



# **Golden passports European Commission and European Parliament reports built on quicksand**

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'European values are not for sale.'

## Introduction

This paper analyses two reports and one recommendation by the European Commission and the European Parliament, all concerned with citizenship by investment (CBI), vulgo golden passports, leaving golden visas out of the picture. These documents purport to ban CBI's in order to safeguard the integrity of Union citizenship, the corollary of possession of the nationality of a MS. Which are the legal bases for these interventions proffered by the EU institutions? Two strongholds have been put forward and will be commented upon – the theory of the genuine link (Nottebohm) and the obligation for genuine cooperation by the Member States. Both foundations are built on quicksand, as the analysis below demonstrates.

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## I. The Commission's Report of 23 January 2019

In her first State of the Union speech as president of the European Commission on 16 September 2020, Ursula von der Leyen vowed to defend 'the rule of law and the integrity of our European institutions' and she explained that one of the targets would be the sale of golden passports: '*European values are not for sale*'. A compelling and stirring slogan.<sup>1</sup> A month later infringement procedures were launched against Cyprus and Malta. It remains to be seen however, to what extent these European values are at stake. Von der Leyen's position was undoubtedly based on the Commission Report on Investor Citizenship and Residence Schemes in the European Union, published one and a half year earlier.<sup>2</sup> The European Parliament had urged the Commission to take action and the Member States involved were requested to phase out their schemes.

Already in the first sentence of the introduction to this Report one feels which way the wind is blowing in the Commission: '*concerns about certain inherent risks, in particular as regards security, money laundering, tax evasion and corruption*.' This is the thrust of the measures taken by the Commission against Member States as Malta, Cyprus and Bulgaria, and against a candidate such as Montenegro,<sup>3</sup> and even third countries. Vanuatu is a case in point, where visa-free travel to the Schengen area is suspended for Vanuatu citizens holding passports issued after 25 May 2015.<sup>4</sup>

In its Report, the Commission draws a distinction between 'ordinary naturalisation procedures' and 'discretionary naturalisation procedures'; the latter based on 'the national interest' and 'highly individualized'. These are excluded from the report, although it observes that a number of MS define the national interest in terms of economic or commercial advantages. It is therefore

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<sup>1</sup> The rule of law is such a value. The Commission is lenient towards the Member States such as Poland, when it comes to upholding the rule of law, thereby undercutting the case law of the ECJ and weakening its position. The Commission is prepared, notwithstanding widespread undermining of the autonomy of the Judiciary in Poland, to give its green light to Poland's insufficient and untrustworthy recovery and resilience plan. (Speech by President von der Leyen at the EP, 7 June 2022). cf. F.C. Meyer, 'Die Kapitulation', *VerfBlog*, 2 June 2022. <https://verfassungsblog.de/diekapitulation/>; Petra Bárd and Dimitry Kochenov, 'War as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening' 27 *European Law Journal*, 2022 (early view).

<sup>2</sup> COM (2019) 12 final, Brussels 23.1.2019.

<sup>3</sup> Montenegro, a candidate Member State, has extended its investor citizenship programme for the year 2022, although it announced earlier, urged by the Commission, that it would discontinue the scheme by the end of 2021 as 'contrary to EU's principles.' The pandemic is given as the reason for extending the program, which until June 2021 involved some 700 persons, including 300 Russian citizens, 150 from China, 50 US citizens and 40 Lebanese citizens.

<sup>4</sup> See Dimitry Kochenov and William Thoas Worster, EU's Neocolonialism: Safeguarding the Purity of Ni - Vanuatu Blood through Blackmail, *eulawlive*, 8 March 2022.

unclear why this distinction is made and why these schemes are left out in the report. Indeed naturalisations are by definition taking place 'by a discretionary decision of the competent authorities', be it Parliament, King, President, Minister or other authority. The distinction between 'ordinary' naturalisations and other naturalisations does not lie in the discretionary character of the second category, but in their special conditions. In addition, most legislators provide for special procedures for special people. These form part of the municipal codes of nationality. In most systems, even 'normal' naturalisations are discretionary. Denmark and Belgium, e.g., naturalise persons by (discretionary) Act of Parliament.<sup>5</sup> In the Netherlands, the official manual to the Code of Nationality lists 'economic and cultural interests' as interests of the State allowing naturalisation dispensing persons from a number of general requirements for ordinary naturalisation.<sup>6</sup> In this way, guidelines are laid down for personnel of companies that are important for the Dutch economy.<sup>7</sup> By the way, 'ordinary' naturalisation procedures are all but uniform, share discretionary elements, and even take the form of conditional option and allow exemption of certain conditions. Although these special discretionary naturalisations are granted on an individual basis, the scheme lays down general rules for specific groups such as talented sportspersons.<sup>8</sup> The state has reduced its discretion in this way, as it is bound by rules of application it has developed.

To label the investment naturalisations as a novel and anomalous form, 'as they systematically grant citizenship of the MS concerned, provided the required investment is made and certain criteria fulfilled' is inadequate to distinguish them from the diversified 'ordinary naturalisations'. It seems that the report is intended to frame the Golden Passport and Residence schemes as *novel and exceptional* in the world of nationality law and therefore to be suppressed. As a matter of fact these special procedures belong to the normal repertory of the codes of nationality all over the world; excluding them is to highlight the genuine link principle and to discard beforehand national interest as a legitimate grounds for granting citizenship. The dice are loaded. Worth noticing is that the European Convention on Nationality (ECN) (1998) states in its Preamble that '*account should be taken both of the legitimate interests of States and those of individuals*', and that it refrains from providing a thick, substantive, definition of 'nationality', but simply indicates

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<sup>5</sup> De Groot & Vonk, *International Standards on Nationality Law* (2015) p.60.

<sup>6</sup> Manual to art.10 Dutch Code of Nationality, sub 2(1).

<sup>7</sup> Future wives and husbands of the (future) Kings and Queens have been fast-tracked in this way, the idea being that their offspring should be fully Dutch.

<sup>8</sup> It is well known that states pay sometimes-large sums to the sport federation concerned of the country of origin to enable sportspersons to take part immediately in international competitions for their new country: reverse golden passports. cf. Robert C. R. Siekmann, *Introduction to International and European Sports Law* (2012), ch. 7.

that it is 'a legal bond between a person and a State'<sup>9</sup>. Sure, the Explanatory Report to the ECN hinted that the concept of nationality was 'explored' by the International Court of Justice in the *Nottebohm* case, without, however, endorsing any results of this exploration.

Another most important, indeed central body of nationality law excluded from the report is the acquisition of nationality at birth, be it by *ius soli* or by *ius generationis* and the mixed forms in between. Are these always supposed to contain the holy grail of the genuine link?

## II. The European Parliament Report of 7–10 March 2022

In the plenary session of 7–10 March 2022, of the EP a Report by the Committee on Civil Liberties, Justice and Home Affairs with proposals to the Commission on citizenship and residence by investment schemes<sup>10</sup> was adopted with 595 votes for, 12 against and 74 abstentions. Again, I will not deal with the Golden Visas, but focus on the parts that are concerned with the CBI schemes. This report refers to the Commission Report of 23 January 2019, and the State of the Union Address of 16 September 2020 by the President of the Commission, mentioned earlier.

The Parliamentary Report states: 'Since 2014, Parliament has been calling for a ban of CBI/RBI schemes, but so far the Commission has not put forward any proposals. Although the Commission claims it has no legal basis for legislative action, it did launch infringement proceedings against Cyprus and Malta in October 2020'.<sup>11</sup>

Moreover, the last paragraph of the document reads, 'Thus far, the Member States have been reluctant to address the matter, to the point of refusing to engage in talks.<sup>12</sup> However, the fact that granting citizenship as such is an exclusive national competence is no pretext for inaction when Union law and values are damaged. Union citizenship and residence are not a commodity. We all have a duty to protect it.'<sup>13</sup>

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<sup>9</sup> Art.2 sub a. ECN.

<sup>10</sup> 2021/2026 (INL).

<sup>11</sup> p.18.

<sup>12</sup> Indeed a Group of Experts from MS appointed by the Commission convened four times in 2019 without arriving at any result. Even about the nature and legal basis of their conclusions disagreement reigned supreme: they would suggest or advise but certainly not recommend. A stakeholders group met concurrently and showed strong resistance against measures to be taken. The EP in its Report 'regrets that the group of Experts (...) has not agreed on a common set of security checks as it was mandated to do by the end of 2019; finds that the failure to agree on a common set of security checks shows the limits of adopting an intergovernmental approach (...) and underlines the need for Union action'.

