It's All about Blood, Baby!

The European Commission's Ongoing Attack against Investment Migration in the Context of EU Law and International Law

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Abstract

This work provides a brief critical assessment of the European Commission's ongoing attack against investment migration in Europe and elsewhere in the world. We first briskly walk through the key elements in this attack, which will be familiar to the majority of readers, in order to focus on the core deficiencies of the Commission's actions. The ongoing attack on investment migration clearly reveals that the mere political suspicion of a particular type of naturalisation is enough for the European Commission to set aside European and international law and proactively misinform the public, underlining once again the problematic tension between the increasingly political nature of this institution and its key task as guardian of the Treaties. Given the amount of in-house legal expertise the Commission benefits from, the deficient legal quality of its output on this issue points to a failure of the structures responsible for protecting EU law from political abuse: the law is being set aside by the guardian of the Treaties, as the Commission fails on the job. Ripe with nationalist assumptions not rooted in the Treaties or the secondary law of the Union, and displaying a convoluted and inconsistent analysis of the issues it purports to address, the Commission's conduct arouses concerns that a purely nationalist, 'genuine links'-based interpretation of the citizenship of the European Union is taking hold, a concept originally introduced precisely to tame poisonous nationalisms and to prevent thick identity claims being deployed as vehicles of discrimination. As the most 'genuine link' emerging from the Commission's analysis, the one which is never questioned, is that of a blood connection, the EU citizenship emerging from the whole sorry story is one of a nationalist ethnocentricism, which sits uneasily with all the legal provisions in force as well as the raison d'être of the Union, which is rooted in the principle of non-discrimination on the basis of nationality. The paper concludes that there is a burning need for the Commission to take a more careful, coherent and informed approach to its actions, and crucially to introduce structures which safeguard independence and accountability, thereby making the abusive misuse of EU law at Berlaymont at least difficult, if not impossible – an approach indispensable for the preservation of the rule of law in the Union.

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I. Introduction and structure

As we learn from the recent actions of the European Commission[1] and the pronouncements of the European Parliament,[2] millionaires can also be a problem for 'Fortress Europe', especially if they 'buy' the sacred privileges of Europeanness instead of winning them in life's 'birthright lottery'[3] or 'earning' them by cultivating 'genuine links' like the many 'others' who are not fortunate enough to qualify for citizenship by blood connections and whom the European Union (EU) is carefully calibrated to keep at bay.[4] The Commission places a special emphasis on the 'genuine links' between the citizen and the Member State of naturalisation, which in its opinion

[1] Including, but not limited to the case *Commission v. Malta* lodged on September 29, 2022, <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5422> accessed 23 October 2022; European Commission, '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' COM(2019) 12 final <https://ec.europa.eu/info/sites/default/files/com_2019_12_final_report.pdf> (European Commission's Report on EU Investment Migration Programmes), and the accompanying Commission Staff Working Document SWD(2019) 5 final <https://ec.europa.eu/info/sites/default/files/swd_2019_5_final.pdf> both accessed 3 August 2022; European Commission, 'Recommendation of 28.3.2022 on immediate steps in the context of the Russian invasion of Ukraine in relation to investor citizenship schemes and investor residence schemes' C(2022) 2028 final, para. 13 (European Commission's Recommendation on EU Investment Migration Programmes) <https://home-affairs.ec.europa.eu/recommendation-limit-access-individuals-connected-russian-belarusian-government-citizenship_en> accessed 3 August 2022. See also 'State of the Union Address by President von der Leyen at the European Parliament Plenary' <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655> accessed 3 August 2022; and initiation of infringement actions against Cyprus and Malta by the European Commission: 'Investor citizenship schemes: European Commission opens infringements against Cyprus and Malta for "selling" EU citizenship' (Press Release) 20 October 2020 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925>; and advancement of the infringement case against Malta: '"Golden passport" schemes: Commission proceeds with infringement case against MALTA' (Press Release) 6 April 2022 <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2068> accessed 3 August 2022.

[2] European Parliament, 'Resolution of 10 July 2020 on a Comprehensive Union Policy on Preventing Money Laundering and Terrorist Financing – The Commission's Action Plan and Other Recent Developments' (2020/2686(RSP)) <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0204_EN.html> accessed 3 August 2022 (European Parliament Resolution 2020/2686(RSP)); European Parliament, 'Resolution of 9 March 2022 with Proposals to the Commission on Citizenship and Residence by Investment Schemes (2021/2026(INL)) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0065_EN.pdf> (European Parliament's Resolution on CBI and RBI programmes (2021/2026(INL)) accessed 3 August 2022.

[3] Ayelet Shachar, *The Birthright Lottery* (Harvard UP, Cambridge MA 2009).

[4] On the problematic ideology of 'integration', see e.g. Sarah Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne. Critique d'une intégration choisie* (Larcier, Paris 2021). It is worth bearing in mind that the EU is the only advanced constitutional system in the world where third-country nationals are not entitled to benefit from *any* of the core rights offered to citizens, especially including being part of the EU's internal market. EU law is thus the only law in the world elevating nationality discrimination to an absolute degree: without the 'right' nationality, the EU disappears as a territory and as a horizon of opportunities: Dimitry Kochenov and Martijn van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' in Daniel Thym and Marleen Zoetewij Turhan (eds), Degrees of Free Movement and Citizenship (Brill/Nijhoff, Leiden/Boston MA 2015) 66–100.

are required by EU law and international law. Naturalisations in the absence of such links are pronounced unlawful and problematic in the EU, although the Union has little to say on the matter, as this work will demonstrate. Only one link is apparently absolute and unquestionable in the eyes of the Commission: that of blood.

Millions of putative EU citizens are welcome as 'genuine' Europeans with no questions asked and at no objection from the Commission without any connection with the Union besides having had one of their (usually male and often very remote) ancestors owe allegiance to (the predecessors) of one of the EU Member States, while other individuals who obtain citizenship by investment, thus making significant contributions to the Union of the present day are presented as lacking 'genuine links', beyond the investment and possessing the status of citizenship of a Member State of the Union itself. In this paper we demonstrate that this position is far from being rooted in EU or international law and expresses a purely nationalist and thus truly problematic understanding of citizenship, by a deeply politicised European Commission, where the matters of legality are hijacked by the blood nationalist interest – quite an unexpected twist, given the history of the Union and the values it aspires to uphold and promote. It is evident that being ardent about the absoluteness of 'native' superiority, besides being legally obscurantist, is also an extremely costly position. While the marketisation of citizenship and residence can bring billions of Euros to the Member States' crisis-stricken budgets,[5] what is most important is that the law, which the Commission ignores, as well as the principles of legality, Rule of Law and non-discrimination, have an important value in the context of the European integration project, far too important to be dismissed for the politicisation of the nationalist reading of EU citizenship, which gives the concept an increasingly nationalist and neo-colonialist understanding.[6]

This work summarises actions and responses of the EU institutions to investment migration programmes, focusing mostly on the European Commission as the institution that is supposed to play the role of the guardian of the Treaties. The paper critically assesses the Commission's politicised misinterpretations and misconceptions at the expense of well established EU and international law.

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[5] Justin Lindeboom and Sophie Meunier, 'Foreign Direct Investment and Investment Migration Programmes in the European Union' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (CUP, Cambridge 2023).
[6] Manuela Boatcă, 'Unequal Institutions in the Longue-durée: Citizenship through a Southern Lens' in Dimitry Kochenov and Kristin Surak (eds.), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging*, (CUP, Cambridge 2023); Manuela Boatcă, *Global Inequalities beyond Occidentalism* (Ashgate 2016).

Indeed, the Commission has been at the forefront of the attempts to shut down one particular way of conferring citizenship among the many available in the absolute absence of a competence to do so. The matter of citizenship conferral is at the core of Member State sovereignty, but the powers in Brussels decided to test this clear division of competences using investment migration as a starting point. The Commission was not alone, however. A small but opinionated body of moral panic literature has also mushroomed around the issues of whether citizenship – a randomly allocated status of totalitarian domination[7] – should be 'for sale'.[8] Naturalisation through investment has even been compared to the 'passport trade',[9] a trade that does not exist, strictly speaking, outside of the clandestine Pacific passport markets[10] and other criminal circles, which provide counterfeited official documents.[11] Be that as it may, the European Commission has been at the forefront of branding one particular route to naturalisation as non-kosher, immoral, if not illegal, alongside handful of scholars and politicians,[12] demonstrating what Carl Baudenbacher characterised as '*fragwürdige Aktionismus*'.[13]

In what follows we briefly introduce the complexity of EU's citizenship and naturalisation landscape, which will enable the Commission's emerging use of a dubious 'genuine links' approach to EU citizenship to be properly contextualised as an ideal in breach of EU law (II.). We then walk through the timeline of the Commission's ongoing attack on investment migration, also touching on the actions of the European Parliament (EP), though the latter is of lesser importance as this parliament cannot propose legislation[14] and its resolutions have no binding

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[7] Dimitry Kochenov, *Citizenship* (MIT Press, Cambridge MA 2019).
[8] Ayelet Shachar, 'Dangerous Liaisons: Money and Citizenship' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer, Berlin 2018) 7; Ana Tanasoca, 'Citizenship for Sale: Neomedieval Not Just Neoliberal' (2016) 57 European Journal of Sociology 169. Cf also Jelena Džankić's writings on this matter.
[9] *See* e.g. Dimitry Kochenov, '"Passport Trade": The Vicious Circle of Nonsense in the Netherlands', *Verfassungsblog*, 8 June 2020, <https://verfassungsblog.de/passport-trade-a-vicious-cycle-of-nonsense-in-the-netherlands/> accessed 1 August 2020.
[10] Anthony Van Fossen, 'Citizenship for Sale: Passports of Convenience from Pacific Island Tax Havens' (2007) 45 *Commonwealth and Comparative Politics* 138.
[11] Georgi Gotev, 'Thousands obtained EU citizenship for €5000 in Bulgarian scam' (*Euractiv*, 30 October 2018) <www.euractiv.com/section/justice-home-affairs/news/thousands-obtained-eu-citizenship-for-e5000-in-bulgarian-scam/> accessed 21 June 2020.
[12] European Parliament, 'Resolution of 16 January 2014 on EU citizenship for sale' (2013/2995(RSP)) (European Parliament Resolution 2013/2995); Ayelet Shachar, 'Citizenship for Sale?', in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad (eds), *The Oxford Handbook of Citizenship* (OUP, Oxford 2019) 795; A Tanasoca, 'Citizenship for Sale: Neomedieval Not Just Neoliberal' (2016) 57 EurJ Sociology 169; Sergio Carrera, 'The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters' (2015) *CEPS Policy Brief*.
[13] Carl Baudenbacher, '"Goldene Pässe" – fragwürdige Aktionismus des EU-Kommission', *Neue Züricher Zeitung*, 4 December 2020, 19.
[14] Articles 289 TFEU and 294 TFEU.

value on the Member States.[15] In any event, what the EP does on this issue fits entirely within the legally irrelevant propaganda frame that the Commission adheres to, with the only difference being that the EP is a political institution the members of which (MEPs) could legitimately be expected to seek political gains no matter what the law says. The Commission cannot avail itself of this excuse, and with its role of the 'guardian of the Treaties', is tasked with upholding the law and providing a reality check when preparing initiatives.

Such a reality check in the matters of investment migration is entirely missing from the Commission's political activities, as we will show. That said, the fact that no legislative proposals have so far been introduced by the Commission following many years of attempting to misrepresent the issue, is a good sign: all the vicious propaganda aside, the Commission actually knows what the law is and steers clear of the overwhelming humiliation which would result from introducing any legislation on naturalisations by the Member States, which is an issue squarely outside the realm of EU competence, as EU law stands today, unlike possible issues related to money laundering, data protection and other matters related to the perceived problems with the regulation of investment migration in the Member States, as Sarmiento and van den Brink also show[16] (III.). Going into further detail, we unpack the false legal claims at the core of the Commission's propaganda, now providing the backbone of its case against Malta in front of the Court of Justice one by one. By pretending not to know the law and misunderstand the core principles that the EU is built upon, what is at hand is a straightforward and alarmingly large-scale abuse of power by the Commission. To make this claim we focus on the core elements of the Commission's narrative regarding investment migration in recent years, dealing specifically with:

a) the myth of CBI naturalisations as an example of 'less stringent conditions';
b) the lack of EU legislative competence;
c) lack of international law rules to back the Commission's position;
d) reliance on obsolete precedent in breach of EU law;
e) practicing discrimination on the basis of nationality, ethnicity and the mode of citizenship acquisition;

[15] The binding legal instruments of the EU are enumerated and defined in Article 288 TFEU: Regulations, Directives and Decisions. Recommendations and opinions are non-binding legal instruments which are also enumerated in in Article 288 TFEU. Other available forms of action with non-binding effect which are not included in Article 288 TFEU include Resolutions, Declarations and Action programmes.
[16] Daniel Sarmiento and Martijn van den Brink, 'EU Competence and Investor Migration' in Kochenov and Surak (eds), *Citizenship and Residence Sales*.

f) residence by investment ('RBI') and the critique of minimum presence requirements;

g) humiliating and discriminatory rhetoric targeting investment migrants; and

h) misrepresentation of the principle of sincere cooperation in EU law.

We demonstrate that we are witnessing a concerted large-scale political campaign by the Commission aiming to mislead the public and befog EU citizenship law. This campaign includes abundant references to the 'law', which are, however, either irrelevant or gravely misinterpreted. The European Commission is abusing its authority by waging an attack on a handful of core principles of EU law from non-discrimination to conferral in order to reimagine EU citizenship as a legal status based on 'genuine links' in direct conflict with the key case law of the Court of Justice and the Treaties. Worse still, the most unquestionable links in the eyes of the Commission appear to be those of blood – a somewhat old-fashioned ideology that the Union in Europe was created to supersede, rather than boost and glorify (IV).

