naturalisation – legal residence and main residence – if they are registered in the municipal personal records database. Other foreigners must also submit proof of legal residence. But none of the other supporting documents – a copy of a passport, a birth certificate, and proof of civic integration[95] – attests to physical presence. Hence, although one may lose one's main residence in the Netherlands due to prolonged absences, this does not seem to be a legal requirement that the national authorities are concerned with during the naturalisation process.

The situation in Sweden seems similar. Sweden has a slightly different regime for EU/EEA citizens compared to foreigners from other countries. EU/EEA citizens do not have to hold a residence permit while residing in Sweden, but before they can apply for nationality, they must present evidence that they have the right of residence or that they have fulfilled the requirements needed for the right of residence.[96] In addition to legal residence, applicants must also be habitually resident in Sweden. According to the responsible authorities, habitual residents are those with long-term residence and the intention to remain in Sweden. The main rule is that residence based on permits leading to permanent residence counts as habitual residence.[97] But to prove both their legal and their habitual residence, EU/EEA citizens must submit documents showing that they have worked, been self-employed, had their own financial assets, or have studied in Sweden. (Self)-employment can be demonstrated by submitting contracts or tax statements, periods of studies based on transcripts, and financial self-sufficiency by submitting bank statements and other relevant documents.[98] In other words, none of the requested documents show how long applicants for nationality have been physically present in the country. They may have spent significant periods abroad.

So, while physical presence is an important legal requirement under many naturalisation schemes, compliance with this requirement is often not examined in practice—and is in many situations not easily examinable. What we see, therefore, is that national authorities have become more interested in the kind of activities applicants for citizenship have undertaken in their

[94] Besluit van de Staatssecretaris van Veiligheid en Justitie van 12 December 2013, nummer WBN 2013/6, houdende wijziging van de Handleiding voor de toepassing van de Rijkswet op het Nederlanderschap 2003.
[95] https://ind.nl/en/dutch-citizenship/Pages/Naturalisation.aspx (last visited: 11-05-2023).
[96] https://www.migrationsverket.se/English/Private-individuals/Becoming-a-Swedish-citizen/Apply-for-citizenship/Citizenship-for-adults.html#time (last visited: 11-05-2023).
[97] https://www.migrationsverket.se/English/Private-individuals/Becoming-a-Swedish-citizen/Apply-for-citizenship/Citizenship-for-adults.html#MoredocumentsforEUEEAcitizens (last visited: 11-05-2023).
[98] https://www.migrationsverket.se/English/Private-individuals/Becoming-a-Swedish-citizen/Apply-for-citizenship/Citizenship-for-adults.html#MoredocumentsforEUEEAcitizens (last visited: 11-05-2023).

country, for which they are asked to present documents such as rental contracts, certificates of ownership, or information about their living arrangements.[99] To what extent applicants have physically lived in the country often seems less relevant, even if the law suggests otherwise.

Physical presence in EU law and practice

This section discusses the extent to which EU law distinguishes between legal residence and physical presence, by studying the relevant legislative provisions and the case law of the CJEU. It should be clarified from the outset that the provisions discussed do not concern the acquisition of national citizenship. The EU is not competent to define who can be a citizen of the Member States and of the Union.[100] Article 20(1) TFEU states clearly that 'every person holding the nationality of a Member State shall be a citizen of the Union' and that EU citizenship 'shall be additional to and not replace national citizenship'. The CJEU has also affirmed on different occasions that it is in principle 'for each Member State … to lay down the conditions for the acquisition and loss of nationality'.[101] The EU enjoys competence, however, to determine the conditions under which EU citizens can exercise the right of free movement and residence across the Member States and to develop a common immigration policy that determines the conditions under which third-country nationals can reside legally in the EU.[102]

In accordance with this competence, the EU has adopted detailed legislation on the right of residence of third-country nationals in the EU and the right of free movement and residence of EU citizens across the Member States. It is these legislative acts that are the subject of our inquiry.