<sup>13</sup> p.18.

Here we see the predicament spelled out: The EP urges the EC into action, but the EC denies having the competence to do so where citizenship of the MS is at stake. Given the reluctance of the MS to see their laws on nationality, considered to belong to their reserved domain, as acknowledged by the EP, subjected to Union law and principles, legislative initiatives, if at all launched by the Commission, in all probability will not be embraced by the Council. Although the pressure is intensified by the war in Ukraine, and the need to target Russian oligarchs is obvious and fully understandable, MS will be wary and may think *hodie tibi, cras mihi*.

Nudging the Commission into action concerning the CBI schemes, the European Parliament suggests as part of a comprehensive legislative package the introduction of measures disallowing MS to introduce new CBI programmes, and obliging MS with existing CBI schemes to phase these out ‘reaching zero in 2025.’<sup>14</sup> It invokes again art 4(3) TEU as the legal basis for this legislative action. In fact, it repeatedly implores the Commission in this document to support the right of initiative of Parliament in following-up Parliament’s own initiative legislative reports with legislative acts. It shows well-founded doubts about the willingness of the Commission to act on the proposal. Even less certain is the reception by the Council of any proposal to curtail the autonomy of the MS in the area of citizenship.

Commissioner for Justice and Consumer Affairs Didier Reynders disagreed with the need for new rules on sale of citizenship; he pointed out that the Commission was already pushing legal proceedings to shut down existing Golden Passport schemes in Malta, Cyprus and Bulgaria. However, he would assess the need for new laws to tighten golden *visa* schemes. Furthermore, a non-binding recommendation would be issued on EU MS issuance of golden passports and residence permits to Russians.<sup>15</sup>

### III. The European Commission’s Recommendation of 28 March 2022<sup>16</sup>

This Recommendation stated that CBI schemes are not compatible with the principle of sincere cooperation and with the concept of Union citizenship, and recommended: ‘*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.*’ And it adds, for good measure:

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<sup>14</sup> Proposal, laid down in the Annex of the Motion for a Resolution.

<sup>15</sup> 8 March 2022. The Recommendation materialized later in the month: C (2022) 2028 final.

<sup>16</sup> C (2022) 2028 final.



'any MS that has naturalised Russian or Belarusian nationals based on an investor citizenship scheme should immediately assess, in accordance with the principles resulting from the case law of the CJEU, including the principle of proportionality and the protection of fundamental rights, whether these individuals' naturalisations should be withdrawn.' The reason for the withdrawal would be the fact that the person involved is or becomes subject to the EU restrictive measures, or because he supports significantly by any means the war in Ukraine. Outcome of the assessments should be reported to the Commission by the end of May 2022.

There is no trace in this Recommendation of Article 21(2) of the Charter: '*Within the scope of application of the Treaties and without prejudice to any of their specific provisions discrimination on the grounds of nationality is prohibited.*' The Commission points out that the assessment has to take place with the protection of fundamental rights in mind. This would include the right not to be discriminated on the grounds of possession of a specific other nationality than that of a MS. In addition: why are naturalised Syrians not included? The assessment has to take place within two months. Moreover, decisions to withdraw the naturalisation may need intervention by the lawmakers of the MS concerned.

It is abundantly clear that the Commission is reluctant to engage in proposing new, harmonizing rules on citizenship of the MS. In addition, the practical effects of new banning measures for golden passports are minimal, given that Cyprus and Bulgaria have already decided to phase out their Golden Passport programs. At the time of writing only Malta shows some resistance.

#### IV. The genuine connection revisited

As both institutions rely on the 'genuine link', it is necessary to explore the genuine connection element in the many definitions of nationality and more specifically in the *Nottebohm* case.<sup>17</sup> As the Permanent Court of International Justice explained in its Advisory Opinion a century ago, '*the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question.*'<sup>18</sup> The relativity of the reserved domain is not only a matter of time, but also one of the subject matter involved.

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<sup>17</sup> *Nottebohm* (second phase) I. C. J. Reports 1955, p.4. I am in full agreement with Peter J. Spiro, '*Nottebohm* and the "Genuine Link": Anatomy of a Jurisprudential Illusion', in this volume, and with Petra Weingerl and Matjaž Tratnik, 'Relevant Links: Investment Migration as an Expression of National Autonomy in Matters of Nationality' in Dimitry Kochenov and Kristin Surak (eds) *Citizenship and Residence Sales* (Cambridge University Press, 2023).

<sup>18</sup> *Tunis and Morocco Nationality Decrees Case* (1923), p.23-24.

In *Nottebohm*, diplomatic protection based on nationality was at stake. Was Liechtenstein allowed under international law to exercise diplomatic protection concerning its citizen, a former German national, against Guatemala, the country where he had lived and worked the larger part of his life? As a satellite state of the US, Guatemala had deprived him during WW II of his assets and had him deported to the US as an 'enemy alien'. The ICJ did not dispute that Nottebohm had acquired the Liechtenstein nationality in 1939 through naturalisation (that involved at least some 40.000 Swiss francs being paid to the State and the Commune of Mauren – a golden passport.) It held, however, that in order to exercise diplomatic protection against Guatemala successfully – the situation as to other states was not discussed – the link between Liechtenstein and its national should be 'genuine', i.e. representing the centre of one's life and work. His ties with Guatemala had been much stronger in 1939 than with Liechtenstein. Nottebohm was even castigated by the Court for his motives to become a citizen of Liechtenstein: *'it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein (...)*'. It seems to me that the ICJ in 1955 still was in the thrall of WW II, seeking revenge on 'enemy aliens', and not heeding the precept of the preamble to the European Convention on Nationality, that *'account should be taken both of the legitimate interests of States and those of individuals'*. Is it not legitimate to try to save your skin and your assets in an oncoming war in which you do not want to be involved? What about the many Jews who had as 'sole aim' to avoid being murdered in acquiring a life-saving nationality or at least a (forged) passport of a country with which they had no connection whatsoever?<sup>19</sup> Are motives relevant in nationality law? <sup>20</sup> Is diplomatic protection to be withheld from persons who seek refuge by acquiring the nationality of another state with which they have no further ties than their rope to life and security? Is this what the ICJ meant?

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<sup>19</sup> cf. I.Kisch, *De Winter sous l'occupation*, NTIR, 1972, p.102-106, also in H.U.Jessurun d'Oliveira (ed) *Uitgelezen Opstellen. Een bloemlezing uit het werk van Prof.mr. I. Kisch* (1981), p.408-412. Here the story is told of my predecessor Prof. De Winter who had laid his hands on a number of passports issued by a Swiss former consul of Paraguay that proved life-saving for Jews who had no connection whatsoever with Paraguay. See also Jan Brokken, *De Rechtvaardigen. Hoe een Nederlandse consul duizenden Joden redde* (2018): The Dutch honorary consul in Riga issued thousands of visas for Dutch colonies to mostly Jews from Eastern Europe, who could, with help of the Japanese consul in Riga, travel on that basis to Japan and China, through Russia, and survived. Not to forget Raoul Wallenberg, the Swedish diplomat who saved between 30.000 and 100,000 Hungarian Jews by handing out Swedish passports, and disappeared in the Soviet Union, most likely murdered.

<sup>20</sup> The argument is dismissed in *Micheletti, Kaur, Garcia Avello* and especially in *Zhu and Chen* paras 35-40: 'although it is true that Ms Chen's purpose in giving birth in Ireland was to secure for her child and herself a long-term right to reside in the United Kingdom, nevertheless it is for each MS, having due regard to Community law, to lay down the conditions for acquisition of its nationality; other MS are not allowed to restrict the effects of the grant of nationality by imposing additional conditions.'

For many reasons *Nottebohm* should be discarded. Nottebohm was left with no diplomatic protection at all, as the only nationality he possessed was that of Liechtenstein. Although he was considered by the Allies to be an enemy alien, he had lost his German nationality and could not be protected by the Successor State to the Third Reich. Germany recognized Nottebohm's Liechtensteiner nationality, by attaching the loss of German nationality to his naturalization, as confirmed by the Federal Republic in front of the ICJ. Thus, the naturalisation according to Liechtenstein's municipal law had clearly its effect on the international level. This is a reason to restrict the precedent of *Nottebohm* to the topic of diplomatic protection; other effects, especially recognition by other states, including the state of former nationality, are not envisaged. Nottebohm had but one nationality and was allowed under international law, to return to Liechtenstein, with or without genuine link.