The question 'in the name of what?' arises. We take issue with the abusive use of investment migration as a pretext for the Commission to start forging a new understanding of EU citizenship, not rooted in the Treaties and directly contradicting the case law of the Court of Justice of the European Union (CJEU), while at the same time, enlarging the powers of the European Commission to a great degree. This is a nationalist 'real links' EU citizenship which would turn the Union into a platform for repeating nineteenth century-style nationalisms, from a vehicle for establishing an area of freedom, security and justice irrespective of nationality, which the Treaties actually demand.[17] At issue essentially is the core of state sovereignty: the Commission aims to deprive the Maltese of the legal tools to determine who is Maltese, and the French of the legal tools to determine who is French. Such moves are in clear contradiction to the EU law in force, as we demonstrate.

[17] Article 67 TFEU. *See* e.g. Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing, Oxford and Portland, Ore 2014); Neil Walker, *Europe's Area of Freedom, Security, and Justice* (OUP, Oxford 2004); Hans Lindahl (ed), *A Right to Inclusion and Exclusion?: Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Hart, Oxford and Portland, Ore 2009); Emilio de Capitani, 'Progress and Failure in the Area of Freedom, Security and Justice' in Francesca Bignami, *EU Law in Populist Times: Crisis and Prospects* (CUP, Cambridge 2020) 375-411.

II. The 'Guardian of the Treaties' gone astray: blood superiority as an unlawful political priority

'What is citizenship?' or a 'normal' way to acquire it? This is always an interesting question, which is very political, usually turning on the issue of who gets to decide. The absolute majority of citizens are created by *ius sanguinis*: they are the sons and daughters of citizens (*de facto,* this is the case even in all the polities, where *ius soli* is the key vehicle, officially of the status's distribution). In other words, citizenship is neo-feudal: blood, here, is key.[18] When 'blood' is there, nothing else usually matters, residence, place of birth, income: these factors, although relevant in truly exceptional circumstances, are of no relevance for citizenship acquisition at birth. The absolute majority of the world population acquired citizenship at birth in this way, without having any say in or enjoying any chance of expressing any preference about it, which is why citizenship is in essence a totalitarian concept.[19] The totality of our rights depends on the status of citizenship we hold, and since these statuses of totalitarian blood distribution of privilege are deeply unequal,[20] the nature of citizenship as one of the core instruments of global inequality is deeply consequential, splitting the population of the world into the global aristocracy – the super-citizens of Western democracies – and the national citizenship poor, who are the victims of citizenship.[21] The blood paradigm is only broken by naturalisations, which amount to fewer than 2% of citizenship acquisitions around the world.[22]

The requirements to be satisfied in this latter category vary greatly. While some countries offer citizenship by investment (CBI) to individuals through specially designed naturalisation procedures, others allow for discretionary naturalisation on the grounds of 'special achievements' (or similar notions) – often explicitly including the economic achievements of applicants –

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[18] Joseph Carens, *The Ethics of Immigration* (OUP, Oxford 2013); Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 Review of Politics 251. Cf, most ironically, Tanasoca, who takes an openly pro-feudal stance, denying the presumption of equal human worth and the principle of dignity, and arguing for the moral superiority of an aristocracy over the 'common' people: Ana Tanasoca, 'Citizenship for Sale: Neomedieval Not Just Neoliberal' (2016) 57 European Journal of Sociology 169. For a criticism, see Suryapratim Roy, 'The "Streetlight Effect" in Commentary on Citizenship by Investment' in Kochenov and Surak (eds), *Citizenship and Residence Sales*.

[19] Kochenov, *Citizenship*.

[20] Cf Dimitry Kochenov and Justin Lindeboom, 'Empirical Assessment of the Quality of Nationalities' (2017) 4(4) European Journal of Law and Governance 314–336; Dimitry Kochenov and Justin Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart, Oxford 2020).

[21] Dimitry Kochenov, 'The Victims of Citizenship: Feudal Statuses for Sale in the Hypocrisy Republic' in Kochenov and Surak (eds), *The Sales of Citizenship and Residence*.

[22] Cf Kochenov, *Citizenship*.

enshrined in national legislation. The difference between the specially designed programmes and discretionary naturalisation on the grounds of 'special achievements' is formal rather than substantial – the former are specifically designed to attract foreign investors, set clear criteria for applicants and are marketed by service providers (agents), while the latter is not necessarily exclusively intended for investors, is less transparent in terms of qualification criteria and is not marketed by nor does it involve agents. Kin groups are another example of the acquisition of citizenship with no residence in the country of naturalisation or knowledge of the language: more than a million Italians, more than a million Hungarians and hundreds of thousands of Greeks, Irishmen, Romanians and Bulgarians have been created this way in recent decades. The end result is always the same – the acquisition of citizenship by the qualifying candidate, usually with a no residence, language or any other requirements.

EU Member States recognise hundreds of ways of conferring citizenship on foreigners and the requirements always vary depending on the class of person who wishes to naturalise as well as the jurisdiction in question:[23] a granddaughter of an Italian lady from Argentina only needs her grandparents' birth certificates; a person with Greater-Hungary ancestry needs to demonstrate a minimal knowledge of Hungarian; and someone with a remote Greek family member will have to demonstrate that the relationship is via the male line, as women could not make Greeks, until quite recently. Everywhere in Europe, immigration is also an option: should you be willing to live in Slovakia for several years, you will get a chance to naturalise there. Getting the right spouse can count too: just get together with a Dutch or a French person and the time of living together anywhere in the world, rather than the time spent in the Netherlands or France will count for naturalisation. These are the most common ways to naturalise, and the immigration route is not necessarily the main one. Indeed, countries such as Hungary naturalise more individuals (over one tenth of the population) through distant ancestral connections, swiftly and without any residence requirements, than they do people through 'immigration' channels, i.e. those who have moved to the country and resided there for several years.[24]

The empirical diversity of the predominant naturalisation modes – whether spousal, ancestral, emigrational or other – raises questions concerning the ideological stakes which underlie the presumption which the European Commission entertains, that the immigrant-to-citizen path is

[23] Please consult the EUDO database of the European University Institute in Florence, which provides a reliable snapshot of the numerous ways available to acquire EU citizenship.
[24] Kriszta Kovács and Boldizsár Nagy, 'In the Hands of a Populist Authoritarian' in Vladislava Stoyanova and Stijn Smet (eds.), *Migrants' Rights, Populism and Legal Resilience in Europe* (CUP, 2021).

the baseline against which all other forms of naturalisation should be compared. Is boasting the right ancestral pedigree or tracing family origins to a particular area on the map – as opposed to money – a more just way of distributing the most important rights?[25] The focus of any naturalisation discussion turns thus, precisely, on this dilemma and the moral panic it provokes: if EU citizenship is sacred and rooted in the native possession of pure European blood providing a 'genuine link' to Europe, how come someone can 'buy' it, thus foregoing the necessary humiliation of 'ordinary' naturalisation? The deeply questionable, racist core of this starting point is evident and connects the issue of citizenship conferral to the broader story of the function that citizenship plays in the contemporary world of passport apartheid.[26] Consequently, those who regard citizenship (just like nationalism and blood privilege) as 'just' should think twice.

Indeed, pronouncements about the 'immorality' of citizenship 'sales' do not constitute the only available approach to understanding the issue of investment migration, as the overwhelming popularity of investment migration among the EU Member States testifies. Indeed, acquiring residence and/or citizenship in exchange for investment or donation is a historically mainstream practice[27] conducted entirely through the law and in full compliance with it.[28] So although currently, there is but one active formal CBI programme in the EU – in Malta[29] – as of 2020, 23 EU

[25] The two obviously overlap, so the question is necessarily tongue-in-cheek: if an investment visa is annulled, a Russian billionaire may be able to visit London again visa-free on an Israeli or on a Portuguese passport, acquired via an established Sephardic connection – only 'blood' and no money involved: David Lesperance, 'Even for The Super-Rich, Citizenship by Descent Is Extremely Useful: Lessons from Abramovich', *Investment Migration Insider*, 5 January 2022; Hans Ulrich Jessurun d'Oliveira, 'Iberian Nationality Legislation and Sephardic Jews' (2015) 11 European Constitutional Law Review 13.
[26] *See* for a more detailed analysis, Dimitry Kochenov, 'The Victims of Citizenship: Feudal Statuses for Sale in the Hypocrisy Republic' in Kochenov and Surak (eds), *The Sales of Citizenship and Residence*; Dimitry Kochenov, 'Ending the Passport Apartheid' (2020) 18(4) International Journal of Constitutional Law 1525.
[27] Maarten Prak, *Citizens without Nations: Urban Citizenship in Europe and the World, c. 1000–1789* (CUP, Cambridge 2018).
[28] Petra Weingerl and Matjaz Tratnik, 'Relevant Links: Investment Migration as an Expression of State Autonomy in Matters of Nationality' in Kochenov and Surak (eds), *Citizenship and Residence Sales*.
[29] Cyprus repealed its CIP on 1 November 2020, i.e. after the European Commission initiated an infringement procedure against the country (alongside with Malta) in October 2020, and also after numerous procedural violations and abuses by officials were exposed by an Al Jazeera investigation as well as pointed out by scholars: *see* <https://www.youtube.com/watch?v=Oj18cya_gvw&feature=emb_title> last accessed 5 May 2022. Cyprus stopped processing applications from 15 October 2021; Sofya Kuryashova, 'The "Sale" of Conditional Citizenship' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill/Nijhoff, Leiden, Boston 2020), 413–440. Other formal citizenship programmes around the world, specifically designed to attract foreign investors, are offered by: Antigua and Barbuda, Cambodia, Dominica, Grenada, Jordan, St Kitts and Nevis, St Lucia, Turkey and Vanuatu. For a global analysis, see Kristin Surak, 'Investment Migration: Empirical Developments in the Field and Methodological Issues in Its Study', in Kochenov and Surak (eds), *Citizenship and Residence Sales*.

Member States allowed discretionary naturalisation for 'special achievements'.[30] Furthermore, 19 EU Member States offer permanent statuses for investment, which are often convertible into the citizenships of those Member States.[31] In short, investment migration is legally practiced by the absolute majority of the EU's Member States.

The presence of investment programmes in Europe in general, and in EU Member States in particular, has naturally triggered the interest of EU policymakers. Indeed, EU citizenship and the rights conferred by it are at the heart of what the EU is about. The freedom of movement of people, enjoyed by virtue of EU law, means in practice that the citizens of any EU Member State can settle in any other EEA[32] or EU Member State and Switzerland, as well as their home country.[33] Non-discrimination on the basis of nationality, which is the core pillar of EU law, assists in the practical use of this right: to make specific Member State nationality matter in any context where EU law applies, is in all likelihood a violation of EU law.[34] Thus a Maltese citizen who obtained his citizenship by investment, just like an Argentinian who has never been to Italy and does not care about that country but found an Italian ancestor and acquired Italian citizenship as a result, can freely relocate to Spain and enjoy most rights that domestic citizens do, including the right to remain, establish or work there. Treating this Maltese and this Italian in Spain as a 'foreigner' in any key respect pertaining to EU citizenship-based rights is absolutely illegal, as it would result in nationality discrimination: specific Member State nationality is thus made irrelevant by the successful operation of EU law.[35]

This is precisely why the EU could have a legitimate interest in following developments related to the acquisition and loss of citizenship in EU Member States and beyond: it already has an overwhelming albeit informal impact in the field of the acquisition and loss of citizenship at the

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[30] EUI Globalcit database – information under 'Mode A24, Special Achievements' <https://globalcit.eu/modes-acquisition-citizenship/> accessed 10 August 2022. As of 1 February 2020, the United Kingdom is not a part of the EU and has been treated as a non-EU Member State for the purposes of this analysis. Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia and Sweden.

[31] These include: Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, France, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia and Spain.

[32] Liechtenstein remains a notable exception.

[33] For detailed information on the free movement of all nationalities, *see* Kochenov and Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index*.

[34] Gareth Davies *Nationality Discrimination in the European Internal Market* (Kluwer Law Int'l, The Hague 2013).

[35] 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* (Edward Elgar, Cheltenham 2018) 179–198.

national level.[36] The core focus of any supranational intervention has traditionally been the usability of supranational rights: preventing the Member States from obstructing the freedom of movement of EU citizens between the Member States of the Union, as well as protecting such citizens from discrimination on the basis of the possession of their particular Member State nationality, whatever form such discrimination could take. Indeed, the Court of Justice has made it abundantly clear, in the case concerning our Argentinian, that Member States of residence are not entitled to question lawfully acquired citizenship of the EU.[37]

The EU's task has never been the preservation and protection of nationalism. Rather, it consists in making sure that EU citizens can use their rights in the entire territory of the Union no matter what the local government in the Member State of their residence might think about the 'genuineness' of their connection with any other state, be it by thickness of blood or thickness of wallet. Once EU law is the starting point of analysis, the whole problem of 'genuine links' essentially does not exist: the EU is designed to give the nationals of EU Member States, who are thereby EU citizens, tangible rights across the Union and 'genuine links' is *not* among the applicable criteria to make rights effective: there is no such requirement in either primary or secondary law, let alone the case law of the Court of Justice.

The very logic of EU's operation as a supranational organisation tasked with the creation of an internal market between the participating states leads to the contrary result to that promoted by the Commission: the practical application of the principle of non-discrimination leads to a situation where naturalisation in the new Member State of residence is not necessary for EU citizens, since they should not be discriminated against there in any case. Worse still: any case of naturalisation of an EU citizen in a new Member State of residence could be presented as a failure of the Union to deliver on its promise in Article 18 TFEU to make the possession of a particular Union nationality legally irrelevant. Put differently: if EU law functions successfully and non-discrimination is secured, there should be no talk whatsoever of any link between an EU citizen and its Member State of nationality beyond the purely legal attachment that the nationality of the Member State itself secures. This is the principle, which enables the whole fabric of EU free movement of persons law to persist. To think otherwise would render the free movement of

[36] For a detailed overview, *see* Dimitry Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship' (2010) EUI Working Paper RSCAS No 2010/23.
[37] *Mario Vicente Micheletti and others* v. *Delegación del Gobierno en Cantabria*, C-369/90, EU:C:1992:295 (Case C-369/90 *Micheletti*).

persons impossible in practice and would turn non-discrimination on the grounds of nationality into an empty promise: the exact opposite of what can be observed in practice.

