

THE PRICE OF EU CITIZENSHIP

The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters

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ABSTRACT

How much does European citizenship cost in the EU? This was the question that has raised so much controversy over the Maltese citizenship-for-sale programme. The outright selling of Maltese nationality to rich foreigners led to unprecedented responses by the European Parliament and European Commission. This paper examines the affair and its relevance for current and future configurations of citizenship of the EU. It studies the extent to which Member States are still free to lay down the grounds for the acquisition and loss of nationality without any EU supervision and accountability. It is argued that the EU's intervention in the Maltese citizenship-for-sale affair constitutes a legal precedent for assessing the lawfulness of passport-for-sale programmes in other EU Member States. The affair has also revealed the increasing relevance of a set of European and international legal principles limiting Member States' discretion over citizenship matters and providing a supranational constellation of accountability venues scrutinizing the impact of their decisions over citizenship. The Maltese citizenship-for-sale affair has placed at the forefront the EU general principle of sincere cooperation in nationality matters. Member States' actions in the citizenship domain cannot negatively affect in substance the concept and freedoms of European citizenship.

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§1. INTRODUCTION

The Maltese citizenship-for-sale affair has attracted much attention since its inception at the end of 2013. The announcement by Prime Minister Joseph Muscat's government of an amendment to the Maltese Citizenship Act introducing an investor citizenship programme led to controversy both in domestic and European circles. Under the programme, the sole requirement for foreigners to obtain Maltese nationality consisted of donating to the state or by investing a substantial amount in the country. The case further presented an evident European dimension. What Malta was actually planning to put on sale was not only its own nationality, but also the supranational status enshrined in citizenship of the European Union. Any person holding the nationality of a Member State is a European citizen and enjoys the rights attached to it, such as the freedom to move and reside within the territory of the Union. The heart of the debates surrounding the adequacy of the Maltese initiative has been the extent to which the European institutions, and in particular the European Commission, could legally intervene and prevent the Maltese government from introducing the scheme.

From an EU law perspective, the case was a difficult one to argue. Questions related to the acquisition and loss of nationality have remained in the ambit of Member State's exclusive competence since the kick-off of EU citizenship in 1993 with the entry into force of the Maastricht Treaty. One of the most sacred of cows in the division of competences between the Member States and the EU is the entitlement to control citizenship laws. No one can become a EU citizen without first passing through the hands of a Member State. Since the introduction of EU citizenship, a number of Member States have been exceedingly anxious to keep the EU out of their citizenship laws and policies.¹ Since then, citizenship has been something of a 'hands-off' area for EU law.

Something fundamental has changed over the last 20 years. The classic boundaries delimiting Member States' discretion over nationality laws have been reshaped as a consequence of the emergence of a set of international principles, and legal and judicial accountability venues overseeing their domestic actions. The degree of exclusivity traditionally enjoyed by EU Member States has been progressively re-modelled, sometimes in unexpected ways. Moreover, while formally keeping their autonomy in the regulation of nationality issues, the Court of Justice of the European Union (CJEU) in Luxembourg has on several occasions held that national policy and legislative

¹ Declaration No. 2 annexed to the Treaty of Maastricht on nationality of a Member State, Treaty on European Union, [1992] OJ C191.

actions need to have 'due regard to' European law and their impact on citizenship of the Union. This begs the question whether Member States can still freely exercise their sovereign powers to lay down the grounds for the acquisition and loss of nationality without EU supervision and accountability.² If not, what EU principles should apply to the granting of citizenship by a Member State? These are the key research questions explored in this essay.

The Maltese Individual Investor Programme (IIP), and the ways in which it has developed since the end of 2013, provide us with an excellent case to test these questions. Discussions on the Programme took on a European dimension almost immediately, with strong criticism from the European Commission and the European Parliament. The Commission Directorate General for Justice, Fundamental Rights and Citizenship (DG Justice) reportedly considering the feasibility of launching infringement proceedings against Malta,³ which followed the adoption of a European Parliament Resolution on January 2014 where a majority of MEPs voted against the Maltese scheme. Amongst the key components of the IIP that attracted criticism was that anyone wanting to obtain Maltese citizenship would not be required to reside in the country. The heft of the applicant's wallet was the main and sole condition for any foreigner to cross the bridge towards Maltese citizenry and that of the Union. Contrary to preliminary expectations, the European Commission succeeded in persuading the Maltese authorities to enact amendments to the IIP to include a residence requirement as one of the naturalization criteria for the fast-track acquisition of Maltese nationality.