That is why the reasoning of the Court, derived from principles concerning dual nationality, was unconvincing: if a court has to choose between two nationalities, e.g. in matters of private international law, and prefers one above the other on grounds that that citizenship is stronger and more effective, real, than the other, the person involved is still in possession of that other citizenship. It seems that the ICJ considered Guatemala as the state with which Nottebohm had the stronger 'nationality'. He was a virtual binational, but was left without any protection.<sup>21</sup> The Court has made the impression of scrutinizing the bond of naturalized persons with their state more intensely than that same bond of nationals by birth.<sup>22</sup> I will return to this issue.

*Nottebohm* is unworkable as well: if in all cases in which diplomatic protection is exercised on behalf of a citizen the genuineness of her link has to become a preliminary issue, a bar eventually to be decided by courts or tribunals, the effectiveness of the tool of diplomatic protection is jeopardized.

If a precedent at all, it should be construed as narrow as possible. It is even questionable whether it should still play a role in the international law and principles concerning the law of nationality. It has been superseded by more recent developments in international law. In the *Flegenheimer*

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<sup>21</sup> cf. M. Boll, *Multiple Nationality and International Law* (2007), p.113.

<sup>22</sup> cf. P. Weis, *Nationality and Statelessness in International Law* (1979), p.181. He considered the context of Nottebohm's naturalization as 'quite exceptional' and the principle developed by the ICJ not lending itself to generalisation.

Claim, decided by the United States-Italian Conciliation Commission in 1958 it was held that the genuine connection test should not be applied to persons holding a single nationality.<sup>23</sup> It stated:

*'But when a person is vested with only one nationality, (...) the theory of effective nationality cannot be applied without the risk of causing confusion.(...) There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State and made their lives in foreign States where they are domiciled and where their family and business centre is located, would be exposed to non-recognition at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized.'*<sup>24</sup>

The ILC in its Commentary to Article 3 of the Draft Rules on diplomatic protection (2002)<sup>25</sup> took its distance from *Nottebohm* as well, even in the area of diplomatic protection:

*'Paragraph two<sup>26</sup> does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the Nottebohm case as an additional factor for the exercise of diplomatic protection. (...) Moreover, the Commission was mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have drifted away from their state of nationality and made their lives in states whose nationality they never acquire (...) or have (nationality) acquired by birth or descent from states with which they have a tenuous connection.'*<sup>27</sup>

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<sup>23</sup> *Flegenheimer Claim*, 20 September 1958, International Law Reports (1958), p.91. One of the members of the Conciliation Commission being prof. Sauser-Hall, Counsel for Liechtenstein in the *Nottebohm* case.

<sup>24</sup> reference

<sup>25</sup> This draft is to be considered as reflecting modern international customary law on the subject.

<sup>26</sup> Art 3 (2) reads as follows: 'For the purpose of diplomatic protection of natural persons, a State of nationality means a State whose nationality the person sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner not inconsistent with international law.'

<sup>27</sup> International Law Commission, Report to the General Assembly, Fifty-fourth Session, p.70. cf. H.U.Jessurun d'Oliveira, *Nationaliteit en diplomatieke bescherming: een update, een vooruitzicht*, Liber Amicorum Luc Strikwerda (2011), p 247-263.

According to the ILC, a tenuous connection as ascribed to *Nottebohm* is not enough to block diplomatic protection; it furthermore explained that the ICJ judgment should not be used as a general principle.

I submit that *Nottebohm* is not only wrongly decided and a relic from the past, but it is being misused as well. This is especially the case in the European Commission's Report where it reads: '*The Nottebohm case of the ICJ establishes that, for nationality granted through naturalisation to be recognised in the international arena, it should be granted on the basis of a genuine connection between the individual and the State in question.*'<sup>28</sup> This misinterpretation is far too wide and at the same time too narrow. It overlooks the limited issue before the ICJ: is Liechtenstein allowed under international law to protect its citizen against Guatemala? The Commission generalises the particular issue of diplomatic protection to the whole body of international law. It suggests furthermore that the genuine link plays a role, according to the ICJ, with regard to nationality acquired by naturalisation only (and not generally).

What is to be learned from *Nottebohm* as a parallel or precedent is this: the bought citizenship of Liechtenstein is recognised internationally by the ICJ and by Germany, but not all effects in the international arena are attached to it: diplomatic protection may not be exercised against Guatemala (against the USA would be another matter). In the same reasoning Golden Passports are legally valid under international law, but not all effects of Union citizenship are necessarily attached to it. This leads inexorably to a weakening of the link between national citizenship and Union citizenship and one can understand why the Commission and the EP do not want to engage into that road. It would imply amending art.20 TFEU. This is however the impractical but unescapable effect of the *Nottebohm* decision as read by the European Commission and as applied to the EU legal order.

The Commission Report continues to explain that citizenship of the Union is an automatic consequence of holding nationality of a Member State, and that all other Member States have thus to recognize this Union citizenship, without additional requirements as to the roundness or effectiveness of the nationality. This obligation is indeed the gist of *Micheletti*,<sup>29</sup> who had a most tenuous connection with Italy and was primarily an Argentinean citizen, and who was allowed to settle and practice as a dentist in Spain, where he was considered Argentinean. Nominal

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<sup>28</sup> Report, p.5.

<sup>29</sup> ECJ 7 July 1992, Case C-369/90.

nationality did the trick. A genuine link check was not involved. I may be allowed to quote from the Opinion of Advocate-General Tesouro in this case:

*'I do not believe that the case before the Court constitutes an appropriate setting in which to raise the problems relating to effective nationality, whose origin lies in a "romantic period" of international relations and, in particular, in the concept of diplomatic protection; still less, in my view, is the well-known (and, it is worth remembering controversial) Nottebohm judgment of the International Court of Justice of any relevance.'*

The learned AG considered as the only limits a Member State could rely on, denying the benefits of the rights of Article 52 EEC Treaty, those concerning public policy and public security. The European Court refrained from mentioning *Nottebohm* in its *Micheletti* judgment, while legislating in the notorious and ominous obiter dictum that '*under international law it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality*'. The Court refrained from checking whether Italy had laid down these conditions with due regard to Community law concerning this son of Italo-Argentineans who had emigrated to South America. Is *ius sanguinis* as such enough, even if a person has never lived in the state of his European nationality? Mr. Micheletti's nominal Italian nationality turned out to be sufficient basis for the exercise of the freedom of settlement and services in Spain (and elsewhere). Thus, the Court denied the impact of *Nottebohm* for Community purposes.

The referral to the municipal law of the Member States was confirmed in *Kaur*. The case was decided based on a Unilateral Declaration by the UK to the European Community (1972) at the occasion of its accession. Persons in the situation of *Kaur* were excluded from the declaration by the British Government concerning their nationality for Community purposes. Although this exclusion could be considered as a fine example of race discrimination,<sup>30</sup> the Court held that *Kaur* never had possessed the quality of British citizen and thus was rightly excluded from the freedom of movement under the Treaty. Unilateral declarations as to who can count as national of the Member State for Community purposes are taken at face value and have never been assessed in terms of their compatibility with Community law.

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<sup>30</sup> It was indeed to be held to constitute racial discrimination by the European Commission of Human rights in the *East African Indians* case.

In *Garcia Avello v Belgium*, the Court, referring to *Micheletti*, repeated that ‘it is not permissible for a Member State to restrict the effects of the grant of a nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedom provided for in the Treaty (...)’.<sup>31</sup>

A year later, the ECJ in *Zhu and Chen*<sup>32</sup> again denied the Member States the right to impose additional conditions for recognition of the national of other Member States of the Union. Catherine Zhu had acquired the nationality of the Irish Republic based on art.6 (1) of the Irish Code on nationality, stating that every person born on the island would *ex lege* acquire the nationality of the Irish Republic. Her mother had traveled to Belfast in Northern Ireland with the aim of this conferral to her daughter that would enable her daughter (and herself) to settle afterwards in the UK. Even the fact that the Irish Republic conferred its nationality to a person born *outside* the Irish Republic but on the island in the UK did not bring the ECJ from its path: to withhold to the baby the fundamental freedom of movement was not allowed, ‘*merely because the nationality of a MS was in fact solely acquired in order to secure a right of residence under Community law for a national of a non-member country*’ (i.e. the mother). Suspect motives, so relevant in *Nottebohm*, do not count for the ECJ.<sup>33</sup> The Irish Republic, however, intended to remedy what it considered an abuse: the conferral of citizenship on persons with no tangible link to the nation or the state. Where this right was only recently laid down in 1999 in the 19th Amendment to the Constitution, the Constitution was amended already five years later, in 2004, by the 24th Amendment, restricting the *iure soli* acquisition by birth to those ‘*who are born on the island of Ireland to at least one parent who is (...) an Irish citizen*’. The upshot of this development, partly inspired by the prospect of the upcoming decision by the ECJ, is that the Irish Republic discards *iure soli* as representing a genuine link. The place where the umbilical cord is buried does not count there as such link.