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[99] Another example is the naturalisation process in Romania, Roxana Barbalescu, Naturalisation Procedures for Immigrants – Romania' (EUDO Citizenship) 11-12. Available at: http://cadmus.eui.eu/bitstream/handle/1814/29795/NPR_2013_17-Romania.pdf?sequence=1 (last visited: 11-05-2023).

[100] Sarmiento and van den Brink (n 7); Dimitry Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights', 15 *Columbia Journal of European Law*, 2009, 169; Martijn van den Brink, 'The Relationship between National and EU Citizenship: What Is It and What Should It Be?' in Theodora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises* (Edward Elgar Publishing 2022). The *de facto* impact of EU law on the nationalities of the Member States has been growing, however: in many EU jurisdictions EU citizens naturalise easier than third country nationals: EU citizens naturalize in other Member States much easier than third country nationals and the discrepancies between the rules applicable to Europeans and non-Europeans in this context has only been growing: Dimitry Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality', in Niamh Nic Shuibhne and Laurence W. Gormley (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford: Oxford University Press, 2012), 241.

[101] Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, para 39; Case C-221/17 *Tjebbes and others* ECLI:EU:C:2019:189, para 30.

[102] See, Articles 21(2) and 79 TFEU. Sarmiento and van den Brink (n 7).

As we will see, EU legislation conditions the enjoyment of specific rights on legal residence, but like national legislation, distinguishes between legal residence and physical presence. Moreover, as we explain, this distinction is a consequence not only of the written law but also of the fact that its application is left to the Member States, which may use their own methods to determine whether the legal requirements have been met.

Let us first analyse Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (Long-Term Residents Directive).[103] Article 4(1) of that Directive provides that 'Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application'. So, like most Member States, the EU requires residence to be both 'legal' and 'continuous'. However, the legislature also decided that third-country nationals do not need to be continuously present during these five years. According to Article 4(3), 'periods of absence from the territory of the Member State concerned shall not interrupt the period … and shall be taken into account for its calculation where they are shorter than six consecutive months and do not exceed in total 10 months within the period referred to in paragraph 1'.

Member States have considerable latitude under the Long-Term Residents Directive in determining whether a foreigner is legally resident. As the CJEU held, the Directive 'does not lay down the conditions which the residence of those nationals must satisfy for them to be regarded as legally resident in the territory of a Member State'.[104] Therefore, 'Member States are to grant long-term resident status to those nationals who, *in accordance with their national law*, have resided legally and continuously within their territory for five years immediately prior to the submission of the relevant application'.[105] This does not mean that Member States may issue permanent residence permits under the Directive to persons who have not legally resided in their territory for five years,[106] but it does mean that Member States have considerable discretion in deciding when persons enjoy legal residence under EU law. Moreover, Member States are of

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[103] Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (OJL16/44).
[104] Case C-40/11 *Iida*, ECLI:EU:C:2012:691, para 36.
[105] Ibid. para 37.
[106] This would arguably be against the Directive's purpose to promote the 'mutual confidence between Member States' (see recital 17).

course allowed to grant permanent residence to anyone under national law, which is not limited by the conditions for legal residence in the Directive.

Member States also have considerable discretion in determining when absences from their territory interrupt the five-year period of residence. We just saw that absences that are shorter than six consecutive months and do not exceed ten months in total during this five-year period do not interrupt this period. Article 4(3) adds, however, that '[i]n cases of specific or exceptional reasons of a temporary nature and in accordance with their national law, Member States may accept that a longer period of absence … shall not interrupt the [five-year] period'. This provision also provides that Member States are allowed to let 'periods of absence relating to secondment for employment purposes, including the provision of cross-border services' count towards the calculation of the five-year period. A study by the Commission has shown that many Member States have used the freedom provided to allow longer periods of absence.[107] What we see, then, is not only that legal and continuous residence does not require continuous physical presence, but also that Member States have different views on how much physical presence should be expected.