This essay examines the Maltese citizenship-for-sale affair and its relevance for current and future contours of Union citizenship. It aims to shed light on the relevant legal arguments driving the EU's reactions to the Maltese IIP and their implications for the evolving competences on grounds of acquisition and loss of nationality at the European level. The essay argues that the ways in which the Malta citizenship-for-sale case has developed can be seen as a step forward in the EU's role in the changing relationship between Union citizenship and nationality. The affair has shown a first inroad by the EU institutions into the formerly exclusive competence of the Member States regarding the granting of citizenship. It has confirmed the relevance of a framework of European and international standards providing a set of legal principles and accountability, transcending the national realms of competence and affecting nation-states' discretionary power in the field of citizenship.

² Opinion of Advocate General Poiares Maduro in Case C-135-08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-01449.

³ Malta Today, 'IIP / Brussels contemplating infringement proceedings against Malta', 18 January 2014.

§2. BACKGROUND TO THE CONTROVERSY: EU PASSPORTS FOR SALE!

At the beginning of October 2013,⁴ the Maltese government announced a new legislative initiative to sell Maltese nationality to foreign donors in the framework of an Individual Investor Programme (IIP), amending the Maltese Citizenship Act.⁵ The official framing of the investor citizenship programme was that it would allow the granting of citizenship by a certificate of naturalization to foreign individuals and their families ‘contributing to the economic development of Malta’. The IIP would make Maltese nationality available to successful applicants when they donate € 650,000 to the state, in addition to € 25,000 for spouses and children below the age of 18, and € 50,000 for dependent parents aged 55 or over, and unmarried children between ages 18 and 25. Prime Minister Muscat’s government declared that the IIP would bring in € 30 million a year for the financial development of the country. In its preliminary form, the IIP was reported by media as allowing a large discretion to the Minister of Home Affairs to award Maltese citizenship. Further, it lacked any transparency or accountability because the list of names of the people who would be granted nationality would not be published in the official government Gazette.⁶ The IIP, as originally presented, did not apply an annual cap on the number of people who could buy citizenship in Malta.

It did not take long for critics to express concerns about the Government’s plans. By the time the bill amending the Citizenship Act reached the Maltese Parliament on 9 November 2013, the controversy reached new heights. The opposition party led by former MEP and the Nationalist Party (PN) leader Simon Busuttill proposed a series of amendments, including a five-year residency requirement, during which at least 30 days a year must be spent in Malta, publication of the names of those acquiring citizenship and an investment of at least € 5 million in the Maltese economy. According to the opposition, the programme should be named ‘individual donor programme’ and if the government would like to keep the current name, ‘there should be clear investment and not a mere contribution or donation’. Busuttill expressed the view that ‘these amendments change the concept of selling citizenship to one which commits a foreigner to the country’,⁷ and that if not introduced, the PN, if elected to government, would revoke applicants’ citizenships under the scheme.

The debate continued when the journal *Malta Today* published a survey asking the question: ‘Do you agree with the scheme through which Maltese citizenship will be

⁴ Times of Malta, ‘Investors may buy Maltese citizenship’, 8 October 2013.

⁵ E. Buttigieg, ‘Country Report: Malta’, *EUDO Citizenship Observatory* (2013), <http://eudo-citizenship.eu/docs/CountryReports/Malta.pdf>; D. DeBono, ‘Naturalization Procedures for Immigrants Malta’, *EUDO Citizenship Observatory* (2013), <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=30-Malta.pdf>.

⁶ Malta Today, ‘Names of those who buy Maltese citizenship will not be published’, 14 October 2013.