It was only in *Rottman, Tjebbes*<sup>34</sup> and *JY* that the European Court unsheathed the sword of Union law by demanding that MS nationality laws comply with Union law, more specifically the principle of proportionality. In the meantime Union citizenship had been upgraded by the ECJ in settled

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<sup>31</sup> *Garcia Avello v Belgium*, 2 October 2003, Case C-148/02, para. 28.

<sup>32</sup> *Zhu and Chen v Secretary of State for the Home Department.*, ECJ 19 October 2004, C 2000/02.

<sup>33</sup> See about the backgrounds of the case, involving evasion of the one-child policy of China: D. Kochenov and J. Lindeboom, ‘Breaking Chinese law, making European One: the Story of Chen, Or: Two winners, Two Losers, Two Truths’, in F Nicola and B Davies (eds) *EU Law Stories* (Cambridge, 2016).

<sup>34</sup> Interestingly the Commission quotes (Report, p.5, footnote 27) *Tjebbes* as endorsing the ‘due regard clause, but adds that the case is still pending. Did the Commission have a sneak preview?



case law as ‘destined to be the fundamental status of nationals of the Member States’. With a slight, but important legerdemain, it was recently even promoted by the Grand Chamber to ‘constitute the fundamental status of nationals of the Member States’<sup>35</sup>. So the Union citizens seem to have arrived at their final destination, that of the fundamental status, as opposed to the fading status of being a national of a MS.

Because of the axiomatic automatic conferral of this fundamental status to MS nationals, the thundering conclusion of the European Commission is that ‘each Member State needs to ensure that nationality is not awarded absent any genuine link to the country or its citizens.’ This is a sweeping statement indeed, needing inspection. In a footnote, it hides another argument: the principle of sincere cooperation with other Member States and the Union, Article 4(3) TEU that would entail introducing a genuine link criterion in the Member States laws on nationality over the board.

## V. Sincere cooperation

The Commission and Parliament thus add another major argument: the principle of sincere cooperation with other Member States and the Union. In the various infringement procedures launched by the Commission, the principle of sincere cooperation as enshrined in art.4 (3) of the TEU is put forward as the main obstacle against golden passport schemes.<sup>36</sup>

This general obligation of sincere cooperation would imply that all MS are obliged, in shaping their laws on nationality, to have due regard to the whole bulk of Union laws and principles; quite an expansion from the duty to comply with the principle of proportionality as up till now laid down by the ECJ. Given its undefined and undefinable content, this cure-all is unworkable and an arbitrary tool in the hands of the Commission and other institutions of the Union.<sup>37</sup> That obligation, moreover, concerns ‘the obligations arising out of the Treaties’. It is highly

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<sup>35</sup> JY v Wiener Landesregierung, 18 January 2022, C-118/20, par. 58. This par. refers to pars. 38 and 46 that both speak of ‘destined’. The referral is thus misleading. Alternatively, are we confronted with a *lapsus linguae*? To refuse naturalisation because of a number of minor traffic offences is not compatible with the Union principle of proportionality. In addition: a former Union citizen who became stateless is still covered by Union law.

<sup>36</sup> E.g. against Malta and Cyprus, 20 October 2020.

<sup>37</sup> Upholding the rule of law would be one of the central obligations of MS under the heading of sincere cooperation. In the case of Poland the Commission turned out, in a fit of Realpolitik, to take its distance from rulings of the European Court of Justice on the independence of the Polish Judiciary, and to reward the Polish Republic for its stand in the Ukraine-Russian war at the cost of the central tenet of the rule of law, selling its birthright for a mess of pottage. Passports may not be for sale, but the rule of law is.



questionable whether such an obligation of the MS to adjust their codes on nationality and introduce a genuine link criterion arises indeed from the Treaty. I see no traces.

The conundrum of what is to count as a genuine link is central to doctrine and practice of the law on nationality, both municipal and international. It is significant that the European Convention on Nationality does not list the genuine link condition as one of its principles on which the acquisition of the nationality of each State Party shall be based. It defines nationality in a neutral and minimalistic way by stating that it is a legal bond between a person and a State. The 'bedrock' of this legal bond, is, according to the ECJ, 'the *special relationship of solidarity and good faith (...) and the reciprocity of rights and duties*'.<sup>38</sup> This 'essence' of citizenship is introduced by the Court as a *result* of its existence *not* as a condition for its acquisition. This phrase cannot be used to underpin the genuine link requirement at the moment of acquisition, certainly not at birth.

If the Commission demands from the MS that their laws on nationality contain the threshold of the genuine link, not only in the area of naturalisation, but generally, and thus also as concerns acquisition at birth, as a necessary consequence of the fundamental status of Union citizenship attached to it, that would necessitate a complete overhaul of the existing laws on nationality of the MS. Another consequence: loss of Union citizenship whenever the genuine link with a MS falls away, according to the perspective of the EU and its institutions.

Does birth on a certain territory, e.g. represent such a genuine link? Certainly not in the *Nottebohm* definition, or in that of the ECJ: where is the relationship of solidarity and good faith of the newborn baby? In addition, does birth from parents of a certain nationality (or different nationalities), constitute such a genuine link? If the Commission want to rely on *Nottebohm*, it should bear in mind what the ICJ had to tell about the subject: '*The reason for (the fact that international law leaves it to each State to lay down rules governing the grant of its own nationality) is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality (...)*'

In other words, it is simply not true, as the Commission pretends,<sup>39</sup> that there exists '*a common understanding of the bond of nationality*' as a necessary condition for accepting Union Citizenship.

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<sup>38</sup> E.g. in *JY v Wiener Landesregierung*, par. 52, but already in *Rottmann* and *Tjebbes* as well.

<sup>39</sup> Commission Report, p.5.

Another consequence of introducing a genuine link condition: would indeed Union Citizenship fall away whenever the genuine link of nationality with a MS ceases to exist according to the views of the EU institutions?

I take a few examples, derived from the Dutch code on nationality. The Minister of Justice may revoke the Dutch nationality of persons condemned for having perpetrated certain terrorist crimes.<sup>40</sup> This is consonant with art.7 (1) of the ECN that allows States to provide for the loss of its nationality in case of 'conduct seriously prejudicial to the vital interests of the State Party', a phrase derived from the 1961 Convention on the Reduction of Statelessness and repeated in art.7 ECN. However, the case law in the Netherlands on the provision goes a step further. Derived from the parliamentary documents, and in order to determine whether this withdrawal of nationality is to be considered as punishment or as an administrative measure, the Dutch Council of State has emphasised that *'with the withdrawal it is expressed that when a person has seriously prejudiced the essential interests of the Netherlands in this way the link with the Netherlands cannot exist any longer.'*<sup>41</sup> To stress the impossibility of maintaining the ties with the Netherlands is, according to the court, even the purpose of the provision. In this way, a collision with the *ne bis in idem* principle in criminal law is parried. However, this ideological turn is exposed to other criticisms. If indeed the purpose of the provision is not to increase the state's safety, but to express the view that the legal bond of nationality cannot exist anymore, it is difficult to see how this can be coupled with the fact that the minister has to effectuate a comprehensive proportionality test before the revocation of the Dutch nationality. *'Il faut qu'une porte soit ouverte ou fermée'* as Alfred de Musset stated. The conviction for terrorist acts, sufficient for the loss of nationality according to the ECN, is in itself not sufficient for withdrawal of the Dutch nationality: a proportionality test has to decide whether the bond of nationality can still exist, and this test has nothing to do with the conviction. Strangely enough, monopatrie Dutch persons, convicted of the same crimes, retain their nationality, although according to the prevailing ideology their bond cannot exist anymore either. It is only because of the prohibition to cause statelessness that their nationality subsists. The position is riddled with contradictions. This is a case of Christian Morgenstern's *'Weil, so schliesst er messerscharf: nicht sein kann was nicht sein darf.'* This ideological frame, consistent with the 'bedrock' formula of the ECJ, encounters the paradox that only binationals are considered to have shown behaviour such as to break the genuine link, whereas mononationals retain this 'relationship of solidarity and good faith.' This goes to show

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<sup>40</sup> Art.14 (2) Nationality Act.