Finally, additional diversity is provided by the fact that Article 7(1) requires the applicant for a long-term residence permit must submit 'documentary evidence *to be determined by national law* that he/she meets the conditions set out in [the Directive] as well as, if required, by a valid travel document or its certified copy'. It is thus up to the Member States to determine how to assess whether the conditions of the Directive are met. Looking at the national conditions, it appears that they do not always attach much importance to establishing whether applicants have been present within their national borders. For example, Sweden requires that applications for long-term residence status are accompanied by a passport and documentary evidence that the applicant has been able to support himself and his family for the past five years.[108] The Netherlands requires applicants to demonstrate that they are in the possession of sufficient financial resources and have successfully passed their civic integration exam.[109] Both countries

[107] Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third country nationals who are long-term residents, COM(2011) 585 final, 28.09.2011.
[108] The information provided by the Swedish authorities is available here: https://www.migrationsverket.se/English/Private-individuals/EU-citizens-and-long-term-residents/Long-term-residents/Long-term-resident-in-Sweden.html (last visited: 11-05-2023).
[109] For the information provided by the responsible Dutch authorities: https://ind.nl/en/Forms/6009.pdf (last visited: 11-05-2023).

thus seem more concerned with whether applicants can contribute to their country and whether there are risks of the applicant becoming a social burden than with actual physical presence.

The Long-Term Residents Directive also defines the conditions under which long-term resident status may be lost or withdrawn. According to Article 9(1), third-country nationals are no longer entitled to this status when it has been obtained fraudulently, when an expulsion measure has been issued against them,[110] and, most importantly, in case of 'absence from the territory of the Community for a period of 12 consecutive months'. According to Article 9(4), third-country nationals are not entitled to maintain their status 'after six years of absence from the territory of the Member State that granted long-term resident status'. However, these provisions allow Member States to derogate from these rules and determine that an absence exceeding these periods shall not entail the loss of that status in specific or exceptional circumstances. More importantly, individuals with long-term resident status hardly need to be physically present during these periods to maintain this status. In *ZK*, the CJEU interpreted Article 9(1) literally and held that any physical presence in the territory of the European Union during a period of 12 consecutive months, even if limited to a few days, is sufficient to prevent the loss of long-term resident status.[111] There is no reason to think that the CJEU would rule differently with respect to the conditions in Article 9(4), which would mean that long-term residents can maintain their status if they visit the European Union once a year and the Member State that granted long-term residence status once every six years.[112]

We see a very similar picture when analysing Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States (the Citizenship Directive).[113] According to Article 16(1) of the Citizenship Directive, 'Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there'. However, EU citizens do not need to be continuously present during that period. Article 16(3) provides that 'continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year'. It is worth noting that EU citizens may be absent for longer periods than third-country nationals. EU citizens must have resided

[110] See, in this respect, Case C-488/19 *WT*, ECLI:EU:C:2020:467.
[111] Case C-432/20 *ZK*, ECLI:EU:C:2022:39.
[112] See also, Steve Peers, 'Residents of Everywhere?' available at http://eulawanalysis.blogspot.com/2022/01/residents-of-everywhere-cjeu-rules-on.html (last visited: 11-05-2023).
[113] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L229/35).

legally and continuously in the host Member State for five years to qualify for permanent residence, but they may be away for approximately half of that period as long as their absences do not exceed 6 months per year. Finally, in the absence of border controls and reporting requirements, it cannot be ruled out that EU citizens may qualify for permanent residence if their absences exceed that period.