⁷ Ibid.

granted to foreigners who pay € 650,000?'. Some 53% of the respondents were against it and 10% only support the measure on the condition that the applicants would make a significant investment in the country.⁸ The PN continued to defend the new citizenship scheme and its original name,⁹ yet following vocal concerns by the opposition party and from abroad, the government presented an amended version of the initiative. The amended initiative increased the total financial contribution by applicants to at least € 1.15 million comprising the original donation of € 650,000 as well as a new 'investment' dimension, composed of:¹⁰

- investing € 150,000 in bonds, stocks, debentures, special purpose vehicles or other investment vehicles which shall be retained for at least a five-year period;¹¹ and
- a property investment in Malta of a minimum value of € 350,000, or taking a residential property lease for a minimum annual rent of € 16,000.¹²

The government also included other changes such as applying a cap of 1,800 applications,¹³ and the creation of a National Development and Social Fund into which 70% of the contributions received would be paid. These contributions would be used 'in the public interest inter alia for the advancement of education, research, innovation, social purposes, justice and rule of law, employment initiatives, the environment and public health'.¹⁴

An interesting feature of the new version is that it left the operational implementation of the scheme to a private company or 'concessionaire' (Henley & Partners),¹⁵ under the supervision of the government agency Identity Malta.¹⁶ If one examines the way in which the sale of Maltese citizenship has been promoted by the company, one finds that Henley & Partners advertises that an 'International Residence and Citizenship Practice Group has been advising private clients, their close advisors such as lawyers and private bankers, as well as governments, on citizenship law, immigration law, and visa policy issues'.¹⁷ The names of the persons granted Maltese citizenship would be published in order to address concerns that the IIP would be convenient for persons evading justice.¹⁸ Prime Minister Joseph Muscat stated in a press conference presenting these modifications: 'This total

⁸ Malta Today, 'Survey/Malta says yes to Budget, no to sale of citizenship', 11 November 2013.

⁹ Times of Malta, 'PM again defends citizenship programme', 26 November 2013.

¹⁰ Individual Investor Programme of the Republic of Malta Regulations, 2013, L.N. 450, B 5308, Maltese Citizenship Act (CAP. 188).

¹¹ Paragraph 6.6 of the Amendment Act L.N. 450.

¹² Paragraph 6.5 of the Amendment Act L.N. 450.

¹³ Times of Malta, 'New citizenship programme creates bond with Malta – Muscat', 23 December 2013.

¹⁴ Paragraph 13 of the Amendment Act L.N. 450.

¹⁵ Paragraph 3 of the Amendment Act L.N. 450.

¹⁶ Identity Malta Agency (Establishment), Order 2013, Public Administration Act, CAP (497), L.N. 269 of 2013.

¹⁷ Website of Henley & Partners, www.henleyglobal.com/the-practice-group.

¹⁸ Times of Malta, 'Let's solve citizenship controversy', 22 November 2013.

of € 1.15 million will create a bond with the country in a tangible manner.¹⁹ Among the advantages advertised by Henley & Partners on the programme is the fact that EU citizenship grants right of establishment in all 28 EU Member States.²⁰

This economic rationale of the IIP is one of the main points attracting wider contention, mainly from a normative perspective, in scholarly reactions to the scheme, such as the one launched by the EUDO Citizenship Observatory in the European University Institute in Florence.²¹ Shachar alluded to the ‘logic of capital and markets infiltrating the classic statist expression of sovereignty’, which in her view was putting up for sale not just the membership but its substantive content as well.²² Bauböck also argued that initiatives such as the IIP link citizenship with social class and, by selecting future citizens on grounds of investment or income, depart from ‘the egalitarian thrust that underlines rules of birthright citizenship as well as residence-based naturalization’.²³

§3. REACTIONS FROM THE EUROPEAN INSTITUTIONS: CITIZENSHIP MUST NOT BE UP FOR SALE!

The European Parliament Strasbourg Plenary Session of 15 January 2014 dedicated a debate to ‘citizenship for sale’. On that occasion, Viviane Reding, former Vice-President of the European Commission, emphasized in a strongly worded speech entitled ‘Citizenship must not be up for sale’²⁴ that naturalization decisions adopted by one Member State ‘are not neutral’ with regard to Member States and the EU as a whole, and one should not put a price tag on citizenship of the Union.