<sup>41</sup> Dutch Council of State, ECLI:NL:RVS:2020:3045,pars.4.2,4.3, 6.3,7.2.

that a pumped up notion of nationality encounters serious intellectual problems. The fact that the ECN *allows, not: obliges to* withdraw the nationality in the case of conduct seriously prejudicial to the vital interests of the State is already an indication that a genuine link element is not involved or is superfluous.

Moreover, what about the situation that the binational holds the nationality of another member state? Will she be considered as having broken the bond of nationality with that other state as well? If not, why not?

In the aftermath of *Tjebbes*,<sup>42</sup> the Netherlands were obliged to introduce a proportionality check to the legislation that withdraws automatically Dutch nationality from Dutch nationals, in possession of another nationality, habitually residing abroad, if they have not manifested the desire to retain their nationality by receiving a renewed passport or other identity document within a ten years period.<sup>43</sup> These nationals were deemed to have lost touch with the Netherlands and to have severed the genuine link. A recent amendment to the Dutch code introduced a new right to 'opt'<sup>44</sup> retroactively for the Dutch nationality for those who lose their citizenship according to the still existing old law; the option is also available for new cases. In the course of handling such requests, the Union principle of proportionality would duly be applied. (Automatic reinstatement in the Dutch nationality for all those who had lost it was of course out of the question: involuntary (re)acquisition ex lege of a lost nationality would be an unpleasant surprise for those who had acquiesced to the deprivation.)

Interestingly, in the amendment the period within which the Dutch diaspora has to receive (on request) a new document is extended to thirteen years. This extension is not introduced in view of altered ideas about the moment of severance of the genuine link, but for the bureaucratic reason that the period for the validity of passports had been prolonged to ten years. Here bureaucratic reason blurs the frame of loss of real links.

Interesting as well is the situation of Dutch citizens settled in the territory of the other MS of the Union: they do not lose their nationality in the first place because that would violate their right as

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<sup>42</sup> Case C-221/17, 12 March 2019, *Tjebbes*.

<sup>43</sup> This provision of art.15 (1) c Rijkswet Nederlanderschap is in line with art.7 (1) e ECN: lack of a genuine link between the State Party and a national habitually residing abroad. This provision, concerning dual nationals, residing for generations abroad, is the only place in the ECN where (lack of) a genuine link is mentioned.

<sup>44</sup> Option in the Dutch system is a misleading term: it is not a unilateral act, but a naturalisation with fewer conditions.

Union citizens, especially their freedom of movement. In other words, there still exists a genuine link with the Netherlands *because* they are Union citizens and have availed themselves of the freedom of movement. This is the world turned upside down: Union citizenship provides the genuine link with the MS of which one possesses the nationality.<sup>45</sup> On the other hand, notwithstanding the loss of a genuine link, Union Citizenship will still result from an empty nationality. A person living in a third country loses *ex lege* her nationality after thirteen years if not receiving a new passport in time, whereas a third or fourth generation emigrant to another MS is still deemed to be connected genuinely to the country of her ancestors.

To be stressed is the fact that *Tjebbes* and other cases concern dual nationality. If the second nationality is one of the other Member States, no loss of Union citizenship is involved by losing the nationality of a MS. However, if the other nationality is one of a third country, loss of the MS nationality becomes problematic: Union citizenship is jeopardised. In *Tjebbes*, the ECJ engages in a *repêchage*, in that it gives an opening towards maintaining Union citizenship notwithstanding the lack of a genuine link according to the municipal law of the MS.<sup>46</sup>

What is important here is that the Dutch provision on automatic loss stays in place and was not censored by the ECJ in *Tjebbes*, although the only way in which the Dutch citizen abroad is allowed to demonstrate her genuine link with the Netherlands consists of the request for and granting of (renewal of) a passport. Nothing else is required. Is this what is meant by genuine link, or the values of the EU, or the essence of Union citizenship? Here again, a passport is a manifestation or attestation of holding a certain nationality, but in this scheme, it is the other way round, granting the passport (or other identity paper) in time by the authorities confers the genuine link and the (prolongation of) nationality.

In combination with the conferral of the Dutch nationality at birth by being born from at least one Dutch parent this state of affairs may go on for an indefinite number of generations of citizens settled abroad. Public international law allows this, but it allows states at the same time to break the chain of intergenerational bestowal of citizenship at one place or another. In France, the loss may be established by the court for French citizens who have never lived in France, and whose parents have lived abroad for at least half a century.<sup>47</sup> Italy draws no time limits on the possession of its nationality; it just allows persons who settle abroad to renounce their Italian *cittadinanza*, if

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<sup>45</sup> H.U. Jessurun d'Oliveira, *Nationaliteitsrechtelijke oogst van het Programakkoord*, Nederlands Juristenblad 2022, Nr. 290, p.339-345.

<sup>46</sup> cf. somewhat differently, D. Kochenov, *The Tjebbes Fail*, European Papers vol 4, 2019, nr.1 p.319-336

<sup>47</sup> Art.23 (6) Code civil français,

not becoming stateless.<sup>48</sup> In Poland, involuntary loss of citizenship because of absence of a genuine link is not allowed; Poles may lose their nationality only on request and with the consent of the President, who has constitutional prerogative powers to deny or grant the renouncement. Polish history explains this lenient provision.<sup>49</sup>

It is as legitimate in terms of the genuine link criterion for states to exclude their citizens because of severance of this link by staying too long abroad – be it ten years or fifty years – as it is to bind their diasporas as long as possible to the state until the umpteenth generation. It is as legitimate to propose that birth on a territory creates a genuine link to that state, as it is to deny that this fleeting moment can convey nationality to the newborn baby. By the way, in most cases, *ius soli* coincides or combines with *ius sanguinis*: the hard core of what is silently considered by most people as the real stuff.

An example where, after some five centuries, ‘prodigal sons’ were allowed to become again members of the household is provided by Spain and Portugal that introduced legislation concerning Sephardic Jews. They had been persecuted and banned from the Iberian Peninsula in 1492 and following years. Officially, this legislation was put into place to right a historical wrong. Does the wish to repair wrongs perpetrated half a millennium earlier constitute a genuine link? Unofficially the desire to attract new investors may have played a role in Spain and Portugal. What is relevant here is the fact that the Portuguese enactment does not require these Sephardim to reside in Portugal; in Spain, the period of residence was reduced to two years. They furthermore are allowed to keep their nationality of origin. Mostly Sephardim from third countries have applied for the scheme.<sup>50</sup> UK citizens of Sephardic descent, seeking to maintain their freedom of movement after Brexit, now covet an Iberian nationality.

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

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<sup>48</sup> Art.11 Legge 5 febbraio 1992, n.9

<sup>49</sup> Art.13 Polish Law on nationality.

<sup>50</sup> H.U. Jessurun d’Oliveira, Iberian Nationality Legislation and Sephardic Jews: ‘With due regard to European law’? in Sergio Carrera Nunez/René de Groot, *European Citizenship at the Crossroads* (2015), p.251-265; L.J. van der Baaren, *On Emigrant Nationality* (2020), ch.5.

respect for identity of the MS in such a sensitive area as that of defining the personal substratum of the member states? Are citizens not a constituent part of the definition of any state? Have the MS transferred the paramount power to define who their citizens are to the EU in so many words in any Treaty document? Did they open up their *reserved domain* tacitly? In the context of EU law, especially art.4 (1) of the TEU, the term 'reserved domain' is even somewhat misleading: the MS did not transfer this central element of their sovereignty.<sup>51</sup>

In this regard, it is important to notice that the MS of the EU as members of the Council of Europe have refused to add the right to a nationality as a Protocol to the ECHR, because that would imply jurisdiction by the ECHR. *'It proved politically unfeasible to require States to forgo their sovereignty in the realm of nationality law.'*<sup>52</sup> That is why a separate European Convention on Nationality was drafted in 1997, again without jurisdiction of the Strasbourg Court. A clear indication that MS resist any interference by an international court with their laws on nationality.<sup>53</sup> The same unwillingness is shown by quite a number of EU MS that did not even ratify the Convention.<sup>54</sup>

There are of course many more indications. The Charter of Fundamental Rights does not mention nationality, except for the prohibition of discrimination on the grounds of nationality.<sup>55</sup> Nationality is however mentioned in the specific General Declaration of the (Maastricht) Conference on the nationality of a Member State, attached to the Maastricht Treaty, stating:

*'The Conference declares that, wherever in the Treaty establishing the European Community, reference is made to nationality of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their*

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<sup>51</sup> See also Declaration 18 to the Conference.