It is crucially important to realise that EU-level rights are not an exception – it is not that a Maltese 'might' work in Germany. They are the rule: from the perspective of EU law it is precisely the act of leaving a Member State of nationality forever – whether visited or not matters little – which is the most significant right of EU citizenship, accompanied by a strict protection against nationality discrimination in the whole territory of the internal market. It is impossible to present the central EU law right in the Treaties since the first years of integration as the discovery of something new: the fact that EU citizens have an EU law-given freedom of movement does not *per se* create the competence to regulate national citizenship. In fact, in full agreement with Hans Ulrich Jessurun d'Oliveira's analysis[38] we can only state that Member State competence on the matter of granting citizenship reigns supreme unless they start deploying nationalist ideologies of citizenship to humiliate Europeans and deprive them of rights related to EU citizenship status, which are provided by EU law. To repeat – and as Martijn van den Brink has also convincingly argued – EU law cannot be deployed to enforce any 'genuine link' requirements[39] without defeating the purpose of EU citizenship. That purpose is to protect EU citizens exercising free movement rights from dangerous nationalisms – not to recreate dangerous blood nationalisms at the EU level. This background overview of the core meaning of EU citizenship and free movement law in the context of the practical operation of the Member States' nationalities and naturalisation requirements is crucial for the assessment of the Commission's actions, as it ignores the core premises and principles of the legal order it was conceived to defend, turning its back on the rules it is there to uphold.

[38] Hans Ulrich Jessurun d'Oliveira, 'Union Citizenship and Beyond' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill/Nijhoff, Leiden, Boston 2020) 28–43; Hans Ulrich Jessurun d'Oliveira, 'Golden Passports: A European Commission's Report Built of Quicksand' in Dimitry Kochenov, Madeleine Sumption and Martijn van den Brink (eds), *Investment Migration in Europe and the World: Current Issues* (Hart, forthcoming).
[39] Martijn van den Brink, 'Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?' 23 *German Law Journal* 2022, 79.

III. The Commission and the European Parliament's propaganda campaign

This section of the paper analyses the latest moves of the European Commission and the European Parliament in the area of investment migration in the midst of the war in Ukraine.[40] These institutions have not wasted time or opportunities, using the crisis to tackle investment migration again, and to call for security measures against Russians and Belarusians including the withdrawal of citizenship and residency permits: a frontal call to break the law, which none of the Member States, quite expectedly, followed.[41] The section then outlines the further criticism of and political pressure exerted by the EU institutions on Member States with investment migration programmes, including by launching infringement procedures against Cyprus and Malta in 2020, and bringing Malta in front of the Court almost two years later. This section of the work elaborates on the most problematic aspects in the European Commission's approach, focusing on the lack of competence of the EU in the field of citizenship matters, its misinterpretation of international law and the inapplicability of 'genuine links', as well as on the flaws in the Commission's arguments on the subject matter.

Drawing on previous sections, the last section then proceeds to reiterate the political nature of the Commission's attacks against investment migration and the competences of the Member States, restating the concerns at the heart of such engagements: deploying the powers of the guardian of the Treaties, which is the Commission's official function, to misrepresent EU and international law, mislead the public, and disrupt the division of competences between the EU and the Member States in the interest of a nationalist blood-based EU citizenship not rooted in

[40] The war was largely used in the EU as a justification for playing down the enforcement of the Rule of Law: Petra Bárd and Dimitry Kochenov, 'War as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening' (2022) ELJ <https://doi.org/10.1111/eulj.12435> accessed 10 August 2022. At the same time, a number of moves against the key principles of EU law were made by the Commission in the field of citizenship and naturalisation, as we will see, under the same justification. The *European Commission's Recommendation on EU Investment Migration Programmes* calling for the annulment of thousands of naturalisations of Russian and Belarusian citizens in the EU, which is both arbitrary and discriminatory as well as lacking a proper legal basis, is a good illustration of this hateful policy. Nationality discrimination also emerged as the main approach to sanctions: cf Dimitry Kochenov, 'Sanctions for Abramovich, but Schröder Goes Scot-Free Linking Sanctions, Citizenship, the Rule of Law and the Values of the European Union', *Verfassungsblog*, 11 March 2022, <https://verfassungsblog.de/sanctions-for-abramovich-but-schroder-goes-scot-free/> accessed 4 August 2022.

[41] Problems arouse in a different, yet interconnected domain: several Eastern and Central European States started using the possession of Russian citizenship as a pretext to disqualify people from the right to claim asylum or apply for a visa – all in direct violation of EU law. Cf. Sarah Ganty, Dimitry Kochenov and Suryapratim Roy, 'Nationality-Based Bans from the Schengen Zone', *COMPAS Working Paper* No. 22-160 (Oxford University) 2022.

the primary law, while setting aside the case law of the European Court of Justice and the core principles of EU and ECHR law, especially non-discrimination, is a dangerous development showing the poor state of the Rule of Law at the supranational level. This points towards systemic deficiencies in the basic accountability and legality structures at the heart of the Commission, which should not, ideally, be serving unlawful purposes as well as emerging as a locus of abuse of power.

3.1 Investment migration in the light of the war in Ukraine

In its 1 March 2022 Resolution on 'Russian aggression against Ukraine' – a document seemingly not dedicated to the issue of investment migration *per se* but which attacks investment migration – the European Parliament '[called] on the Member States and allied countries with residence by investment schemes to review all beneficiaries of such residence status and to revoke those attributed to Russian high-net-worth individuals and their families, in particular those linked to sanctioned individuals and companies'.[42]

About a week later, the European Parliament adopted a Report by Sophie in 't Veld MEP and the LIBE Committee 'with proposals to the European Commission' on investment migration programmes in which it called for the complete phasing out of such programmes across the Member States and for strict regulation of RBI programmes.[43] The reference to a 'proposal' in the title of the Resolution should not, however, be confused with a formal initiative of a legislative proposal since this is a right almost entirely reserved to the European Commission.[44] The European Parliament may invite the European Commission to submit legislative proposals, rather than proposing legislation itself.[45] Such an initiative of the European Parliament does not create an obligation on the European Commission to propose the legislation in question. While the European Commission is expected to explain the reasons for not submitting a proposal upon the initiative of the European Parliament, it is by no means obliged to follow it. The EP Report as adopted, 'with proposals to the European Commission' is therefore not a legislative proposal since the European Parliament has no competence to submit legislative proposals. Given that the EU as such does not have a straightforward competence to regulate the issues related to naturalisations by the Member State authorities, as we shall see, the Report in question is thus

[42] European Parliament, 'Resolution of 1 March 2022 on the Russian aggression against Ukraine' (2022/2564(RSP)) (European Parliament, Resolution 2022/2564(RSP)), para. 23.
[43] European Parliament's Resolution on CBI and RBI programmes (2021/2026(INL)), paras 21-25.
[44] Article 17(2) TEU.
[45] Article 225 TFEU.

rooted in double wishful thinking: not only is it not a legislative proposal, it would not be lawful even if it were one. It is only in the absence of competence on the matter that the European Parliament could act so frivolously: this is done in full knowledge that whatever is in the Report, the lack of Union competence on the core issues of Citizenship by Investment excludes any chance whatsoever of the European Parliament's Report being acted upon, and its result, were any such thing ever to emerge, inevitably being overturned by the Court.[46]

The European Commission equally regarded the start of the war as a pretext to voice its opinion on investment migration, calling for immediate termination of existing CBI programmes and stricter checks of RBI in its Recommendation dedicated to Russian and Belarusian citizens who naturalised or obtained their residence through investment.[47] Furthermore, the European Commission called on the Member States to assess and revoke citizenships or resident permits that they had granted to Russian or Belarusian nationals and their family members based on investor programmes if it is determined that they are or were to become subject to the EU restrictive measures or that they supported the war in Ukraine or other 'related activities of the Russian government or Łukašenka regime breaching international law',[48] thereby adding someone's personal opinions about international law to the list of factors to be taken into account when the status of citizenship or a residence permit is to be withdrawn: a novelty in global law. In both cases, the Member States concerned should take into account the principles of proportionality and the protection of fundamental rights.[49]

Strikingly, the Commission did not make the same recommendation about Russians and Belarusians who obtained or are in a process of acquiring their EU citizenship for 'special

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[46] Note that the situation is different in the field of RBI, but any legislative proposal is unlikely to change the current *status quo*, as the classical supranational approach has always been to extend the rights of individuals through EU legislation, not to close opportunities for those wishing to benefit from establishing residence in the EU: Daniel Sarmiento, 'EU Competence and the Attribution of Nationality in Member States' (2019) IMC-RP 2019 <https://investmentmigration.org/wp-content/uploads/2020/09/IMC-RP-2019-2-Sarmiento.pdf> accessed 4 August 2022. Even more so, a second significant factor will need to be taken into account here: the supranational residence rules currently in force always allow the Member States to deviate from the supranational minimal denominator in cases when they wish to establish more permissive rules – exactly what allows for RBI permanent residences in deviation from the relevant directive, as analysed by Martijn van den Brink in detail: Martijn van den Brink, 'Investment Residence and the Concept of Residence in EU Law Interactions, Tensions, and Opportunities' (2017) IMC-RP 2017/1 <https://investmentmigration.org/wp-content/uploads/2020/09/Van-den-Brink-IMC-RP1-2017.pdf> accessed 4 August 2022. For the most detailed assessment of competence delimitation between the EU and the Member States on the issues of residence and citizenship, *see* Sarmiento and van den Brink, 'EU Competence and Investor Migration'.

[47] *European Commission's Recommendation on EU Investment Migration Programmes*, para. 15.

[48] Ibid.

[49] Ibid, paras. 13 and 15.

achievements', often in an almost identical, yet less transparent way, than their compatriots who 'bought' it. Should we recall that kin-citizenship for the Russians and Belarusians was not even mentioned? The right great great-grandfather ensures that someone who would have otherwise needed to 'buy' EU citizenship, can now get it for free, and is therefore not a security risk. The fact that the Commission is concerned about the investment programme of Malta, and has not raised its concerns about other EU Member States, which allow for acquisition of citizenship without any residence or other 'thick' requirements, strongly suggests that the EU is more concerned with the form rather than with the substantive threats. These threats, according to the Commission, are brought about by investment migration, which some scholars have cast serious doubts on,[50] not least given the chronic inability of the Commission to explain why someone whose great-grandfather was born on what used to be post-First World War Romanian settlement territory or, rather pre-First World War Hungarian territory, is a lesser security threat and is less prone in engaging in money-laundering than someone who bought that privilege. Fetishisation of the nativist understanding of citizenship as a blood connection to the nation, which is not rooted in EU law or international law, significantly undermines the Commission's whole crusade against investment migration.

Indeed, the fact that other EU Member States do not have formal investment migration programmes does not change the reality that citizenship by investment and numerous other ways to acquire citizenship without any 'thick' connection to a particular Member State – which EU law does not require, as we have seen, but which the Commission purports to expect in its attacks against rich Europeans – is or has been practiced by other Member States than Malta. More concerning, however, is the fact that the Commission has only focused on new or future citizens coming from particular countries and acquiring their EU citizenship through a particular mode of naturalisation – choosing a slippery ground as an institution tasked to uphold EU law, an important part of which is rooted in the protection against discrimination.

Moreover, the Commission did not limit itself to recommending withdrawal or non-issuance of residence permits or citizenships to the sanctioned nationals of Russia and Belarus and their family members, but went further to request that Member States also apply restrictions to

[50] Hans Ulrich Jessurun d'Oliveira, 'Golden Passports: A European Commission's Report Built of Quicksand' in Dimitry Kochenov, Madeleine Sumption and Martijn van den Brink (eds), *Investment Migration in Europe and the World: Current Issues* (Hart, forthcoming); Elena Basheska, 'Why the EU's Top Court Should Clarify EU Law' IM Ybk 2020/21, 32–34. For a broad overview, see Dimitry Kochenov and Kristin Surak, 'Introduction: Learning from Investment Migration', in Kochenov and Surak (eds), *Citizenship and Residence Sales*.

citizenship and residence through investment programmes to *non-sanctioned* Russians or Belarusians. This recommendation comes in the middle of a war which has generated a mass-scale outflow from Russia of business people and other professionals opposed to the Putin's regime and its actions.[51] It applies guilt by association to the nationals of two particular countries both of which are not known to be democratic states and thus do not depend on the support of the population in their actions, including the decisions to go to war.[52] The European Commission justified this move with 'the difficulty to conduct the appropriate security checks and due diligence in these particular circumstances and in view of the gravity of the situation'.[53] And again, the Commission did not express similar concerns about Russians and Belarusians who are acquiring their EU residence permits on the basis of other grounds than investment migration programmes, nor did it mentioned the risk of granting EU residence permits to other nationalities. This seriously calls into question the genuineness of the Commission's reasons underpinning the call for the suspension of investment migration programmes in general and RBI in particular.

Indeed, the Commission's Recommendation, as recognised by the European Commission itself, 'is only one element of the Commission's policy to take determined action on both citizenship and residence investor schemes. It should therefore be seen in the context of this larger effort and is without prejudice to ongoing and future initiatives of the Commission in this respect'.[54] In other words, the war in Ukraine has been used by the European Commission to fight its own war against investment migration, which benefited Russian and Ukrainian investors alike,[55] as well as

[51] According to data from Russia's Federal Security Service (FSS), more than 8.3 million Russians have left the country in the first half of 2022, which is an increase of around 1.5 million people compared to the first half of 2021. For more details, see the FSS official records on departures of Russian citizens <https://www.fedstat.ru/indicator/38480#> accessed 5 August 2022. The flights from the country has intensified significantly following the announcement of the 'partial mobilisation' September 2022. See also 'Rise of Russia Hardliners Sows Fear In Putin's Elite: Kremlin tolerance of outspoken calls for "Stalinist" measures sows alarm among insiders', *Bloomberg News* (8 November 2022) <https://www.bloomberg.com/news/articles/2022-11-08/rise-of-russia-hardliner-yevgeny-prigozhin-fuels-fear-in-putin-s-elite?leadSource=uverify%20wall> accessed 16 November 2022.