On 16 January 2014, the European Parliament adopted a Resolution on EU Citizenship for Sale condemning Member States’ citizenship for sale programmes, with specific reference to the Maltese IIP.²⁵ Some 89% of the MEPs voted against the selling of Maltese nationality and European citizenship. As the EUobserver reported, ‘[i]n a sign of the Maltese government’s isolation on the European stage, its own political group, the centre-left S&D, co-sponsored the motion, along with the centre-right EPP and the Liberal and

¹⁹ Times of Malta, ‘New citizenship programme creates bond with Malta – Muscat’, 23 December 2013.

²⁰ Website of Henley & Partners, ‘Citizenship by Investment’, www.henleyglobal.com/citizenship-malta-citizenship and <http://daphnecaruaganalizia.com/wp-content/uploads/2013/11/Malta-Individual-Investor-Program-1310-copy.pdf>.

²¹ A. Shachar and R. Bauböck (eds.), ‘Should Citizenship be for Sale?’, *EUI Working Papers RSCAS 2014/01* (2014), http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf?sequence=1.

²² A. Shachar, ‘Dangerous Liaisons: Money and Citizenship’, in *Ibid.*, p. 5.

²³ R. Bauböck, ‘What is wrong with selling citizenship? It corrupts democracy!’, in A. Shachar and R. Bauböck (eds.), ‘Should Citizenship be for Sale?’, *EUI Working Papers RSCAS 2014/01* (2014), http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf?sequence=1.

²⁴ Europa Rapid Press Release, *Viviane Reding, Vice-President of the European Commission responsible for Justice, Citizenship must not be up for sale*, 15 January 2014, SPEECH/14/18.

²⁵ European Parliament resolution on EU citizenship for sale, 2013/2995(RSP), 16 January 2014.

Green Groups'.²⁶ The European Parliament declared that the scheme of outright sale of Maltese citizenship undermined citizenship of the Union. The Resolution concluded that 'this way of obtaining citizenship in Malta, as well as any other national scheme that may involve the direct or indirect outright sale of EU citizenship, undermines the very concept of European citizenship'.²⁷ It called upon the Commission to provide an analysis of the legality of such schemes as well as guidelines on granting EU citizenship via national schemes and recommendations to prevent such schemes from undermining EU values.

The Parliament criticized the Maltese programme on a number of grounds: first, citizenship should not be a tradable commodity and 'cannot have a price tag attached to it'; secondly, citizenship should depend on people having ties with the EU or ties with a EU citizen; and thirdly, the programme privileges rich people over the poor, and therefore raises issues of non-discrimination because it allows only the richest third-country nationals to obtain EU citizenship, 'without any other criteria being considered'.²⁸ The European Parliament Resolution put special emphasis on the need for Member States to be careful when exercising their national competences on matters of residency and citizenship and 'to take possible side-effects into account'. It underlined that 'a number of member states have introduced schemes which directly or indirectly result in the sale of EU citizenship to third country nationals', yet no specific names were given in the Resolution.²⁹

Muscat's government reportedly did not show any preliminary signs of ceding to EU pressure, referring to the investor citizenship programmes in Austria and Cyprus, and voiced several concerns of the opposition Nationalist Party (PN) 'tarnishing the country's name overseas, by taking political infighting into the European area'.³⁰ The press reported on 17 January that the European Commission had begun laying the groundwork for a legal challenge and potential infringement proceedings against Malta on the IIP.³¹ It appears that Reding's speech of 15 January and the favourable position of the Commission's legal service on the matter encouraged the Commission's Directorate General (DG) Justice services to proceed with the case against Malta. A meeting took place in Brussels on January 29th between the Maltese authorities and representatives of the DG Justice of the European Commission where the IIP and its compatibility with EU law were discussed in detail. According to a joint press statement by the European

²⁶ EUobserver, 'EU institutions attach Malta passport scheme', 16 January 2014.

²⁷ European Parliament resolution on EU citizenship for sale, 2013/2995(RSP), 16 January 2014, Point 1.

²⁸ Ibid., Point K.