<sup>52</sup> De Groot and Vonk, *International Standards on Nationality Law*, (2015) p.41; H.U. Jessurun d'Oliveira, *Het Europees verdrag inzake nationaliteit, Straatsburg 6 november 1997. Een verkenning*, in H.U. Jessurun d'Oliveira (ed) *Trends in het nationaliteitsrecht. Nationaal en internationaal*. (1998), p.8.

<sup>53</sup> It is significant that in a recent case before the ECHR, *Adam Johanssen v Denmark* (1 February 2022), concerning deprivation of nationality and expulsion, the Court quoted extensively the European Convention on Nationality in the paragraphs concerning the facts, but concentrated its assessment on art.8 of the ECHR, without so much as mentioning the ECN: a no go area.

<sup>54</sup> As per 30 March 2022 of the 46 member states of the Council of Europe 21 have ratified the Convention. Salient absentees for various reasons: Belgium, France, Greece, Ireland, Italy, Poland, Spain, (the UK), the Baltic States.

<sup>55</sup> Art.21 (2) Charter.

*nationals for Community purposes by way of a declaration lodged with the presidency and may amend such declarations when necessary.'*

I highlight two elements of this declaration: in the first place, no mention is made of any 'due regard to community law', as expounded by the ECJ. This declaration, then, is a clear token of the resistance by the Council against any inroads into the exclusive jurisdiction of the MS in this area. Second: nationality for Union purposes is a *functional* nationality, not necessarily identical with nationality according to the national codes on nationality. In declarations by Germany, the UK and Denmark the categories of nationals to be considered as nationals for Union purposes are indicated, and these declarations bind the EU and the MS.<sup>56</sup> Thus MS may declare that persons availing themselves of the CBI schemes will not be nationals for Union purposes. However, what they are not allowed to do is to exclude (former) nationals of a third state, e.g. Russians from this functional nationality, because the EU Charter does not allow discrimination on the grounds of nationality.

And if the principle of sincere cooperation demands from MS to accommodate a genuine link into their codes of nationality, why is it then that settled case law set by the ECJ in *Micheletti*, *Kaur* and *Zhu and Chen* prohibits other MS to test the genuineness of the link or the motives of persons, who are their nationals in acquiring a nationality? The ECJ has stated repeatedly that MS are obliged to refrain from imposing additional conditions for recognition of the nationality of other MS, in several cases where the (non) existence of a genuine link was at stake. Why is it then that they are not requested by the European Commission to cooperate in implementing this test? In addition, why does the Commission allow itself to impose additional conditions on the acquisition of MS nationality? *Quod licet Iovi non licet bovi?* It is no accident that the Commission does not mention this well-established jurisprudence of the ECJ in its Report at all. Why would only the EU Commission be legitimized to impose the genuine link element on the MS codes of nationality? The principle of sincere cooperation is far too vague to be of any use in defining what actions are required from which MS: according to the Court, they are to abstain, according to the Commission and Parliament they are obliged to take action. To my mind, there is a clear clash between the position of the ECJ and that of the Commission and Parliament. Will MS have to cooperate sincerely with the ECJ or with the Commission and Parliament, or, alternatively, rally with the position of the Council or the Conference? And what will the Council say, in the event

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<sup>56</sup> See H.U.Jessurun d'Oliveira, Nationality and the European Union After Amsterdam, in O'Keeffe/Twoomey, Legal Issues of the Amsterdam Treaty, (1999), p.395-412.; A.Kojanec, Citizenship of the European Union, in Aan de grenzen van het Nederlandschap, Opstellen voor A, F. Th. Zilverentant, (1998), p.135.

that the Commission, beseeched by the EP, notwithstanding their acknowledgement of the fact that the Commission denies having any competence in this area, should come up with a legislative proposal concerning the (non) acceptability of the MS provisions on nationality, in view of the entailing Union Citizenship?

Moreover, what about diplomatic and consular protection to be exercised by MS on behalf of nationals of other MS that are not represented in a third State?<sup>57</sup> Are they to apply a genuine link test before taking up this task or are they to refrain from this check and take the nationality of such other MS for granted? The Decision concerned<sup>58</sup> states that the show of a passport or other identity document will suffice for demonstrating the nationality. According to the ILC, a genuine link test is not required by international law, but the question arises whether EU law obliges the MS involved to ascertain whether the national on whose behalf diplomatic protection shall be exercised is a genuine citizen of the non-represented MS. In addition, how about the cooperation and coordination by the EU? Should this involvement include ascertaining the genuineness of the link? I do not think so: it is for the incriminated state to allege the absence of an effective link.

Arriving at an interim conclusion, I submit that *Nottebohm* was wrongly decided, and wrongly applied by the European Commission and European Parliament, and that a round definition of nationality of the MS for Union purposes by including a genuine link ingredient is not feasible. Not only because this would imply a drastic overhaul of the national codes of nationality of the MS, but also because of the impossibility, both intellectually and politically, to arrive at common ideas about genuineness. The principle of sincere cooperation moreover leads to paradoxical and conflicting conclusions, because there are conflicting views between the institutions of the Union concerning this issue, and even concerning EU competence in this area.

## VI. Citizenship in early modern times in Europe.

In its Report, the Commission considers the naturalisation procedures concerning golden passports as 'new'<sup>59</sup>, or even novel. Is this indeed the case?

On my desk lies a doctoral dissertation at the University of Utrecht, defended in the year 1853. Its title reads *Specimen historico-juridicum inaugurale de peregrinis receptis et civitate donatis in*

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<sup>57</sup> Art.23 FTEU and art.43 Charter. Directive (EU) 2015/637.

<sup>58</sup> Decision 95/553.

<sup>59</sup> Commission Report, p.3.



*patria nostra usque ad annum MDCCXCV (1795).*<sup>60</sup> The author, S.J. van Geuns, describes in this work in detail the situation of foreigners and immigrants and the ways in which they could become citizens, 'burgers' or 'poorters' in the cities of the Netherlands until the year 1795, when the unitary Batavian Republic – a vassal state of France – was established. The acquisition of '*burgerschap*' in the Republic of the seven United Provinces since 1588 rested in the hands of the local authorities that issued by-laws and took individual decisions.

There existed three ways to become a 'poorter' or 'burger' (citizen). First by marriage to a 'poorters' daughter or widow. (Acquisition by women of the status of 'burger' by marriage to a 'poorter' was a matter of course). In some cities, one had to pay a fee, and had to take a Poorters' oath, swearing to behave as a good and loyal poorter and to fulfill all the duties incumbent on him.<sup>61</sup>

Second by complimentary bestowal on groups or individuals: in Amsterdam tradesmen and shopkeepers in textiles, professors and ministers, protestant refugees from France and the like were welcomed.<sup>62</sup>

Third and most important in terms of quantity, foreigners, male immigrants and unmarried women, could buy *burgerschap*. The sum to be paid changed according to time and place. In Amsterdam '*in 1624 14 guilders and 6 pennies; in 1630 30, in 1634 40 and in 1650 50 guilders*'<sup>63</sup> Poorterschap was coveted because one of the important legal, political, social and economic rights attached to it was admissibility to one of the many guilds. On average in the seventeenth century every year some 400 foreigners bought their *burgerschap* in Amsterdam, mostly to enable them to become a member of a guild, but others, such as mariners, soldiers, labourers, were primarily interested in the existing welfare institutions such as the municipal orphanage (now the Amsterdam Museum), open only to children of burgers. As there was a steep increase

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<sup>60</sup> The title page is, however, in Dutch: *Proeve eener geschiedenis van de toelating en vestiging van vreemdelingen in Nederland tot het jaar 1795*. The author was granted the right by the university authorities to write his thesis in Dutch and not in Latin as was customary at the time.

<sup>61</sup> One of the duties mentioned was to take part in cutting holes in the ice to hinder enemies to enter the city.