[52] The Commission is not alone, regrettably, as the drive to close the EU borders for the Russians fleeing the Putin regime demonstrates. Cf. Sarah Ganty, Dimitry Kochenov and Suryapratim Roy, 'Nationality-Based Bans from the Schengen Zone', *COMPAS Working Paper* No. 22-160 (Oxford University) 2022.

[53] *European Commission's Recommendation on EU Investment Migration Programmes*, para. 15.

[54] Ibid, para. 20.

[55] The quality of both nationalities in question is at the level of the victims of citizenship making Ukrainians and Russians alike the ideal clients of the investment migration industry: Dimitry Kochenov and Justin Lindeboom, 'Empirical Assessment of the Quality of Nationalities' (2017) 4(4) European Journal of Law and Governance 314–336; Dimitry Kochenov, 'The Victims of Citizenship: Feudal Statuses for Sale in the Hypocrisy Republic' in Kochenov and Surak (eds), *The Sales of Citizenship and Residence*.

the Member States of the EU.[56] The moment seemed right for the Commission to invoke security risks to tackle a largely invented problem, which is hardly related to the current circumstances. It is a clear fact that what the Commission refers to as 'policy to take determined action on both citizenship and residence investor schemes' lacks the legal basis and is thus entirely *ultra vires*, as we will discuss in more detail in the next section.

The European Commission's Recommendation on EU Investment Migration Programmes is only one of the many attempts to tackle investment migration, which has attracted strong criticism from EU institutions ever since the launch of the Maltese CBI.[57] Indeed, as the following section demonstrates, the European institutions have continuously problematised investment migration, by various means, and at different levels.

3.2 Tackling investment migration by all means

Over the last eight years, the Commission and the European Parliament have turned to the issues of investment migration on numerous occasions. While the Parliament has passed a number of (non-binding) resolutions calling on EU Member States to abolish such programmes, the European Commission went further, initiating infringement procedures against Cyprus and Malta in 2020 and eventually bringing Malta in front of the Court of Justice on 29 September 2022. After Cyprus closed its CBI, Malta is the only EU Member State with an active formal CBI amidst the strong political pressure from the European Commission and the European Parliament to comply with questionable demands made outside the area of EU competence against the smallest EU Member State. The rough chronology of the PR attack is the following:

- On 15 January 2014, the Justice Commissioner, Viviane Reding, initiated a plenary debate in the European Parliament about the Maltese IIP asking that Member States 'only award citizenship to persons where there is a "genuine link" or "genuine connection" to the country in question';[58]

[56] Madeleine Sumption, 'Can Investor Citizenship Programmes Be a Policy Success?', in Kochenov and Surak (eds), *Citizenship and Residence Sales*.
[57] Amendments made to the Maltese Citizenship Act in 2013 provided the possibility of naturalising individuals 'who contribute to the economic development of Malta' as well as their families and a framework for the enactment of LN 47 of 2014 'The Individual Investor Programme of the Republic of Malta Regulations' which introduced further amendments. The 2014 Regulations were issued following negotiations between Malta and the European Commission: *see* European Commission, 'Joint Press Statement by the European Commission and the Maltese Authorities', Press Release, 29 January 2014.
[58] Plenary Session debate of the European Parliament on 'EU citizenship for sale', Strasbourg, 15 January 2014.

- On 16 January 2014, the European Parliament adopted a Resolution on EU citizenship for sale, following Viviane Reding's approach and emphasising that access to funds should not be the main criterion in conferring EU citizenship on third-country nationals;[59]
- On 29 January 2014, representatives of the European Commission and of the Government of Malta met to discuss the compatibility of the Maltese IIP with EU law, upon which Malta agreed to amend its programme (under political pressure from the European Commission) by including a legal residency requirement (i.e. possession of a residence permit at the moment of application for naturalization);[60]
- On 15 November 2017, the European Parliament adopted a Resolution on the rule of law in Malta, calling on Malta to publish the names of those who had acquired their citizenship through investment;[61]
- On 26 March 2019, the European Parliament adopted a Resolution on Financial Crimes, Tax Evasion and Tax Avoidance, calling 'on Member States to phase out all existing CBI or RBI schemes as soon as possible';[62]
- On 10 July 2020, the European Parliament adopted a Resolution on a comprehensive Union policy on preventing money laundering and terrorist financing calling on the Member States 'to phase out all existing [CBI] or [RBI] schemes as soon as possible';[63]
- 29 September 2022, the Commission brings Malta to Court rehearsing the same dull arguments of questionable nature.

Moreover, in January 2019, the European Commission issued its own report on the subject, relying heavily on previous documents from EU institutions and bodies.[64] While recognising that applicants may invest in a Member State for legitimate reasons,[65] the European Commission described the risks associated with investment migration programmes, including money

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[59] *European Parliament Resolution 2013/2995*.
[60] European Commission MEMO, 'Joint Press Statement by the European Commission and the Maltese Authorities on Malta's Individual Investor Programme (IIP)' Brussels, 29 January 2014 <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_70> accessed 17 May 2022.
[61] European Parliament, 'Resolution of 15 November 2017 on the Rule of Law in Malta' (2017/2935(RSP)), para. 13.
[62] European Parliament, 'Resolution of 26 March 2019 on Financial Crimes, Tax Evasion and Tax Avoidance' (2018/2121(INI)), para. 195.
[63] *European Parliament Resolution 2020/2686(RSP)*.
[64] *European Commission's Report on EU Investment Migration Programmes*. For analyses, see e.g. 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; 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; Jessurun d'Oliveira, 'Golden Passports'.
[65] *European Commission's Report on EU Investment Migration Programmes*, section 4, p. 9.

laundering, corruption and tax evasion, as well as the possibility of infiltration of criminals into the EU, without explaining why those risks could not be tackled without attacking the idea of naturalisation based on investments, thus intruding on a field where the EU does not have a competence to legislate.

Non-legislative organs, such as the TAX3 Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance, and the European Economic and Social Committee (EESC) also had their say on the subject, calling for the phasing out of all investor programmes. The TAX3 Special Committee issued a Report on the basis of which the European Parliament adopted a Resolution.[66] The EESC issued an Opinion urging Member States to follow its recommendation on the phasing out of investor programmes.[67] Yet neither the Tax 3 Special Committee nor the EESC are legislative organs and whatever reports or opinions they might issue are incapable, just like Resolutions of the European Parliament, to alter the scope of Union competences. This is something that can only be done via Treaty change, using one of the procedures of Article 48 TEU[68] and which would require unanimity of the Member States to become a realistic option. Such unanimity is nowhere in sight, given that, as outlined above, it is precisely the plurality of approaches to citizenship that is at the heart of the European integration project.[69] Enlarging the powers of the Union to deal with investment migration, however strictly defined and even if a valid reason for it was to hand, threatens to open the gates to the EU's legislative interference into issues lying at the heart of the remaining 'stateness' of the Member States:[70] the ability to determine who belongs to the people of a Member State and who does not, and for what reason. Such a valid reason, however, is missing, since whatever the Commission or the Parliament's TAX3 committee may think about preserving the value of EU citizenship is absolutely irrelevant in a context where not a single argument is brought to the table to explain why the absolute glorification of the blood ties as a way of distributing rights and privileges is the right way forward for the EU, and how the sacrifice of the internal market – which the Union was designed to bring about – at the altar of 'genuine links' between EU citizens and concrete Member States is at all justifiable in face of the overwhelming harm that the Commission's unlawful 'genuine links' move is bound to cause to the foundational principle of non-discrimination on the basis of nationality. Quite remarkably, the

[66] *European Parliament, Resolution on Financial Crimes, Tax Evasion and Tax Avoidance 2018/2121(INI).*
[67] EESC Opinion, 'Investor Citizenship and Residence Schemes in the EU' SOC/618-EESC-2019 (EESC Opinion), para. 11.
[68] *See* in detail Dermot Hodson and Imelda Maher, 'The Transformation of EU Treaty Making the Rise of Parliaments, Referendums and Courts since 1950' (CUP, Cambridge 2018).
[69] Kochenov and Lindeboom, 'Pluralism Through Its Denial'.
[70] Antje Wiener, 'Going Home? "European" Citizenship Practice Twenty Years After' in Dimitry Kochenov (ed) *EU Citizenship and Federalism: The Role of Rights* (CUP, Cambridge 2017) 243–268.

institution appears to be ready to give up its very *raison d'être* in the name of defending what appears to be the superiority of European blood against corrupting attacks from those less ethnocentric of the EU's governments.[71]

The Commission's court case against Malta needs to be considered in this context.[72] As mentioned above, the Court has already clarified EU law on the matter on a number of occasions and the fact that the Commission politicises the law to the point of misrepresenting what it requires could never help it in Court, even if its press releases would collect plentiful likes on twitter. Pointing in the direction of a Union built on the idea of European blood superiority, the Commission explained that investment programmes under which citizenship is granted in the absence of a genuine link or residence requirement undermine the essence of EU citizenship. Ancestral citizenship and kin naturalisations for the millions of those who have never even visited Europe were never mentioned: blood ties, for the Commission *are* the 'genuine links' – and this would make the founders of the Union, who wrote into its very essence that discrimination on the basis of nationality would outlawed by EU law, very ashamed of the current college.

Quite alarmingly, the Commission's propaganda about the law has been effective enough, especially if one looks at the results of the European Parliament's vote on the Report of Sophie in 't Veld MEP.[73] The outcome of *Commission v. Malta* would certainly influence further

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[71] This behaviour, although astonishingly *passé* at its heart, does not seem to contradict von der Leyen Commission's eagerness to defend the 'European way of life' despite numerous critics – as put by Andrew Stroehlein, European media director for Human Rights Watch, 'Putting migration under a portfolio named "protecting our European way of life" is another example of just how much mainstream politicians in Europe are adopting the framing of the far right', and also 'Normalizing their ugly rhetoric is a dangerous step toward normalizing their abusive policies that threaten democracy and human rights': quoted in Matina Stevis-Gridneff, 'Protecting Our European Way of Life'? Outrage Follows New E.U. Role', *The New York Times* (12 September 2019) <https://www.nytimes.com/2019/09/12/world/europe/eu-ursula-von-der-leyen-migration.html> accessed 10 August 2022. In fact 'genuine links' and 'European way of life' seem to be reference to the same brand of nationalism, which is of course at odds with the values, which the EU is purportedly built to defend, but has been failing so far: Štefan Auer, *European Disunion: Democracy, Sovereignty and the Politics of Emergency* (C. Hurst & Co, London 2022); András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values Ensuring Member States' Compliance* (OUP, Oxford 2017); Dimitry Kochenov, 'EU Law without the Rule of Law' (2015) 34 YEL 74–96.

[72] 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; Interview with Dimitry Kochenov, 'Commission Would Likely Be "Humiliated" if CIP-Matter Goes to Court over "Genuine Links"' (23 October 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3718328> accessed 5 August 2022.

[73] Members of the European Parliament voted overwhelmingly in favour of the text with 595 voting in favour, 12 voting against and 74 abstaining from vote. *See* 'MEPs demand a ban on "golden passports" and specific rules for "golden visas"' (Press Release) 9 March 2022 <https://www.europarl.europa.eu/news/en/press-room/20220304IPR24787/meps-demand-a-ban-on-golden-passports-and-specific-rules-for-golden-visas> accessed 10 August 2022.

developments in the investment migration world, even if the global context would remain unchanged no matter what the Court finds, as the centre of citizenship by investment industry measured both as a matter of the numbers of applications and by investment scale is in Turkey and the Caribbean, not the EU. The same applies to investment residence, long centred on the US with its EB-5 programme. Be it as it may, losing the case before of the Court would be something the Commission undoubtedly cannot afford, after so much energy went into knowingly misrepresenting what the law actually is. The Court is not blind and its members have unquestionably read the Commission's unfortunate scribbles and see the implications of what it advocates for the future of the internal market and the consistency of own critically important case law on EU citizenship. Moreover, the loss would mean that other Member States would quickly join the smallest ones that the Commission has so far been attacking and establish investment migration programmes without paying attention to the Commission's unlawful 'genuine links' propaganda, should it not stop after the Court has spoken.

Given the behaviour of the Commission on the matter so far, it is difficult for legal experts to estimate what would guide its judgment: the law has so far never been taken into account by the 'guardian of the Treaties', offering a clear example of the need for the reinforced checks and balances within the institution, which seem to be entirely missing at the moment, showing a threat to the basic elements of the Rule of Law.[74]

IV. Unpacking the most unfortunate elements of the Commission's position

The most problematic aspects of the European Commission's attack on the lawful exercise of national competence by the Member States wishing to establish CBI and RBI programmes can be boiled down to four key elements:

a) The myth of CBI naturalisations as an example of 'less stringent conditions'
b) A lack of EU legislative competence
c) A lack of international law rules to back the Commission's position
d) Reliance on obsolete precedent in breach of EU law

[74] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) Hague Journal on the Rule of Law <https://link.springer.com/article/10.1007/s40803-022-00176-8> accessed 5 August 2022.

e) Practicing discrimination on the basis of nationality, ethnicity and the mode of citizenship acquisition
f) RBI and the critique of minimum presence requirements
g) Humiliating and discriminatory rhetoric targeting investment migrants
h) Misrepresentation of the principle of sincere cooperation

Notwithstanding the fact that some of these issues have already been touched upon above, it makes sense to look at them in some more detail.

a) The myth of 'less stringent conditions'

Citizenship,[75] together with territory, is the essential starting point of the concept of the sovereignty of states.[76] The limits of the EU competences are governed by the principle of conferral. This means that the EU acts only within the limits of the competences that EU Member States have conferred upon it in the Treaties, and nationality is not among these competences.[77] As per the case law of the CJEU, the limitations on the principle of conferral are interpreted strictly, and require close involvement of the Member States.[78] So when the Commission claims to have discovered what citizenship is about, writing that citizenship 'is traditionally based on […] *ius sanguinis* and […] *ius soli*',[79] this is all correct, but the Devil, as is only so frequently the case, is in

[75] The term 'citizenship' is often interchangeably used with 'nationality', Article 2(a) European Convention on
Nationality (adopted 6 November 1937, entered into force 1 March 2000) ETS No. 166 (*European Convention on Nationality*) stipulates: 'For the purpose of this Convention: a "nationality" means the legal bond between a person and a State and does not indicate the person's ethnic origin'. These two terms are used interchangeably in this Report, understood simply as a classification of a natural person belonging to a particular State.
[76] On sovereignty of states, *see*, among many authors, Leo Gross 'The Peace of Westphalia: 1648–1948' (1948) 42 AJIL 20–41; Henry Wheaton, *Wheaton's Elements of International Law*, Coleman Phillipson (ed) (5th edn Steven and Sons Ltd, London 1916); Hans Kelsen, *Principles of International Law* (Rinehart and Company, NY 1952; repr. by The Lawbook Exchange, Clark, NJ 2003); Charles E Merriam, *History of the Theory of Sovereignty Since Rousseau* (Faculty of Political Science of Columbia University, NY 1900; repr. by The Lawbook Exchange, Clark, NJ 1999); Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (PUP, Princeton, NJ 2001); Cf Randall Lesaffer, 'International Law and Its History: The Story of an Unrequired Love' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff, Leiden 2007) 27–42; Stéphane Beaulac, *The Power of Language in the Making of International Law* (Martinus Nijhoff, Leiden 2004); Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth' (2001) 55 International Organization 251–287 etc.
[77] Article 5 TEU. For historic development of the principle *see* René Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30 CMLRev 85–91, and
Kieran Bradley, 'The European Court and the Legal Basis of Community Legislation' (1988) 13(6) ELRev, 379–385.
[78] *See* in greater detail Sarmiento, 'EU Competence and the Attribution of Nationality', 3 et seq.
[79] *European Commission's Report on EU Investment Migration Programmes*, section 2.1, p. 2.

the detail. In giving its 'golden standard', the Commission does not make clear that the reality is much more complex than what its selective summary purports to demonstrate.