²⁹ Ibid., Points 6, 12 and 13.

³⁰ Malta Today, 'Can European Commission take Malta to court over citizenship scheme?', 19 January 2014.

³¹ Malta Today, 'IIP / Brussels contemplating infringement proceedings against Malta', 18 January 2014.

Commission and the Maltese Authorities on the IIP,³² both parties reached a common understanding on the issues at question.

The Maltese representatives presented their intentions regarding further amendments of the IIP ‘with a view to clarifying that this Programme will confer full rights, responsibilities and a full citizenship status’. The amendments would aim at establishing a ‘genuine link’ to Malta through the introduction of ‘an effective residence status in the country’ before acquiring Maltese nationality. The joint press statement stated that no naturalization certificate would be issued unless the applicant could show evidence of having resided in Malta for a period of at least 12 months immediately prior to the date of issuance. A particular issue of discussion was how this residency requirement would be implemented in practice, with the Commission insisting on a concept of residence similar to the one applied in Maltese naturalization procedures in the Maltese Citizenship Act.

Muscat announced in a press conference held on 29 January in Malta³³ that the European Commission had endorsed the IIP after the government accepted the introduction of a residency requirement, which was described as a ‘minor’ change by Muscat during the press event.³⁴ He also insisted before the press that the residency criterion would not mean that an applicant would be required to spend 365 days in the country before Maltese nationality would be granted. While these high-level political announcements seemed to conclude that the case had been closed, it was reported that the Commission services would still be ‘closely monitoring Malta’s implementation of the newly amended scheme and it will be keeping in touch’, in particular regarding the way in which the residency requirement would be applied in practice.

On 4 February 2014, the government issued an amended version of the IIP,³⁵ which included a new paragraph 7.12 according to which ‘[n]o certificate of naturalisation under these regulations shall be issued unless the main applicant provides proof that he has been a resident of Malta for a period of at least twelve months preceding the day of the issuing of the certificate of naturalisation’. The Malta Independent reported that ‘the Commission was actually still analysing the text to confirm that it ensures that its “effective residence” requirement is met’.³⁶ In the meantime, the Maltese government published yet another new amended version of the IIP on 14 February, further specifying questions related to the residency criterion, in particular the so-called ‘Form N’ on the application for naturalization as a citizen of Malta. In its final version, the form included

³² European Commission Press Release, *Joint Press Statement by the European Commission and the Maltese Authorities on Malta’s Individual Investor Programme (IIP)*, 29 January 2014, MEMO/14/70.

³³ Malta Today, ‘Malta, EC reach agreement on citizenship, Reding welcomes breakthrough’, 29 January 2014.

³⁴ Ibid.

³⁵ Individual Investor Programme of the Republic of Malta Regulations, 2014, L.N. 47 of 2014, Maltese Citizenship Act (CAP. 188), B 341. See also Citizenship (Amendment) Regulations, 2014, L.N. 17 of 2014, Maltese Citizenship Act, CAP. 188.

³⁶ Malta Independent, ‘Government amends Citizenship Act again, but residency still remains undefined’, 16 February 2014.

two new elements in the 'I Declare' section: first, that the applicant undertakes to provide proof of residence in Malta prior to being granted a certificate of naturalization as a citizen of Malta; and second, that the applicant will take an oath of allegiance to Malta and declares 'to do all things necessary to evidence my new allegiance'.

While these new amendments position the IIP more in line with the European Commission's demands, the way in which the 'effective residency requirement' will be implemented and consistently assessed in practice still remains unclear.³⁷ During the negotiations between the Commission and the Maltese authorities, which preceded the change in the law, the Commission's position regarding the meaning of 'effective residence' was to apply a similar residency requirement as in ordinary naturalization procedures. However, the Maltese government declared on several occasions that the 12-month criteria would not mean that applicants necessarily have to live in the country to apply, nor that they would need to set foot on Malta. According to an interview held with the Maltese authorities for the purposes of this essay,³⁸ the calculation of time would still be different from the one applicable to other naturalization procedures. If the applicant resided in Malta for the last six months before the submission of the application, this period of residence would be counted in the 12-month period. Although a number of potential applicants have already expressed interest in the Maltese citizenship scheme,³⁹ doubts remain as to whether the concept of residency fulfils the Commission's criteria.