<sup>62</sup> One of them was the first Earl of Shaftesbury (1621-1683), who had fled, accused of treason, to Amsterdam in 1682. Shaftesbury was a former Lord Chancellor of England, and had fiercely opposed the Dutch Republic in the successive Anglo-Dutch wars. As a Cato redivivus he even invariably had exclaimed in parliament '*delenda est Carthago*'. The Amsterdam municipality explained benevolently: '*Carthago non adhuc deleta Comitem de Shaftesbury in gremio suo recipere vult.*' (Van Geuns, o.c. p.273).

<sup>63</sup> Van Geuns, p.275. Fifty guilders in 1650 represent around 500 euro nowadays. An example: immigrant-carpenter Jacob Wesselsz Wiltingh buys his poorterschap of Amsterdam on 20 January 1650 for fifty guilders. (Mark Ponte / Erik Schmitz, Rembrandt paints master carpenter Jacob Wesselsz Wiltingh. An unknown Rembrandt from the archives of the Amsterdam notaries. *Kroniek van het Rembrandthuis* 2021, 18-29)

of orphaned children in the orphanage between 1587 and 1633, from about 200 to nearly a thousand, the trustees urged the mayors of the city of Amsterdam to raise the fees for bought *burgerschap* and to tighten the rules for admission to the orphanage.<sup>64</sup> A direct relationship between the steady increase of the purchase price and the burdens on the budget of the city seems probable.<sup>65</sup>

All three ways to citizenship, existing in early modern cities in the sixteenth to the nineteenth century all over Europe, are still common in modern codes of nationality. Local citizenship developed into national citizenship in the newly formed nation-states after the French revolution. Marriage to a national still allows easier naturalisation or option, and was for women for a long period even the automatic effect of marriage. Award of citizenship in the national interest by discretionary naturalisation procedures, e.g. for outstanding achievements in sports, culture or science still finds its place in national codes on nationality; and likewise acquisition by investment in the economy of the political entity (purchase) is still with us. These categories are not watertight, however. As mentioned before, quite a number of states define the 'national interest' as encompassing economic or commercial interests.<sup>66</sup>

Leo and Jan Lucassen, writing on immigration in the Low Lands in the 17th and 18th Century state: *'Common to the cities in the coastal areas, compared with those in the inlands and especially Germany, were the low costs involved in acquisition of official citizenship. Were they in the maritime Dutch areas equal to one or a few months' wages, in the East they amounted to twice or thrice as much and in Germany the tariffs equaled some years' wages – inaccessible therefore for the average immigrant.'*<sup>67</sup>

As a leading specialist in the field, Maarten Prak, writes on the modes of access to formal legal citizenship in prerevolutionary Europe: *'On a European scale there were two main routes into citizenship: birth ('patrimony') and purchase. It is relatively easy to establish the scale of the*

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<sup>64</sup> Willem Frijthoff / Maarten Prak (eds), *Geschiedenis van Amsterdam 1578-1650*, (2004), p.200-201.

<sup>65</sup> W. Maas, *Immigrant Integration, Gender and Citizenship in the Dutch Republic*, *Politics, Groups and Identities*, 1 (3), (2013), 390-401 (at 396). . 396.

<sup>66</sup> 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*. 23.1.2019, Com (2019) 12 final, p.3. See e.g. art 21 (21) code civil français.

<sup>67</sup> Leo&Jan Lucassen, *Vijf eeuwen Migratie. Een verhaal van winnaars en verliezers*. (2018), p.37 and Jan Lucassen & Rinus Penninx, *Newcomers. Immigrants and their Descendants in the Netherlands 1550-1995* (1997), p.91 explains: *'There were four ways of becoming a freeman: by being born to a freeman, by marriage to the daughter or a widow of one, by grant, or by purchase. The recommended method for newcomers was generally purchase, and occasionally grant or marriage.'*

*second route because records were kept.*<sup>68</sup> In addition, Julius Kirshner reminds us that already Bartolo de Sassoferrato (1313–1357), the most prominent postglossator, is mentioning the common division of the *cives in civitate* into two categories – original and non-original citizens – of which the last group could acquire citizenship by paying taxes or by buying a house in the city: CBI.<sup>69</sup>

As to naturalisation in the Provinces of the Dutch Republic: the States could confer the status of ‘inboorling’ (native) to persons or groups of persons from abroad. According to a Resolution of the Province of Holland in 1748, one had to pay a fee of 500 guilders; the names of the new citizens were registered.<sup>70</sup>

Acquisition of citizenship by foreigners through marriage, by bestowal and primarily by purchase thus belong to the perennial common heritage of Europe. Acquisition *iure pecuniae* of a nationality is not ‘a new form of naturalisation’ as the Commission suggests<sup>71</sup>, but a long-standing practice all over Europe to incorporate newcomers, a way of dealing with foreigners originating in its cities. It had existed ‘for the best part of a millennium’, as Maarten Prak writes<sup>72</sup>. Certainly, this is a somewhat oversimplifying statement, but it can be maintained that the mode of acquisition of the central status in the cities by purchase has been a tradition in early modern Europe, and has found its way into the codes of nationality since the early nineteenth century. What is new, however, is systematical minimizing of the residence requirements in the conditions of sale in some countries. Old customs may be outdated, but they are not ‘novel’.

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<sup>68</sup> Maarten Prak, *Citizens without Nations. Urban Citizenship in Europe and the World c. 1000-1789*. (2018) p.34.

<sup>69</sup> Julius Kirshner, *Civitas Sibi Faciat Civem; Bartolus of Sassoferrato's Doctrine on the Making of a Citizen*. *Speculum* (1973), p.694-713(702). See Cornelius Riethdorf, *A new Citizenship? National and European Identities from a Historical Perspective*. PDU Studies 1/2014 on the split between cities' citizenship and citizenship of the Roman Empire (the case of Dante and his banishment from Florence): one could lose citizenship in the city, but still be connected to the Empire.

<sup>70</sup> Van Geuns, o.c., p.281.

<sup>71</sup> Report .p.4.

<sup>72</sup> Maarten Prak, ‘Citizenship for Sale in pre-Modern Europe’, in Dimitry Kochenov and Kristin Surak (eds), *The Sales of Residence and Citizenship* (Cambridge, 2023).

## VII. Conclusions and solutions

I have tried to show a number of weaknesses and misrepresentations in the Reports of the European Commission and the European Parliament:

- a. Leaving out discretionary naturalisation procedures in the MS, although these are the vehicle for acquisition by investment, in order to enhance 'normal' naturalisation procedures. Discretionary naturalisation is normal and common.
- b. Emphasis on the 1955 *Nottebohm* decision of the ICJ, whereas this has been relegated to legal history through later developments such as the Draft Rules on Diplomatic Protection by the ILC. Misinterpretation of *Nottebohm* by maintaining that the genuine link criterion is not only barring diplomatic protection in specific circumstances, but counts as a positive obligation of states to include it in their nationality arrangements over the board.
- c. If anything is learned from *Nottebohm* as a parallel or precedent, it is this: A purchased citizenship is recognised as legally valid internationally both by the ICJ and by Germany; it is only in the realm of effects an inroad had been made as to the diplomatic protection against Guatemala (against the USA would have been another matter). Transposed into terms of Union law: Golden passports are to be recognized, by the other MS and the Union, but not all effects of Union citizenship need to be attached.
- d. Neglecting and leaving out the rulings of the ECJ that MS have to recognise the nominal nationality of other MS for Union purposes, without additional conditions, in order to create a level playfield. This prohibition to impose additional conditions is 'with due regard of Community law', as the Court repeatedly stated. Thus, the case law of the ECJ conflicts with the views of the Commission and Parliament.
- e. To invoke the principle of sincere cooperation opens the door to arbitrary inroads into the laws on nationality of the MS by Union institutions. It represents a power grab by these institutions. Furthermore, the ECJ, the Commission and Parliament and the Council show opposed views over with which institution to cooperate sincerely. The last word is with the ECJ.
- f. Purchase of the status of citizen is not at all novel: before the French Revolution, it was widespread in Europe and it found its way into various national Codes of nationality.
- g. The genuine link criterion may be useful in situations of plural nationality, (e.g. in private international law), albeit refused by the ECJ, but should not be introduced generally as a principle underlying the nationality codes of the MS. There does not exist a sufficient

*communis opinio* about what constitutes such a genuine or effective link.; .A genuine link test is not without reason absent among the principles of the ECN.