Referring to citizenship by investment, the Commission writes that in essence, such 'citizenship is granted under less stringent conditions than under ordinary naturalization regimes'.[80] As we have demonstrated in the opening section of this work, this statement is far from correct. What is crucial here is to mention the different ways that the citizenship law of all the Member States rationally accommodate enabling the acquisition of citizenship by different categories of applicants.

Perusal of any citizenship law book makes as much clear: when we speak of the acquisition of citizenship, differentiated treatment of different cases is key. It is an essential and characteristic part of nationality regulation. Member States establish what is desirable and while Italy decided that asking an ailing Japanese Cardinal – stateless upon retirement from Vatican service – to wait the usual 10 years to become Italian is undesirable, replacing it with zero years instead, and the Dutch government decided that asking asylum seekers to wait as long as others to naturalise would be unkind, the Maltese government makes the grant of nationality conditional on a significant donation to drive the economy of the island. In light of the existing differences in procedure, underpinned by the great disproportion in the numbers, where hundreds of thousands became EU citizens through extremely remote ancestry or other ways having nothing to do with the state or its 'culture' through the laws of Bulgaria, Greece, Ireland, Italy, Romania and other states, stating that investment citizenship is 'less stringent', as the Commission does, is an absurd misrepresentation.

To drive this point home, it is even more absurd than what it first seems to be, for at least two reasons. Most importantly, many other ways to acquire citizenship do not require a significant investment. An American kid, like the son of a Venezuelan friend, searching through archives for any Greek connections so as to avoid paying US-rate tuition fees at Bologna Medical School, is not bringing several millions to Greece. To imply that undying Greekness can persist across six generations, however ethno-nationalist and *passé* a notion this might be, is a decision for the Greek government to take, which fits the general international trends, as Christian Joppke has shown.[81]

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[80] Ibid, p. 2 (emphasis added).
[81] Christian Joppke, 'Citizenship between De- and Re-Ethnicization' (2003) 44 European Journal of Sociology 429.

So the Cypriot choice to create citizens through investment is at least as rational (or irrational) as the Greek, but not to a protestor in the 'Macedonia is Greece' crowds of course,[82] which our US kid, thankfully, will never join. The question of what is 'legal' does not arise, since it is not up to the Commission to ask or comment on this, and international law, just like European law, is clear: Member States will decide as they see fit. So for Malta EUR 650,000 was more important than blood nationalism, while for Greece the opposite is true. Some would applaud this choice: 'Greek blood is important!' To suggest, however, that some other choice is somehow 'less legal' in the context where EU citizenship is equated with some mythical superiority of European blood, whatever is implied by it, cannot be correct. And morality has never played a role in citizenship law, especially in the EU, with its colonial past[83] and the essentially race-based exclusion from EU citizenship[84] approved by the ECJ in *Kaur*.[85] Globally the picture is no different: citizenship is currently the main tool for the preservation of global inequality, as Branko Milanović, among others, explained with clarity.[86]

Secondly, and equally importantly, 'ordinary conditions' – as opposed to the frowned-upon 'less stringent' ones – imply a level of due diligence which is significantly lower than what investment citizenship promises: the entirety of one's finances and business connections, as well as your entire life history would not normally be dug up by independent due diligence providers, unless you are an investor naturalising on that ground.[87]

This is only right: different applicants require different standards. The absurdity of implying, as the Commission does, that investing several millions and going through deep scrutiny is less stringent than finding a Greek man whom you have never met in your ancestry (citizenship has traditionally been sexist, of course),[88] speaks for itself. This begs the conclusion that the 'context'

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[82] Zamira Rahim, 'Athens riots: Clashes as 60,000 protesters march in Greece against Macedonia name change' (*Independent*, 2019) <https://www.independent.co.uk/news/world/europe/athens-protests-violence-riots-police-officers-macedonia-name-change-prespes-agreement-a8737581.html> accessed 22 June 2020.
[83] Peo Hansen and S. Jonsson, *Eurafrica: The Untold Story of European Integration and Colonialism* (Bloomsbury Academic, London 2014).
[84] Lord Anthony Lester, 'Thirty Years on: The East African Case Revisited' (2002) 47 Public Law 52.
[85] Case C-192/99 *Kaur*, ECLI:EU:C:2001:106; Helen Toner, 'Annotation Case C-192/99 *Kaur* [2001]' (2002) 39 Common Market Law Review 881. Cf Dimitry Kochenov, '*Ius Tractum* of Many Faces' (2009) 15 Columbia Journal of European Law 169.
[86] Branko Milanovic, *Global Inequality* (Harvard UP, Cambridge MA 2016).
[87] Mark Corrado and Kim Marsh, 'Investment Migration and the Importance of Due Diligence: Examples of Canada, Saint Kitts and Nevis, and the EU' in Kochenov and Surak (eds), *Citizenship and Residence Sales*.
[88] Jamie R Abrams, 'Examining Entrenched Masculinities in the Republican Government Tradition' (2011) 114 West Virginia Law Review 165.

of citizenship acquisition, to which the Commission dedicated a whole section in its Report,[89] and on which its case against Malta is built is misleading: forgetting to mention 'difference' amounts to failing to tell the true story. The Commission has thus failed at the most basic level, and is unable to present the fundamental rules for the acquisition citizenship.

b) The lack of legislative EU competence to regulate the issue

Of crucial importance is the sovereignty/competence aspect of this story. The crucial question is how far the Commission can actually enforce its own understanding on Member States' nationalities and EU citizenship, however enlightened such an understanding could be. If there is no Competence to regulate, the Commission's opinions – especially if they contradict the Treaties and the settled case law of the CJEU (as we discuss below), let alone be based on startling European blood-superiority visions (as discussed above) – could and should always simply be ignored by the Member States as outright *ultra vires*.

The ABC of global citizenship law is that states are free to confer citizenship on those whom they consider qualified under the Hague Convention of Nationality[90] and unquestionably under EU law – as Shaw,[91] Kochenov[92] and most recently, Jessurun d'Oliveira,[93] Sarmiento[94] and Tratnik and Weingerl[95] have demonstrated. By extension, this applies to EU citizenship, which is a derivative – *ius tractum* – citizenship.[96] No sane academic voice would be able to argue that the EU has competence to legislate here, which is why all the documents that the Commission released so far with the aim of attacking the CBI industry are not legislative proposals, even if they attempt to push the Member States, purely politically, to alter their regulation in a particular way and even the abuse of the infringements route by the Commission, which is otherwise painfully underutilized as Kelemen and Pavone demonstrated.[97] Note the difference with the EP's position: powerless as it is to introduce legislation, the EP attempted to push the Commission to do

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[89] *European Commission's Report on EU Investment Migration Programmes*, Section 2.1, pp. 3, 4.
[90] *See* Article 1, *Hague Convention* above.
[91] Jo Shaw, 'Citizenship for Sale: Could and Should the EU Intervene?' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer, Berlin 2018) 61.
[92] Kochenov 'Rounding up the Circle'.
[93] Jessurun d'Oliveira, 'Union Citizenship and beyond'. *See* also Jessurun d'Oliveira, 'Golden Passports'.
[94] Sarmiento, 'EU Competence and the Attribution of Nationality'.
[95] Matjaž Tratnik and Petra Weingerl, 'Investment Migration and State Autonomy: The Quest for the Relevant Link' (2019) Investment Migration Research Papers 2019/4.
[96] Kochenov, '*Ius Tractum* of Many Faces', 169.
[97] R Daniel Kelemen and Tommaso Pavone, 'The Curious Case of the EU's Disappearing Infringements', *Politico*, 13 January 2022, <https://www.politico.eu/article/curious-case-eu-disappearing-infringements/> accessed on 23 October 2022. Cf. Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, After All', 38 *Yearbook of European Law* 2020, 3.

precisely that and predictably failed, as signaled by Commissioner Reynders.[98] It will not surprise the reader to learn that France still decides on who is French and retains all the rights to do so, just as Malta decides on who is Maltese and Finland on who is Finnish. The law is crystal-clear, just like the fact that all the Member States find the continuation of this approach vital to their interests – which makes the EP's Report look at once particularly weak and allowing the Commission's position on the matter of CBI to appear like a poorly orchestrated attempted power-grab, when presented in Court. It is impossible to propose the rigid framework that the Commission purports to have found (ius sanguinis + ius soli + 'genuine links' + the exclusion of citizens of particular countries – *in casu* Russia and Belarus – whether under sanctions or not, whom the Commission seems to dislike[99]) for establishing any mode of acquisition of citizenship, in an area where the Commission has no say in law, but the aspiration is clear.

The naturalisations of those who are not 'natural born' citizens including a sub-type of investment naturalisations, falls squarely within the realm of what is legal worldwide, including in the EU. While the academic consensus worldwide is well articulated and undisputed, in the EU it is confirmed unequivocally by the case law of the Court of Justice:[100] from *Micheletti* and *Zhu & Chen*[101] to *Tjebbes*.[102] If a Member State wants an investment migration programme, it can have one: the division of competences is crystal clear, as the Court not charmed by Commission's thinly veiled blood-nationalism in the times of the rise of the extreme right will no doubt reconfirm.[103]

Furthermore, EU citizenship is complementary to, but does not replace, national citizenship.[104] Put differently, EU citizenship protects the rights of Member State nationals, which are not granted by their states but by the Union itself.[105] It is for the EU Member States, however, to

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[98] In the words of Justice Commissioner, Didier Reynders, 'legal and political feasibility of such a legislative proposal would need to be carefully assessed, in particular at a time when infringement procedures are still ongoing' < https://www.youtube.com/watch?v=OzyF-mnMOSc&t=201s> accessed 10 August 2022.
[99] The exclusion of Russians and Belarusians based solely on their nationality is even mentioned in the press release concerning the Commission's case against Malta published on 29 September 2022.
[100] See, for the general analyses, Kochenov and Lindeboom, 'Pluralism Through its Denial'; Jessurun d'Oliveira, 'Union Citizenship and beyond'.
[101] Case C-200/01 *Zhu and Chen*, *ECLI*:EU:C:2004:639.
[102] Case C-221/17, *Tjebbes*, ECLI:EU:C:2018:572. Cf Dimitry Kochenov, 'The *Tjebbes* Fail' (2019) 4 *European Papers* 319; Hans Ulrich Jessurun d'Oliveira, '*Tjebbes* en aanhangend nationaliteit' (2019) *Nederlands Juristenblad* 37; Katja Swider, 'Legitimising Precarity of EU Citizenship: *Tjebbes*' (2020) 57 *Common Market Law Review* 1163.
[103] On the specific issue of investment residences please see van den Brink, 'Investment Residence and the Concept of Residence in EU Law'.
[104] Article 20(1) TFEU.
[105] As stated by the CJEU many times, citizenship of the Union is intended to be the fundamental status of nationals of the Member: Case C-184/99 *Rudy Grzelczyk* v *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458, para. 31; *Baumbast and R* v *Secretary of State for the Home Department*,

regulate who qualifies as a national, having due regard to EU law. The EU case law preserves this competence of Member States,[106] with the only exception being instances where it is necessary to ensure effective and uniform protection of the rights of EU citizens. The EU has therefore normally only interfered in nationality matters where Member States have enacted measures that restrict the rights of EU citizens rather than where such rights are to be enjoyed by new citizens.[107]

Given that there is no legal basis in the TEU or TFEU for the pursuit of a 'natural' citizenship myth as it once was – as discussed by Spiro,[108] Joppke[109] and others, it comes as no surprise that the Commission has resorted in the course of its anti-CBI propaganda campaign to obsolete legal authority and abundant, flawed legal reasoning to sell the untenable position that it has no legal basis properly to defend.

c) The lack of international law rules to back Commission's position

In its analyses of the legal positioning of CBI programmes in the EU the European Commission often tries to justify its approach with references to the principles of international law. Indeed, 'genuine links' are at the centre of its case against Malta. However, the situation in international law is rather different to what the Commission has been promoting – in short, states have broad discretion, if not complete exclusivity, in deciding who qualifies as their citizen and under what circumstances. The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930 (Hague Convention) clarified this point in Article 1: 'It is for each State to determine under its own law who are its nationals'.[110] It further stipulates, however, that: '[t]his 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'.[111]

ECLI:EU:C:2002:493, para. 82; *Carlos Garcia Avello* v *Belgian State*, ECLI:EU:C:2003:539, para. 22; *Kunqian Catherine Zhu and Man Lavette Chen* v *Secretary of State for the Home Department*, ECLI:EU:C:2004:639, para. 25; and *Janko Rottman* v *Freistaat Bayern*, C-135/08, ECLI:EU:C:2010:104 (*Rottman*), para. 43.