§4. INVESTOR CITIZENSHIP PROGRAMMES IN THE EU: A COMPARATIVE OUTLOOK

The Maltese citizenship-for-sale programme was in the eye of the storm in EU debates over the last months of 2013 and the beginning of 2014. Yet, the Maltese scheme is not so unique across the Union. Similar programmes have been introduced in a few other Member States during 2013, which grant fast-track naturalization to rich foreign investors and donors.

Cyprus for instance introduced a new investor citizenship programme in mid-2013 that is very similar to the Maltese IIP. The Cypriot Scheme for Naturalisation of Investors, adopted by the Council of Ministers on 24 May 2013,⁴⁰ provides a fast-track acquisition

³⁷ Ibid.

³⁸ Interview with representatives of Permanent Representation of Malta to the EU, Brussels, 21 February 2014.

³⁹ Times of Malta, 'First applicants for Maltese citizenship are approved', 16 March 2014. Also, Malta Today reported that by mid-February 2014, a total number of 277 requests for Maltese passports had been received, see Malta Today, 'Foreign Minister says 277 requests for Maltese passport received in Embassies', 17 February 2014.

⁴⁰ Scheme for Naturalisation of Investors in Cyprus by exception on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002–2013, Council of Ministers Decision dated 24.5.2013, www.moi.gov.cy.

of nationality.⁴¹ The programme presents similar features to the Maltese IIP, such as the combination of investment and a donation to the state as criteria for naturalization and no effective residency condition. Fast-track investor naturalization comes with the following price tags: € 2 million purchase of shares/bonds with the National Treasury, and € 0.5 million donation to a Research and Technology Fund; or direct investments in Cyprus of € 5 million; or personal fixed-term deposits for three years in Cypriot banks or deposits in privately owned companies or trusts of € 5 million; or a combination of mixed investment and donation to a State Fund of € 5 million; or deposits in national banks amounting to a total of at least € 3 million.

Bulgaria has an investor citizenship programme with some important distinguishing components. Similar to the cases of Malta and Cyprus, the Bulgarian programme was adopted in early 2013. Under the scheme, foreign applicants who have been granted a permanent investor residency permit⁴² will acquire Bulgarian citizenship without demonstrating Bulgarian language proficiency or renouncing any other nationality.⁴³ Still, the applicant will be eligible for naturalization without needing to comply with the 5 years residency requirement applicable to all other applicants to be granted with long-term stay and naturalization in Bulgaria.⁴⁴ Permanent residents under the investors' scheme will have facilitated access to Bulgarian nationality in this way, without the need to reside continuously in the country for five years prior to the submission of the naturalization application.⁴⁵ Permanent residence is granted to non-Bulgarian nationals who have invested over BGN 1,000,000 (+/- € 500,000) in the country, in addition to other financial conditions, or have invested BGN 6,000,000 (+/- € 3,000,000) in a Bulgarian company.⁴⁶

The Maltese authorities had already referred in media and political discussions to the 'citizenship-by-investment programme' in Austria as a justification of their own initiative. Austrian authorities declared that Austria has never sold citizenship and that Maltese media and public officials were misinterpreting Austrian law.⁴⁷ Austria does have an unofficial investor citizenship programme which is negotiated with applicants on a case-by-case basis; Dzankic⁴⁸ has highlighted that the actual regulation of the 'citizenship

⁴¹ According to Section A6 of the law, 'the applicant must hold a permanent privately-owned residence in the Republic of Cyprus, the market value of which must be at least € 500,000, plus V.A.T'.

⁴² Foreigners in the Republic of Bulgaria Act (FRBA), as amended in February 2013.

⁴³ Bulgarian Citizenship Act (BCA), SG, 136, November 18, 1998, amended SG 41, April 26, 2001, amended SG 54, May 31, 2002, amended in February 2013, Section III, Acquiring Bulgarian citizenship by naturalisation. See D. Smilov and E. Jileva (2013), 'Country Report: Bulgaria', *EUDO Citizenship Observatory* (2013), <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=2013-22-Bulgaria.pdf>, p. 12.