It also follows from several CJEU judgments that legal residence under the Citizenship Directive means residence in accordance with the conditions set out therein.[114] In *O and B*, it addressed the question of whether legal and continuous residence under the Directive requires continuous presence. Advocate General Sharpston argued that she did not think that 'residence requires constant physical presence in the territory of a single Member State'.[115] Otherwise, 'one could be found to be resident in a Member State only if one had not exercised the right to freedom of movement'.[116] She also explained that EU citizens may reside in two or more Member States:

'In many cases, the exercise of the right to reside freely in the European Union will involve moving residence from one Member State to another, without keeping any meaningful connection with the former place of residence. In other cases, however, it will be expedient for various reasons to maintain significant ties.'[117]

The CJEU agreed, ruling that to determine whether someone is resident in the host Member State, his presence must not be continuous, but 'genuine'[118] – a rather vague term, it must be said. The CJEU clarified that 'short periods of residence such as weekends or holidays' do not satisfy the conditions for a right of residence,[119] but it is clearly not a requirement to be continuously present in the host state.

Moreover, like the Long-Term Residents Directive, the Citizenship Directive leaves it to the Member States to determine how to assess legal and continuous residence. According to Article 21, 'continuity of residence may be attested by *any means of proof in use in the host Member State*' (emphasis added). Thus, although the Directive provides precise guidance on the permitted periods of absence from the host state, the application of these criteria will vary from

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[114] Joined Cases C-424/10 and C-425/10 *Żiołkowski and Szeja*, ECLI:EU:C:2011:866, para. 46. See also Case C-162/09 *Lassal*, ECLI:EU:C:2010:592, paras 52-56.
[115] Case C-456/12, *O and B*, Opinion of AG Sharpston, ECLI:EU:C:2013:837, para. 102.
[116] Ibid.
[117] Ibid. para. 103.
[118] Case C-456/12, *O and B*, ECLI:EU:C:2014:135, paras 53-57.
[119] Ibid. para. 59.

one country to another, depending on how continuity of residence is demonstrated at the national level. Not only that, given the general difficulty of investigating actual presence, it will often be difficult to prove that EU citizens have not met the requirements. This difficulty is reflected in the way Member States apply the permanent residence provisions. As we have seen, the Swedish authorities require EU and EEA nationals to prove that they have met the conditions for permanent residence by showing that they have been employed or self-employed, have sufficient financial resources, or have been students for the past five years.[120] The Netherlands checks primarily whether EU citizens have an address in the Netherlands.[121] If these conditions are met, the permanent residence permit is granted; presence does not seem to be checked.

Finally, Article 16(4) specifies the conditions under which the right of permanent residence is lost: 'only through absence from the host Member State for a period exceeding two consecutive years'. Contrary to the plain meaning of the provision, the CJEU once held that 'the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence *even outside* the circumstances mentioned in Article 16(4)',[122] but it said this in passing and it is unlikely that this is a binding interpretation of the provision.[123] On the contrary, the CJEU has generally emphasised that this provision 'refers to loss of the right of permanent residence on account of absences of more than two consecutive years from the host Member State'.[124] The question on which the CJEU has not yet ruled is how much absence is allowed, but it is likely that the interpretation of Article 9(1) of the Long-Term Resident Directive in the *ZK* judgment applies by analogy to Article 16(4) of the Citizenship Directive. In *ZK*, the CJEU suggested that the provisions of both Directives may need to 'be interpreted in a similar way'.[125] If so, EU citizens could maintain their permanent residence status if they visit the Member State that this status once every two years.

[120] https://www.migrationsverket.se/English/Private-individuals/Becoming-a-Swedish-citizen/Citizenship-for-adults/How-to-apply/Further-documents-for-EU-citizens.html (last visited: 09-06-2023).
[121] https://ind.nl/en/dutch-citizenship/Pages/Naturalisation.aspx (last visited: 09-06-2023).
[122] Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13, para 25.
[123] For criticism, Uładzisłaŭ Belavusaŭ and Dimitry Kochenov, '*Kirchberg* Dispensing the Punishment: Inflicting "Civil Death" on Prisoners in the Recent Case-Law', 40 European Law Review, 2016, 557; Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889, 920.
[124] *Lassal* (n 114) para 55; Case C-325/09 *Dias*, ECLI:EU:C:2011:498, para 59.
[125] Case C-432/20 *ZK*, ECLI:EU:C:2022:39, para 43. See also, Peers 'Residents of Everywhere?' (n 113).