[106] The landmark case is Case C-369/90 *Micheletti*.

[107] *See* e.g. *Rottman*, para. 60; *Gerardo Ruiz Zambrano* v *Office national de l'emploi (ONEm)*, ECLI:EU:C:2011:124, para. 45. For the context of the latest case-law, see, e.g. Dimitry Kochenov and David de Groot, 'Helpful, Convoluted, and Ignorant in Principle: EU Citizenship in the Hand of the Grand Chamber in *JY*', 47 *European Law Review* 2022.

[108] Peter Spiro, 'Cash-for-Passports and the End of Citizenship' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer, Berlin 2018) 17.

[109] Christian Joppke, *Citizenship and Immigration* (Polity, Cambridge 2010); Christian Joppke, 'The Instrumental Turn of Citizenship' (2018) 44 Journal of Ethnic and Migration Studies 1.

[110] Article 1, Convention on Certain Questions Relating to the Conflict of Nationality Law (adopted 12 April 1930, entered into force 1 July 1937), vol. 179, p. 89 (*Hague Convention*).

[111] Ibid.

Article 3 of the European Convention on Nationality (ECN) uses almost identical words to define the nationals of a state and the conditions under which a state's citizenship law should be recognised.[112] As the information provided by the European Commission itself in all the documents it released to attack CBI makes absolutely clear, CBI naturalisations are fully recognised and practiced in numerous states around the world. It is thus unquestionable that a CBI programme-based citizenship is a lawfully acquired nationality in the eyes of international law, which is also clear from the *Nottebohm* case concerning the recognition of bought Liechtensteiner nationality, which will be analysed in detail below.

In other words, in a context where international law unquestionably allows states to determine who their citizens are and which has traditionally recognised CBI citizenships as lawfully acquired – and the tradition of 'buying' citizenship here goes back centuries, as the brilliant scholarship of Maarten Prak clearly demonstrates[113] – states' competence in the field of citizenship matters is only limited by binding rules of international law. It is clear that CBI programmes as such are a mainstream application of a states' sovereign ability to decide who their nationals are, rather than a breach of any such rule. Consequently, given that citizenship by investment is entirely kosher in the eyes of international law, the one and only rule that could stand in the way of the states in the course of the implementation of their investment migration programmes as far as international law is concerned, is the element of the voluntariness of the individual acquiring the citizenship, as non-consensual naturalisation is precluded. Non-consensual naturalisations have been consistently ruled out as breaching international law at least since the attempts of the Latin American nations to start regarding European expats born outside of their territory – people like Mr Nottebohm – as if they were local citizens, as Peter Spiro reports.[114] After a burst of international outrage, this practice of forced naturalisations stopped and could be observed for a brief period only in the Stalinist Soviet Union, which did not bother much with international law compliance.[115] All the CBI naturalisations in the EU and in its direct vicinity have been unquestionably consensual.[116]

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[112] Article 3, *European Convention on Nationality*.
[113] Maarten Prak, *Citizens without Nations* (CUP, Cambridge 2018); Maarten Prak, 'Citizenship for Sale in Pre-modern Europe' in Kochenov and Surak (eds), *Citizenship and Residence Sales*.
[114] Peter J Spiro in Kochenov and Surak (eds), *Citizenship and Residence Sales* (and the literature cited therein).
[115] Eric Lohr, *Russian Citizenship: From Empire to Soviet Union* (Harvard UP, Cambridge MA 2012).
[116] The only possible examples of a non-consensual CBI programme could be found in the Comoros: the island state used to offer wholesale naturalisation options to the Gulf monarchies seeking to reduce the level of statelessness among the Bidoon population. This CBI programme was subjected to clear criticism

Furthermore, different treatment of persons in similar situations is always prohibited under the principles of international law, except where it is reasonably justified and the measures taken are proportionate to a legitimate aim. In line with Article 5 of the UN Convention on the Elimination of All Forms of Racial Discrimination[117] and Article 5 ECN, conferral of citizenship cannot discriminate against citizens on grounds including national or ethnic origin. The Commission's Recommendation suggesting stripping EU citizens of Russian and Belarusian origin who acquired their EU nationality based on CBI naturalisations thus strongly suggests a potential breach of this basic rule of international law by the Commission on top of the disregard of the Union law, which it also represents. Lastly, discrimination on the grounds of sex in the conferral of nationality is equally prohibited.[118]

While other requirements have also often been discussed in the context of possible constraints on state sovereignty in the field of citizenship, none of them has developed into binding international law, which may affect a states' competence in citizenship matters. One of the most commonly discussed cases, which has been wrongly brought into connection with the acquisition of citizenship, more recently and rigidly by the European Commission, is the *Nottebohm* case of the International Court of Justice (ICJ).[119] Indeed, the European Commission relied heavily on the doctrine of 'genuine links' discussed in *Nottebohm* to justify its opposition to investment migration programmes, missing however, some very important aspects of that doctrine.

d) Reliance on obsolete precedent in breach of EU law

In the *Nottebohm* case, the ICJ referred to the limitation on the recognition of nationality enshrined in the Hague Convention (Article 1) and described 'nationality' as a legal bond based on 'a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[120] In particular, the ICJ discussed the genuine link requirement in the context of diplomatic protection and the recognition of citizenship in the absence of a 'genuine link', while confirming the sovereign right of states to determine whom their nationals are:

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in the literature as potentially breaching international law: e.g. Spiro in Kochenov and Surak (eds), *Citizenship and Residence Sales*.

[117] Article 5, *Hague Convention*.

[118] Ibid.

[119] ICJ, *Liechtenstein* v *Guatemala* [1955] ICJ Rep 4 (*Nottebohm*).

[120] *Nottebohm*, 23.

> 'It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain [...]
>
> But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein [...] It is international law which determines whether a State is entitled to exercise protection and to seize the Court.
>
> The naturalization of Nottelbohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.
>
> International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State'.[121]

The ICJ further noted:

> 'in order to be capable of being invoked against another State, nationality must correspond with the factual situation [...]
>
> The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality [...]
>
> It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the

[121] *Nottebohm*, 20–21

> authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State'.[122]

Therefore, as confirmed by the ICJ, states do not have to recognise the effects of a citizenship granted by another state in the absence of a genuine link. That said, the power of states to decide who their citizens are remains unaffected under international law. Indeed, even in the case itself, Guatemala had unquestionably recognised the Liechtensteiner nationality of Mr Nottebohm when he established residence in the country as a Liechtensteiner. Consequently, the case of *Nottebohm* has rightly and vigorously been criticised by experts since it was rendered[123] and has rarely been applied by international tribunals, and only in the context of dual nationality.[124]

Accordingly, contrary to the allegations of the European Commission that *Nottebohm* imposes an obligation on states to adhere to the 'genuine link' or residence requirement in cases of naturalisation, such a requirement has never been a binding rule of international law.[125] The reasons why are very clear: it is the legalistic and totalitarian nature of citizenship as a legal status, which frequently fails to correspond to any expected 'thick' links on the ground.[126] Rogers Brubaker famously defines citizenship as an 'object and instrument of closure',[127] in other words a means for selecting those who 'belong' from the available number of bodies and guarding the selected few from those who do not 'belong'. It means that not caring about a country and its purported 'values' will not make you less of a citizen in the eyes of the law, just as caring a lot about some officially endorsed 'culture' or language will *not* make you a citizen, unless you are named as such by law. Pretending that this is not the case – and many countries go to absurd lengths with this, such as the Netherlands – but only applying any of the conditions to dual citizens and leaving the rest alone no matter what,[128] is deeply unhelpful and usually only

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[122] *Nottebohm*, 22-23.
[123] E.g. Peter Spiro, (2019) 'Nottebohm and "Genuine Link": The Anatomy of Jurisprudential Illusion' (2019) IMC WP 1/2019. *See* also J Mervyn Jones, 'The Nottebohm Case', (1956) 5(2) ICLQ 230–244; *see* also Josef L Kunz, 'The Nottebohm Judgment' (1960) 54 American Journal of International Law 536–571 and the extensive literature cited therein; Robert D Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 1–60.
[124] Audrey Macklin, 'Is It Time to Retire *Nottebohm*?' (2017) 111 American Journal of International Law 492–97, 494.
[125] See e.g. Dissenting opinion of Judge Klæstad in *Nottebohm*.
[126] Kochenov, *Citizenship*.
[127] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard UP, Cambridge MA 1992).
[128] Dimitry Kochenov, '*Mevrouw De Jong Gaat Eten*: EU Citizenship and the Culture of Prejudice' (2011) EUI RSCAS Working Paper 6/2011. Please note that the situation has become much worse since the paper was written, as the level of absurdity and humiliation which those willing to get the local documents are subjected to has risen sharply.

humiliates minorities, who typically have more than one citizenship and are often unable to renounce the harmful ones, such as Iran or Morocco-imposed statuses.[129]

When the Commission informs us that 'the study looked at other factors [...] which might arguably create a link between the applicant for citizenship and the country concerned',[130] a citizenship lawyer reading this might well be puzzled. It is fundamental to realise that only *citizenship* can be such a link. To present citizenship – an abstract legal status – as something that requires more than *itself* in order to be enjoyed is not faithful to the letter and the spirit of global citizenship law as it stands today. The Commission's analysis carries with it a whiff of the totalitarianism of nineteenth century approaches to allegiance.[131] Only blood links, most regrettably, are taken as unquestionable and 'genuine' – EU citizenship is being turned by the Commission through its clumsy attacks against the CBI, into a deeply nationalist – read also racist – project, what it was never designed to become.

This is all the more ironic, given that the poor precedent of *Nottebohm* – which is not even good law at the international level anymore – has actually been expressly outlawed by the EU's own Court. In other words, every reference to 'genuine links' by the European Commission is not only a clear misrepresentation of international law – it is also an attack on the well-articulated core of European one. Indeed, the situation in the EU could not have been clearer. As lucidly explained by the Court of Justice in the case of *Micheletti* – which concerned the Argentinian moving to Spain to establish a business using an Italian passport referred to above – checking 'genuine links' is expressly prohibited by EU law.[132]

'Genuine links' is a requirement which *breaches EU law*. This fact, while well recognised by the European Commission,[133] has been regularly brought into connection with the mode of acquisition of citizenship through investment, with the principle of sincere cooperation enshrined in Article 4(3) TEU and with the status of EU citizenship reflected in Article 20 TFEU – as follows directly from the Commission's framing of the case against Malta. The arguments of the European Commission are far from clear, or at least far from what has been established as EU law so far: amounting to a deliberate misrepresentation of EU law. One wonders what hopes drive

[129] Katja Swider, 'Legitimizing Precarity of EU Citizenship'; David A.J.G. de Groot, 'Free Movement of Dual EU Citizens' in Cambien, Kochenov and Muir (eds), *European Citizenship under Stress*; Kochenov, 'The *Tjebbes* Fail'; Kochenov and de Groot, 'Helpful, Convoluted, and Ignorant in Principle'.
[130] *European Commission's Report on EU Investment Migration Programmes*, section 2.3, p. 4.
[131] Cf Kochenov, *Citizenship*.
[132] Case C-369/90 *Micheletti*, paras 10-13.
[133] *European Commission's Report on EU Investment Migration Programmes*, section 2.4, p. 5.

the Commission ahead of the necessity to defend such misrepresentation in front of the Court. Was the case designed for Malta to blink in order for lawlessness and propaganda to win? The Commission's purely political and legally obscurantist position, in assuming 'genuine links' between states and citizens, is not only flawed in terms of international law, but it also falls short of the 'market citizenship' standard of the Union itself, however criticised.[134] If conditioned on such 'genuine links', the free movement of EU citizens would be endangered, if not impossible, which is precisely the reason why AG Tesauro laughed at the embarrassing position embraced by the Commission in the ancient *Micheletti* case.[135]

It is impossible, with recourse to the law in force, to justify the Commission's position, since such a justification would require the annihilation of all that the EU stands for: liberal values, non-discrimination on the basis of nationality, human dignity and equality, *inter* many *alia*. Should the Commission be allowed to undo all the value core of EU law on the basis of tired and unambiguously racist and blood-nationalist tropes such as 'links' with states and 'cultures' pre-approved by the powers that be, where blood connection is the only unquestioned 'link'? The whole point of the Commission's engagement with CBI, it appears, is the deep dislike of the idea that thick nationalist blood bonds are bypassed: the Commission's apparent desire to play handmaiden to nationalist totalitarianism: a nineteenth century ideal replicated at the supranational level in breach of EU law and imposed on the often smallest Member States by way of propaganda and outright bullying. Is this Maltese a 'real' Maltese? What if he has never visited the European Union? And what about this Irishwoman?[136] And this Brit?[137] This Dutch?[138] This is where the obsolete case law of the International Court of Justice – expressly *overruled* by the EU's own Court of Justice – comes into play: the Commission refers quite extensively to the *Nottebohm* theory of 'genuine links'.[139]

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[134] See, for the best available analysis, Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart, Oxford 2017). See also Dimitry Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the European Union' in Fabian Amtenbrink et al. (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W Gormley* (CUP, Cambridge 2019) 217 (and the literature cited therein).
[135] Opinion of AG Tesauro in Case C-369/90 *Micheletti*, para 5.
[136] Case C-434/09 *McCarthy v Secretary of State for the Home Department* [2011] ECR I- 3375.
[137] Case C-192/99 *Kaur*.
[138] C-221/17, *Tjebbes*; Dimitry Kochenov, 'The *Tjebbes* Fail' (2019) 4 *European Papers* 319; Swider, 'Legitimising Precarity of EU Citizenship'.
[139] *Nottebohm* (Judgment) [1955] ICJ Rep 4. The citizenship of Lichtenstein held by Mr Nottebohm was not recognised by Guatemala, the latter state treating Mr Nottebohm as a German citizen – a status he did not hold. The ICJ agreed with this restrictive vision, ruling that nationality is a 'legal bond having as its basis a social fact of attachment, a genuine connection of experience, interests and sentiments, together with the existence of reciprocal rights and duties'. The ICJ failed to mention, however, that in the absence of any