This brings me to my own position in this heated debate. Point of departure is my opinion that the EU should be very reluctant in interfering with the reserved domain of the MS to define their citizens, even in the light of the Siamese bond with Union citizenship. To instruct MS to accommodate their nationality codes to the genuine link criterion makes an unnecessary and undefinable inroad into a sensitive area of law, directly linked to the sheer existence and identity of the MS with their individual histories. The high coefficient of sensitivity is demonstrated by the existence of the European Convention on Nationality. Nationality is listed neither in the ECHR nor in later Protocols as an independent fundamental right precisely because the MS of the Council of Europe and the EU refused to see their codes of nationality being subjected to scrutiny and definitional power by an international court such as the ECtHR or other supranational institutions. It is no accident that the ECN lacks such supervision and that the ECtHR takes its distance.

The grounds adduced for trying to impose this rearrangement are weak and wobbly. Invoking *Nottebohm* means not taking into account the development of international law in the last fifty years that witnesses a withdrawal from the genuine link principle. Into the bargain, *Nottebohm* is misread: if anything, the judgment introduces a negative test to be applied in the international arena, and only in the area of diplomatic protection. It did not challenge the legitimacy of the purchased nationality of Liechtenstein involved.

If indeed the existence of Union citizenship with the rights (and duties) attached to it as the fundamental status of MS citizens demands the introduction of a genuine link test in the nationality law of the MS, both in the provisions on acquisition and in those of loss, then this requirement should hit all MS, and not selectively be applied on a few MS while targeting only one type of acquisition. A thorough investigation of the national rules on loss of citizenship, not only in terms of proportionality, should include parameters to measure the provisions on involuntary loss in terms of their representing the severance of a genuine link with the individual MS. Which generation, living in non-EU countries, can be considered to have lost an effective link?<sup>73</sup> Are rules to prevent multiple nationality acceptable if a MS nationality is lost by an individual in the process of voluntary acquisition of a third state nationality, while staying in the

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<sup>73</sup> As shown, the MS have widely different views on the moment in which the genuine link has evaporated.

EU? Many more questions can be asked if a genuine link is to be imposed by EU law on the MS nationality codes.<sup>74</sup>

Nationality law is targeted by the Commission as a tool to combat money laundering, corruption, tax evasion and the like. These are without doubt '*areas for concern*'. However, the instrumentalisation of nationality law for these purposes follows a dangerous indirect path and is undesirable. To fight against money laundering, corruption, tax evasion and to abate concerns about security, specific tools should be and are in fact already abundantly put into place.

Dir. 2015/849 on the prevention of the use of the financial institutions for the purpose of money laundering or terrorist financing offers a number of mechanisms to deal with this plague. Art.1 (2):'*Member States shall ensure that money laundering and terrorist financing is prohibited.*' Should the specific instructions contained in this directive prove to be insufficient, the right way of action is implementation and eventually amendment of the directive.

Directive 2014/42 on freezing and confiscation of instrumentalities and proceeds of crime in the EU tells us in art.5 (2) that 'criminal offence' '*shall include at least the following: (a) active and passive corruption (...) in the private sector as well as active and passive corruption involving officials of the institutions of the Union and of the Member States (...).*' Should the specific instructions contained in this directive prove to be insufficient, the right way of action is implementation or eventually amendment of the directive.<sup>75</sup>

The Reports mention a plethora of additional measures, all directly addressing the concerns about money laundering, financing of terrorism, tax evasion. May I add to this cornucopia as a powerful tool Regulation 2020/2092 on a general regime of conditionality for the protection of the EU budget?<sup>76</sup> On 16 February 2022, actions by Poland and Hungary against this, this Regulation have been dismissed in their entirety by the full ECJ.<sup>77</sup> In its art.4, the Regulation defines quite a number of situations that are exactly the concerns of the Commission about the Golden Passports: money laundering, tax evasion, terrorist financing etc. The Council, on proposal

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<sup>74</sup> See H.U. Jessurun d'Oliveira, "Latent" citizens. What do they tell us about the concept of citizenship? *Liber Amicorum Monika Pauknerová* (2021), p.297-307.

<sup>75</sup> The Directive mentions in art.3 a host of international and EU instruments in this area.

<sup>76</sup> OJ 2020 L 4331.

<sup>77</sup> Judgments ECJ in cases C-156/21 Hungary v. Parliament and Council and C-157/21 Poland v Parliament and Council.

of the Commission, can step in with monetary measures to nudge the MS involved into compliance. Let OLAF and EPPO do their jobs!

Given this variety of mechanisms, the fundamental principles of subsidiarity and proportionality<sup>78</sup> should have discouraged the Commission and the EP to choose to interfere with the nationality of the MS.<sup>79</sup> And if the EU really wishes to maintain or rather introduce the genuine link to a MS as a precondition for Union citizenship, it could sacrifice the holy cow of the immutable connection between the two, by breaking the automatism: if in individual cases the genuine link is absent, Union citizenship will not be entailed by MS citizenship.<sup>80</sup>

This is of course a highly impractical implication; one reason more to abandon the road towards imposing conditions on the nationality codes of the MS, even if this implies the existence of a number of free riders and paying guests to Union citizenship. In addition, we should not forget about the people with strong connections in the EU: long-term residents from third countries. They are denied Union citizenship although they may have much more intense ties and richer attachments with a MS or the Union as a whole, than many formal MS nationals may.<sup>81</sup>

To be sure, acquisition of citizenship by investment is not primarily about residence but about mobility. EU MS nationality is coveted for its access to mobility in the first place by individuals holding the nationality of third states that allows them considerably less mobility in the world and other drawbacks. We have to acknowledge the fact that nationalities differ widely in what they are able to promise in terms of rights, both in the municipal environment and internationally, as Kochenov and Kälin have convincingly demonstrated.<sup>82</sup> It is therefore understandable that individuals want to improve their situation by acquiring in one way or the other a richer nationality that allows them to travel around the world. Is that not a legitimate interest? Marriage, convenient or not, is one of the gateways to the coveted nationality, available for the average person.<sup>83</sup> The same goes for recognition, adoption or legitimation. Purchase is for the happy

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<sup>78</sup> Art.5 (3) TEU and Protocol no 2.

<sup>79</sup> In the same vein, Daniel Sarmiento and Martijn van den Brink, *EU Competence and Investor Migration*, this volume, p.xxx.

<sup>80</sup> cf. the fate of Dante Alighieri: banned from the city of Florence thus losing his citizenship, he remained a citizen of the Roman Empire.

<sup>81</sup> Their 'genuine link' may be compared with those of Nottebohm with Guatemala.

<sup>82</sup> D. Kochenov and J. Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index*.(2019)

<sup>83</sup> H.U. Jessurun d'Oliveira, *The Artefact of "Sham Marriages"*, *Yearbook of Private International Law*, Vol. 1 (1999), p.49-83. 'Sham' marriage is an arbitrary frame by a state to avoid effects that are considered unwelcome, be it a nationality, a nobility title, housing, access to the labour or services market or other advantages. According to most private law systems, motives for entering into marriage are irrelevant and

kleptocracy and that is the exasperating aspect of the phenomenon. Why should privileged people be still more privileged? However, this is a moral or political point of view. In addition, their coming out ahead is a sociological fact, whether it concerns air crashes, shipwrecks, diseases, floods, earthquakes and other disasters.<sup>84</sup>

Possessing the nationality of a MS gives access to a large bundle of rights and duties in a political community. However, it can also be qualified as a commodity most people in the EU have been granted free, by birth or marriage. They are the free riders. For outsiders costs are involved in terms of integrational efforts and spending money.

Purchase can be discouraged through the implementation, application and monitoring of all the EU instruments that are already abundantly available. There is no need to open the box of Pandora in scrutinizing nationality laws on overall bowing to an elusive genuine link principle. This amounts to putting the cat of the genuine link among the pigeons or swaying the ambiguous flag of sincere cooperation. European values and principles as subsidiarity and proportionality, and upholding the identity of the MS mark the boundaries of interfering with the nationality laws of the MS. Purchasing citizen status represents moreover a millennium old European legal practice.

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not to be scrutinized by the state. The secular state is concerned with form and procedure, not with the substance of marriage.

<sup>84</sup> cf. the seminal and inspiring essay by Marc Galanter, *Why the 'Haves' come out ahead: Speculations on the Limits of Legal Change*, *Law and Society review* (1974), p.95-160. The *Zhu and Chen* case is a fine example: a wealthy family gets what it wants by hiring expertise: an extra child, a new nationality, and a residence right.



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