Conclusion

We studied the requirements of legal residence and physical presence in Member State nationality laws and EU legislation governing the right to move and reside freely of third-country nationals and EU citizens. Three conclusions can be drawn from our analysis. First, while legal residence is a requirement to be met for persons who seek to obtain citizenship through ordinary naturalisation procedures, it is not for many who can obtain citizenship through preferential naturalisation—often the most popular method of naturalising in the EU. Second, legal residence does not coincide with physical presence, either in EU law or in national law. The required duration of physical presence is always shorter than that of legal residence, often considerably shorter, or, not infrequently, absent altogether. Third, national authorities often do not examine whether applicants for naturalisation meet the physical presence requirements, and indeed cannot easily examine this in a Union where internal borders have largely disappeared.

These findings are relevant for ongoing debates concerning the rules and practices regarding the acquisition of nationality in Europe, more specifically regarding the European Commission's argument that nationality should not be awarded absent a genuine connection of the applicant with the state. Our analysis does not allow direct conclusions on the validity of the Commission's claim as a matter of legal fact or normative principle. It does shed doubt, however, on its claim, or at least the underpinning presumption, that naturalization is normally possible only once a genuine link with the state granting nationality has been established. The Commission claims that immigrants ordinarily have 'the possibility to naturalise as citizens, provided they fulfil certain integration conditions and/or show a genuine connection to the country'.[126] It means 'residence-based naturalisation',[127] possibly combined with additional requirements that would demonstrate a genuine connection, such as language or civic integration tests.[128] The Commission is right, of course, that ordinary naturalisation procedures typically require the applicant to have been legally resident for an extended period of time, and also that states typically require applicants to pass such tests as part of their application for citizenship.[129] Yet while ordinary naturalisation schemes are residence-based, not all of them require extensive

[126] Commission Report COM (2019) 12 final, 2.
[127] Annex III to the Commission Report COM (2019) 12 final.
[128] Ibid.
[129] Sarah Ganty, 'Integration Duties in the European Union: Four Models,' 28 *Maastricht Journal of European & Comparative Law*, 2021, 784; Liav Orgad, 'Naturalization' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017). Cf. Dimitry Kochenov, *Citizenship* (MIT Press 2019) 73 et seq.

physical presence on the national territory. More importantly, there are numerous preferential naturalisation practices that allow citizenship to be acquired by persons that have only briefly or never resided, let alone been physically present, in the state awarding citizenship. It may well be that the only link these people have with the state that provided them citizenship is the legal link of citizenship itself.

This means one of two things for the Commission's arguments. On the one hand, if the claim it makes in the context of its challenge to citizenship by investment, that citizenship should not be granted without a 'genuine link' is legally credible, then it logically follows that other national citizenship laws and practices also violate EU law.[130] However, as it is a national competence to lay down the rules on the acquisition and loss of citizenship, there does not seem to be any basis under EU law for its claim and, more generally, for challenging the citizenship pluralism as it currently exists in the EU.[131] On the other hand, it could mean, following Petra Weingerl and Matjaž Tratnik, that a broader account of 'relevant links' is required.[132] But if the Commission considers applicants' distant ancestral ties, their sports achievements, marriage certificates, or contribution to the arts and sciences, as 'genuine links', it is unclear why the depth of their pockets, i.e. their financial contribution to a state, would not qualify as such a link too. In any event, as this study has demonstrated, physical presence and/or legal residence is not at all indispensable, as the EU and national law and practice stands today, for the establishment of such links and successful naturalisation.

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[130] See also, van den Brink (n 7).
[131] Dimitry Kochenov and Justin Lindeboom, 'Pluralism through Its Denial: The Success of EU Citizenship', in Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Cheltenham: Edward Elgar, 2018), pp. 179.
[132] Weingerl and Tratnik (n 5).

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