It could of course be possible that the Commission's desk officers might be unaware of the fact that *Nottebohm* was also opposed immediately after it was decided by Jones, Kunz, Panhuys, Weis – the list of authorities could be continued *ad infinitum* – and later dismissed by René de Groot, Jessurun d'Olivera, Macklin, Sloane, Thwaites, Vermeer-Kunzli and many others, as Spiro has splendidly summarised.[140] What they could not overlook, however, is that 'genuine links' are incompatible with a world which has moved on, at least officially, from perpetual allegiance and the glorious mystifications of blood nationalism, as the Court of Justice confirmed in *Micheletti*.[141] As per Advocate General Tesauro, the 'romantic period of international relations'[142] is over. It is thus quite unacceptable, in the respectful opinion of these authors, to provide a reference to 'genuine links' and *Nottebohm* in an official document of the European Commission in reference to the need to have a nationality acquired by naturalisation recognised in the 'international arena'.[143] The reference is flawed, since the Court of Justice of the European Union has *expressly prohibited* the Member States from relying on *Nottebohm* in dealing with each other's nationals. The Commission's 2019 Report contradicts itself, on a number of occasions, but one such is the most telling:[144] you cannot have a rule of recognition 'in the international arena' based on *Nottebohm*, which is at the same time expressly prohibited by the highest EU Court, with the immediate effect, of course, of blocking *Nottebohm* in the territory of the EU. This point is absolutely crucial: the Commission's positions knowingly *misrepresent EU law*.

e) Practicing discrimination on the basis of nationality, ethnicity and the mode of citizenship acquisition

The Commission's attack against investment migration assumes that is acceptable to target groups of EU citizens and single them out for differentiated treatment based on the ground on which the nationality of an EU Member State and thus EU citizenship had been acquired. This type of discrimination is squarely prohibited in EU law at least since the *Boukhalfa* case law.[145]

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other nationality but that of Liechtenstein and with a 'genuine link' only to Guatemala, precisely the state attacking him, Mr Nottebohm was deprived of any remedy as a result of the controversial decision, even if limited only to the recognition of nationality for the purposes of diplomatic protection. To see the incoherence of the judgment, *see* the Dissenting Opinion of Judge Klæstad and the dissenting opinion of Judge Read. For an analysis *see* the literature recommended in Albert Bleckmann, 'The Personal Jurisdiction of the European Community' (1980) 17 Common Market Law Review 467, 477 and note 16.

[140] Spiro, '*Nottebohm* and "Genuine Link"'.

[141] Case C-369/90 *Micheletti*.

[142] Opinion of AG Tesauro in Case C-369/90 *Micheletti*.

[143] *European Commission's Report on EU Investment Migration Programmes*, sections 2.3 and 2.4. pp. 5–6.

[144] Ibid, p. 7.

[145] Case C-214/94 *Ingrid Boukhalfa* v *Bundesrepublik Deutschland*, ECLI:EU:C:1996:174. Although the Report recognises the importance of non-discrimination on this ground, it is written based on the presumption of

Treating Europeans differently based on the particular rule which made them EU citizens is not what EU law allows and the majority of national constitutions would prohibit it too. The crusade against CBI is an assault on this principle.

The Commission's stance on denaturalisations in the 2022 Recommendations is particularly unlawful and out of place, saved only by the *ultra vires* nature of the document itself. The Commission proclaims *inter alia* that EU citizens of Russian and Belarusian origin (whom the Commission calls 'Russians' and 'Belarusians')[146] and their family members should, in accordance with the CJEU principles including proportionality and protection of human rights, be stripped of their EU nationality gained through investment if they become subject to EU restrictive measures or because they significantly support the war in Ukraine or activities of the Russian or Belarusian regimes breaching international law.[147]

Deprivation of citizenship as a security measure has resurged in state practices in recent years, including among European states.[148] A most recent Report of the Institute on Statelessness and Inclusion and the Global Citizenship Observatory has identified four deprivation grounds relating to international security: disloyalty, military service to a foreign country, other service to a foreign country, and other (ordinary criminal) offences.[149] In the light of the conflict in Ukraine, all these grounds may serve as basis for deprivation of citizenship including instances of Ukrainians who refuse to remain and fight in Ukraine as well as foreign fighters who come from countries where joining a foreign army is considered an offence.

Russians and Belarusians, as well as other nationalities, can be also deprived of their EU citizenship on the basis established in the national laws of EU Member States. Therefore, any citizen of Malta by registration or naturalisation may be deprived of his Maltese citizenship for an act or speech that is: a) 'disloyal or disaffected towards the President or the Government of Malta'; or b) 'has, during any war in which Malta was engaged, unlawfully traded or communicated with

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the necessity to discriminate, which follows from its questionable 'genuine links' logic in the context of giving effect to nationalities acquired by naturalisation. Under this approach, outlawed by the Court of Justice, Miss Boukhalfa could have had no genuine links with Germany to allow her to be protected from discrimination.

[146] *European Commission's Recommendation on EU Investment Migration Programmes*, para. 13, and point 3.

[147] Ibid, para. 15.

[148] Luuk van der Baaren et al., 'Instrumentalising Citizenship: In the Fight Against Terrorism' (ISI & GLOBALCIT, 2022) <https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf> accessed 17 May 2022.

[149] Ibid, 8–12.

an enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war; or c) 'has, within seven years after becoming naturalised, or being registered as a citizen of Malta, been sentenced in any country to a punishment restrictive of personal liberty for a term of not less than twelve months'; or d) 'has been ordinarily resident in foreign countries for a continuous period of seven years and during that period has neither – (i) been at any time in the service of the Republic or of an international organisation of which the Government of Malta was a member; or (ii) given notice in writing to the Minister of his intention to retain citizenship of Malta'.[150] These grounds are equally applicable to all naturalised citizens notwithstanding their previous (or other) nationality or method of naturalisation. Targeting only Russians and Belarusians who have naturalised through investment, as proposed by the European Commission, is discriminatory on various grounds including ethnicity, national origin and the ground of citizenship acquisition.

In accordance with the Principles on Deprivation of Nationality as a National Security Measure, which were developed by more than 60 international experts, 'States shall not deprive persons of nationality for the purpose of safeguarding national security',[151] and if that happens, 'the exercise of this exception should be interpreted and applied narrowly, only in situations in which it has been determined by a lawful conviction that meets international fair trial standards, that the person has conducted themselves in a manner seriously prejudicial to the vital interests of the state'.[152] This exception is further limited by the international law standards for the avoidance of statelessness; the prohibition of discrimination; the prohibition of arbitrary deprivation of nationality; the right to a fair trial, remedy and reparation; and other obligations and standards set out in international human rights law, international humanitarian law and international refugee law.[153]

The Principles clarify that 'the deprivation of nationality of citizens on national security grounds is presumptively arbitrary. This presumption may only be overridden in circumstances where such

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[150] Part VI ('Renunciation and deprivation of citizenship'), CAP. 188 Maltese Citizenship Act of 21 September 1964 as amended.
[151] *See* principle 4 of the Institute on Statelessness and Inclusion, 'Principles on Deprivation of Nationality as a National Security Measure' (February 2020), section 4.1 <https://files.institutesi.org/PRINCIPLES.pdf> accessed 17 May 2022 (*Principles on Deprivation of Nationality*); *see* also the more recent 'Position of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights consequences of citizenship stripping in the context of counter-terrorism with a particular application to North-East Syria' (February 2022), 4-5 <http://www.ohchr.org/sites/default/files/2022-03/Deprivation-of-Citizenship.docx> accessed 17 May 2022.
[152] *Principles on Deprivation of Nationality*, section 4.2.
[153] Ibid, section 4.3.

deprivation is, at a minimum: […] Carried out in pursuance of a legitimate purpose; […] Provided for by law; […] Necessary; […] Proportionate; and […] In accordance with procedural safeguards'.[154] Proportionality requires that '[t]he immediate and long-term impact of deprivation of nationality on the rights of the individual, their family, and on society is proportionate to the legitimate purpose being pursued; The deprivation of nationality is the least intrusive means of achieving the stated legitimate purpose; and The deprivation of nationality is an effective means of achieving the stated legitimate purpose'.[155] Yet, as noted by some experts in the field, even if in accordance with national law, 'the exercise of (certain) functions and powers may never violate peremptory or non-derogable norms of international law, nor impair the essence of any human right'[156] – such as the principles of non-discrimination and equality.[157]

f) RBI and the critique of minimum presence requirements

The Commission's documents went into great length to establish a connection between legal residence and physical presence, which is not a requirement of EU law. Some residence can even be proclaimed almost fake on this count, should the recipient of the residence permit not give up the usual life of global ambition in favour of a sedentary life-style in on EU Member State. This view is deeply problematic and legally incorrect.

The Long-Term Residence Directive (Directive 2003/109) states unequivocally in Article 13 that: 'Member States may issue residence permits of permanent or unlimited validity on terms that are *more favourable* than those laid down by this Directive' (emphasis added). To imply that the Directive establishes a minimum threshold for defining permanent residence in the EU[158] is outright incorrect, since the text of the provision above is quite clear. It is of course true that national requirements, which are more lenient than those set out in Directive 2003/109, will not produce EU-level rights for the holders of these permits,[159] but this is not the general point the Report seems to be making. The Report is taking issue, erroneously, with the low physical presence thresholds under national legislation in Member States with RBI programmes. Any

[154] Ibid, section 7.1.
[155] Ibid, section 7.5.
[156] Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, 'Ten Areas of Best Practices in Countering Terrorism', A/HRC/16/51, para. 16.
[157] Christophe Paulussen, 'Stripping foreign fighters of their citizenship: International human rights and humanitarian law considerations' (2021) 103 (916/917) International Review of the Red Cross, 605–618.
[158] *See* e.g. Sergio Carrera, 'The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters (2015) *CEPS Policy Brief*.
[159] van den Brink, 'Investment Residence and the Concept of Residence in EU Law'.

criticism of more favourable definitions of residence in national law compared with what can be found in supranational regulation, which we find in the Commission's documents, is entirely moot, since the Directive expressly allows the Member States to set the presence requirement at zero days. Furthermore, the concern of the Commission that a residence permit obtained through investment can be used to naturalise in the host Member State under traditional naturalisation procedures enters again the domain of the acquisition of nationality, which falls outside the scope of EU competences.

Clarifying this point is of crucial importance for the assessment of the unlikely practical implications of the parts of the EP Report supported by in 't Veld MEP, since even if residence based on investment, comes to be regulated supranationally as the EP suggests[160] (and here the Commission would have clear competence to propose legislation, of course),[161] such regulation will of course contain similar clauses, allowing the Member States to depart from the harmonised regulation in order to meet the needs of specific categories of residents, who would receive better treatment in national law. Not to do this would turn the very rationale behind supranational regulation on its head, since the starting point for thinking about supranational regulation is that it provides a minimum threshold of rights of individuals to be safeguarded no matter what, rather than creating obstacles to rights. Should states be willing to offer more rights in their territory, this is to be allowed, rather than prohibited. Again, the opposite view would imply that supranational regulation is about setting the maximum standard for rights that the Member States can possibly offer and this contradicts the underpinnings of European integration to date pretty much in all the spheres of residency regulation: the Union as such has traditionally been too hostile to non-EU citizen residents to wholeheartedly present itself as the maximum denominator of rights.[162]

g) Humiliating and discriminatory rhetoric targeting investment migrants

The Commission routinely demonises investment migrants – an approach which is questionable at best. Its core argument in numerous documents could be boiled down to the following: third-country nationals who invest in Member States may be criminals and therefore, investment

[160] *European Parliament's Resolution on CBI and RBI programmes* (2021/2026(INL)), paras 21-25.
[161] van den Brink, 'Investment Residence and the Concept of Residence in EU Law'.
[162] Kochenov and van den Brink, 'Pretending There is No Union'.

migration programmes create security risks; the fact that EU citizenship provides for cross-border rights increases such risks further.[163]

The Commission seems to make assumptions about investors largely on the basis of their status of beneficiaries of RBI and CBI programmes. The Commission is open about its assumption – without explaining its reasons – that rich people who wish to invest and become EU citizens are probably criminals, and the chances of this are even higher because of the qualities of EU citizenship allowing for free movement. The same assumptions are notably missing concerning EU citizens who naturalise, because of kin blood connection, family links (even in cases where such naturalisations does not require any presence in the EU, as French or Dutch law would allow, for instance), or those who naturalise based on the discretion of the Member States. Only CBI clients are criminals in the Commission's mind – and the presumption of innocence apparently does not enter the picture. This is absolutely contrary to the EU Charter and wider EU law, especially given that discrimination on the basis of the particular mode of citizenship acquisition is prohibited. Based on the Commission's abundantly expressed views, its approach to CBI seems to be driven uniquely by discrimination based on the mode of the acquisition of EU citizenship.

To complicate matters further, the Commission underlines the risks related to the freedom of movement between the Member States of these new citizens after their naturalisation throughout its 2019 Report[164] and elsewhere.[165] Such purported risks underpin its case against Malta in front of the Court. Yet all the individuals naturalised through citizenship by investment are in fact not only full, but also ideal EU citizens in the light of Part II TFEU and Directive 2004/38, as they will never be a burden on the social security systems of the host Member States and will obviously have comprehensive health insurance – the two core requirements to be met in order to benefit from the free movement right under Article 21 TFEU. That said, when practiced in non-transparent and corrupt ways, investment migration – like any other enterprise – will certainly generate problems that have to be tackled. These precisely involve corruption, money laundering and tax evasion rather than naturalisation as such. Indeed, money laundering, tax evasion, corruption and other illegal activities are one thing, and the acquisition of citizenship through investment quite another. The Commission's attack on CBI and RBI fails to make this distinction. From this perspective, banking, mining or gambling – to name but a few corruptible enterprises – could be frowned upon – yet when banks, casinos or mines are regulated, it is not presumed

[163] E.g. 2019 *European Commission's Report on EU Investment Migration Programmes*, section 4, pp 9-10.
[164] Ibid.
[165] Press Release on infringement procedures, 6 April 2022.

that these activities should be outlawed. It follows that the Commission is not at all driven in its attacks by the possible negative externalities of CBI and RBI, but indeed by a set of fundamental considerations about the essence of EU citizenship in the light of its questionable 'genuine links' theory, if one can call this approach a theory. So not the risks posed by CBI programmes, but the fact that the very existence of such naturalisations contradicts the Commission's nationalistic view of EU citizenship based on blood privilege and 'thick' links with the nation seems to be the reason for approaching millionaires willing to naturalise in the EU as criminals: wrong blood cannot be remedied by money on this purely nationalistic view of European integration in the best traditions of passport apartheid[166] and the victimisation of those receiving the worst citizenships by birth.[167] This is why in the context of the shrinking numbers of infringements as per Kelemen and Pavone referred to above, the case it against Malta and not against FRONTEX, for instance, busy humiliating and sometimes killing racialized former colonials either directly or by proxy.[168] Be that as it may, this approach is absolutely unacceptable and the mere fact that the Commission needs to be reminded of this already sets alarm bells ringing about the state of the rule of law in the Union.

h) Misrepresentation of the principle of sincere cooperation

The Commission's attack on CBI programmes including its court case against Malta makes frequent references to the principle of sincere cooperation. These are embarrassingly misplaced. The reasoning goes as follows: the grant of EU citizenship on the basis of payment or investment and without a 'genuine link' (for instance a blood link) is incompatible with the principle of sincere cooperation enshrined in Article 4(3) TEU and undermines the integrity of the status of EU citizenship provided in Article 20 TFEU.[169] This much-repeated reasoning was rehearsed in the most recent Recommendation issued by the Commission following the start of the Russian aggression in Ukraine. The Commission stated the following:

> 'Investor citizenship schemes under which the nationality of a Member State, and thereby Union citizenship, is granted in exchange for a pre-determined payment or

[166] Dimitry Kochenov, 'Ending the Passport Apartheid. The Alternative to Citizenship is No Citizenship – a Reply' (2020) 18(4) International Journal of Constitutional Law I·CON 1525.
[167] Dimitry Kochenov, 'The Victims of Citizenship' in Kochenov and Surak (eds), *Citizenship and Residence Sales*.
[168] Ian Urbina, 'The Secretive Prisons that Keep Migrants out of Europe', *The New Yorker* 28 November 2021, available at <https://www.newyorker.com/magazine/2021/12/06/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe> accessed on 23 October 2022.
[169] European Commission's Press Release on infringement procedures, 20 October 2020.

> investment and without a genuine link with a Member State are not compatible with the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on European Union and with the concept of Union citizenship as provided for in Article 20 Treaty on the Functioning of the European Union. Any Member State operating such an investor citizenship scheme needs to ensure compliance with its obligations pursuant to these Treaty provisions by repealing it immediately'.[170]

It remains entirely unclear how investment programmes infringe Article 4(3) TEU, especially in light of the analysis above. It is unlikely to become much clearer following the Commission's populist step to seize the Court of Justice with this argument. For now one can only wonder which Treaty duty, precisely, a Member State breaches when exercising its own competences fully in line with *Tjebbes*, *Micheletti*, *Zhu and Chen*, *JY* and all the other known EU citizenship case law? Since there is no duty to back down in the face of the Commission's propaganda and misrepresentation of the law, the Commission's argument related to sincere cooperation is very weak. It is particularly unclear to anyone who is not a feudal nationalist and who does not fetishise blood as the paragon for building a just human society, how precisely EU citizenship status could be undermined by investment programmes? Do, by analogy, other naturalisation modes that do not require genuine links with Member States infringe Article 4(3) TEU and Article 20 TFEU in the opinion of the Commission? Or is blood the only true genuine link? The Treaties are silent on all these issues. Given that the Commission has not launched any court actions in relation to a huge variety of other naturalisation modes in the Member States and has selected CBI uniquely as the test ground for attempting to increase the ambit of the Union's powers in this domain, the answer seems quite clear: the reference to sincere cooperation stands for an unlawful attempt of the Commission to usurp the liberating essence of EU citizenship as a supranational legal status by pushing it in the direction of the blood-based nationalist dream that the *Nottebohm* ICJ had in mind in the 'romantic times' of international law, to quote the mocking reference to Commission's key 'principle' by the learned AG Tesauro.

Contrary to the Commission's arguments and as already clarified above, the 'genuine link' theory has not developed into obligatory rules or principles of international law, let alone in EU law, which provides instead for non-discrimination on the basis of nationality, which finds itself in direct and irreconcilable opposition to the Commission's spirited approach to blood-nationalism. Trying to impose a 'genuine link' requirement on Member States with regard to their criteria for the

[170] *European Commission's Recommendation on EU Investment Migration Programmes*, point 1.

acquisition of citizenship would not only be incompatible with EU law, but would also almost certainly spark ethnic nationalism, undermining the values of the Union itself.[171]

Moreover, it is difficult to imagine that the principle of sincere cooperation could be successfully invoked in the context of investment migration. Article 4(3) TEU concerns the achievement of EU objectives and genuine compliance with EU law, none of which seems to be related with investment migration.[172] Furthermore, the CJEU more recently mapped out the principle of sincere cooperation as a general principle, which may be invoked in infringement procedures only when there is first a violation of a more specific obligation under EU law.[173] A possible infringement of that provision could be imagined in the case of mass naturalisation, which may have a significant negative impact on the internal market.[174] This is where a Member State confers its citizenship to a large, disproportionate number of third-country nationals. However, this does not seem to be the case with the investment migration programmes in EU (former and current) because the number of citizenship granted through these investment programmes remained low in general and compared to the number of other naturalisations in the EU in particular.[175]

While the European Commission has not clarified the basis for its argument that CBI could undermine the essence of EU citizenship,[176] the above suggests that 'genuine links' are the essence of EU citizenship, which cannot be further from the truth. The core principle of EU law of persons is non-discrimination on the basis of nationality. It states, to put it very roughly, in simple language that any links – however 'genuine' – with a particular Member State cannot matter: only the legal status of citizenship does. This is the law the Commission is there to respect, uphold and promote. Any action of the Commission contrary to this is therefore, unquestionably *ultra vires* and absolutely unacceptable since it goes against the very rationale of the operation of EU citizenship law and essentially seeks to annul all its added value.

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[171] *See* in greater detail Basheska, 'Why the EU's Top Court Should Clarify EU Law'. *See* also Investment Migration Insider's interview of 23 October 2020 with Dimitry Kochenov on the subject matter <https://www.imidaily.com/editors-picks/kochenov-commission-would-likely-be-humiliated-if-cip-matter-goes-to-court-over-genuine-links/> accessed 17 May 2022.
[172] Ibid, Basheska.
[173] *See* Case *Republic of Slovenia* v *European Commission*, ECLI:EU:T:2020:402. *See* also Brian McGarry, 'Republic of Slovenia v. Republic of Croatia' (2021) AJIL 115: 101–107. <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/republic-of-slovenia-v-republic-of-croatia/62A7A90EA96F56C381149445286DE436> accessed 17 May 2022.
[174] *See* e.g. Recommendation 11, 'Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations' of the OSCE High Commissioner on National Minorities (June, 2008), <https://www.osce.org/hcnm/bolzano-bozen-recommendations> accessed 17 May 2022.
[175] Basheska, 'Why the EU's Top Court Should Clarify EU Law'.
[176] European Commission's Press Release on infringement procedures, 6 April 2022.

In light of the above, it is truly astonishing that the Commission would purport to order Member States acting entirely within their rights and clearly within their own spheres of competence to do something based on no clear legal argument whatsoever. Even before taking the case against Malta to the CJEU, the European Commission 'decided' entirely on its own and against all the case law and legal academic writing on the matter that naturalisation through investment is incompatible with Article 4(3) TEU and with the Article 20 TFEU. Beyond the issue of the general politicisation of the Commission at the cost of observing the law and the constant attempts of this institution to strip EU citizenship of all of its potential by reimagining it as a nationalistic blood-based neo-feudal status based on unquestionable blood links among Europeans, the problem with the most recent order contained in the Commission's Recommendation is essentially threefold: firstly, the Commission refused to provide a single sound legal argument in support of its thesis so far; secondly, the Commission has no competence to legislate in the field of citizenship; and, thirdly, the Commission may not decide in the place of the CJEU whether naturalisation based on investment is compatible with EU law, especially in a situation where such a reading of EU law seems to go against all known CJEU case law to date. This question will of course be clarified by the CJEU even if the Court has already shed abundant light on the majority of the arguments invoked by the Commission in its earlier case law. In the meantime, the Commission's propaganda and misrepresentation of the law threatens to undermine the prestige of the institution profoundly.

V. Conclusion: By forcing 'genuine links' onto EU citizenship, the European Commission is failing on the job

Investment migration unquestionably underlines citizenship's absurdity,[177] by allowing those who emerged as losers in the global 'birthright lottery'[178] – members of the absolute majority of the world's population[179] – to 'buy' what others got assigned to them for free by blood, but at once also to be singled out as having uniquely undeservedly acquired this status. When the '(high) price' of citizenship for the randomly unlucky is made clear, the hypocrisy of citizenship's essence

[177] Dimitry Kochenov, 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer, Berlin 2018) 51; Peter Spiro, 'Cash-for-Passports and the End of Citizenship' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer, Berlin 2018) 17.
[178] Shachar, *The Birthright Lottery*.
[179] Kochenov, *Citizenship*; Kochenov and Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index*.

is instantly laid bare.[180] It therefore necessarily challenges the glorificatory nationalist paradigm of contemporary citizenship regulation and citizenship studies long noted by Linda Bosniak and other scholars.[181]

Investment migration is legally practiced by the absolute majority of the EU's Member States. While only Malta facing the Commission in Court has an official CBI programme in the EU, over twenty other Member States allow for discretionary naturalisation for 'special achievements', including in most instances economic contribution. The differences between the Maltese CBI programme and discretionary naturalisation for economic contributions in other countries are formal rather than substantial. Yet the European Commission decided that unlike countless co-existing types of naturalisations, investment migration programmes infringe the principle of sincere cooperation and undermine the essence of EU citizenship. This approach by the European Commission is inconsistent with its arguments. Furthermore, the entire concept built around the idea that the acquisition of citizenship through investment infringes EU law is totally incorrect and politically motivated, as it has no backing in the law in force.

The attempts of the European Parliament and the European Commission to delegitimise investment migration programmes and interfere in a sphere of exclusive competence of Member States started with the launch of Malta's Individual Investor Programme in 2014 and has continued and intensified ever since then. The European Parliament has been constantly calling for the phasing out of the citizenship by investment programmes and has most recently invited the European Commission to propose legislation on that matter. It is unlikely, however, that the Commission will propose legislation before the CJEU has voiced its opinion on the subject.

The first problematic aspect is the lack of EU competence in citizenship matters. The EU can only interfere in cases where rights of EU citizens need to be protected from the actions of the Member States, rather than to determine the conditions for the acquisition of citizenship in EU Member States. The CJEU has been clear on the subject, clarifying in *Micheletti* that Member States may not impose conditions or check 'genuine links' for recognising the effect of citizenship of other Member States. In other words, the 'genuine links' requirement for recognition of citizenship which is applicable in certain instances under international law is strictly prohibited under EU law. The attempts of the European Commission to reverse that prohibition into an obligation for

[180] Kochenov, 'Citizenship for Real' 51.
[181] Linda Bosniak, *The Citizen and the Alien* (Princeton, NJ: Princeton University Press, 2006) 5–9; and further James Tully, *On Global Citizenship* (Bloomsbury Academic, London 2014). See also crucially Christian Joppke's work, virtually all of which could stand as an illustration of this point.

Member States to introduce this excluded 'genuine link' doctrine is self-contradictory, as well as being discriminatory to investment migration as one of the modes of acquisition of citizenship. So is the Commission's impossible expectation that citizenship and permanent residency permits are tied to continuous long-term residence in the host Member State – a requirement that Member States decide.

Furthermore, the Commission's arguments that CBI programmes infringe the principle of sincere cooperation and undermine the essence of EU citizenship are not based on a single piece of evidence of any negative impact of investment programmes on the internal market. The European Commission has not clarified which specific Treaty obligation Malta, for instance, violated to infringe the principle of sincere cooperation. Infringement of the principle of sincere cooperation itself – i.e. without violation of a more specific Treaty obligation – cannot be successfully invoked and Article 20 TFEU, which is often argued by the Commission in the same context as the principle of sincere cooperation, does not impose such a specific obligation on Member States.

Finally, stripping Russians and Belarusians of their citizenship acquired through investment may be problematic even if that is conducted for justified security reasons. EU Member States have conditions for the withdrawal of citizenship, including for security reasons, and such rules are equally applicable to naturalised citizens of all nationalities and notwithstanding their grounds for naturalisation. Applying such rules to Russians and Belarusians specifically, including individuals not on any sanctioning lists, as apparently suggested by the European Commission, is arbitrary and discriminatory. Moreover, according to experts in the field, the deprivation of nationality of citizens on national security grounds is presumptively arbitrary and exceptions to that are very limited.

In summary, the 'war' of the European Parliament and the European Commission against investment migration programmes has not contributed to the development of EU law in any way. It has rather brought confusion and uncertainty to otherwise well-established concepts in EU law. It remains to be seen what CJEU decides on the subject matter now that the Commission has taken Malta to the Court – a much-preferred option to being arbitrarily judged by other EU institutions. The CJEU should put an end to the over-politicisation of investment migration once and for all, as the Commission's continued efforts to push a nationalist 'genuine links'-based notion of citizenship on the Member States erodes the core aspects of EU law, degrades the rationale for the Union, and undermines the promise of an anti-nationalist EU citizenship based on rights in the process.

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