⁴⁴ Article 12.2 of the BCA.

⁴⁵ Article 25.5 of the FRBA (amend. – SG 29/07; revoked – SG 9/11; new – SG 23/13; amend. – SG 70/13).

⁴⁶ Refer to Article 25 FRBA (amend. SG 11/05; amend. – SG 36/09).

⁴⁷ Times of Malta, 'Austria denies it has ever sold citizenship – Council insists various factions are "misinterpreting laws"', 23 January 2014.

⁴⁸ J. Dzankic, 'The Pros and Cons of Ius Pecuniae: Investor citizenship in comparative perspective', *EUI Working Papers RSCAS 2012/14* (2012), http://cadmus.eui.eu/bitstream/handle/1814/21476/RSCAS_2012_14.pdf.

by investing' in Article 10.6 of the Austrian Nationality Act is in fact an unofficially recognized investor citizenship programme,⁴⁹ where no residency requirement seems to apply as a criterion for naturalization. In her analysis, she points out that the programme is loosely regulated and largely dependent on a high degree of discretion on the part of the government and relevant ministry.

That notwithstanding, it is important to highlight that there are clear differences when comparing the Austrian schemes to those identified in Malta, Cyprus and even Bulgaria. The provisions in Austrian law do not form, at least formally, the basis of an investor or donor citizenship programme. The donation and/or investment components are absent. It has neither been publicly presented nor advertised as such by the Austrian government. Furthermore, a fundamental difference between these programmes is one of the newest features characterizing systems such as those described in Malta and Cyprus, namely the idea of a 'donation', according to which the state granting nationality requires wealthy foreigners to deliver a substantial financial donation which the applicant will never get back. In Malta, the IIP demands applicants to pay € 650,000 of which 70% will go to a National Development and Social Fund, which according to Maltese law 'shall be used in the public interest inter alia for the advancement of education, research, innovation, social purposes, justice and rule of law, employment activities, the environment and public health'.⁵⁰ Similarly, in Cyprus, the applicants can qualify for the scheme for naturalization of investors through a combination of mixed investment and donation to a state fund of € 5 million.⁵¹

The answer to the question 'how much does citizenship cost' in the EU is therefore a fragmented one, depending upon the domestic nationality legal systems in each Member State. There are at least three EU Member States where EU citizenship has now a price tag: Malta: +/- € 1.15 million; Cyprus: +/- € 2 and € 5 million; and Bulgaria: +/- € 500,000. One of the key features of these schemes is the financial donation, going beyond actual investment in the country, which creates an even higher degree of dissonance. There is certainly a question of comparative price and value. Some Member States are taking advantage of the margin of manoeuvre on questions of acquisition and loss of nationality to design strategic nationality and attractive migration schemes for their own economic advantages and national interests. The question is whether these programmes are also in the EU's interest when the actual interest of people in the programmes is to live elsewhere in the EU, not in the state that has pocketed the money. If this is the case, then the Member States offering the schemes may be classified as free riders, and unjustly benefit from the attractiveness of life in other Member States that they have not paid for

⁴⁹ Article 10.6 of the Federal Law concerning the Austrian Nationality (Nationality Act, 30 July 1985, Federal Law Gazette of the Republic of Austria, FLG No. 311/1985).

⁵⁰ Paragraph 13.2 of the Individual Investor Programme of the Republic of Malta Regulations, 2014, Maltese Citizenship Act (CAP. 188), L.N. 47 of 2014.

⁵¹ Scheme for Naturalisation of Investors in Cyprus by exception on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002–2013, Council of Ministers Decision dated 24 May 2013.

or participated in creating. By instrumentalizing the granting of their citizenship, they are selling something they do not own (or pay for) – life in other Member States.

§5. LEGAL GROUNDS BACKING EU INTERVENTION: POST-NATIONAL CITIZENSHIP PRINCIPLES AND ACCOUNTABILITY VENUES

The political reactions by the Commission and the European Parliament were unprecedented on questions related to the regulation of nationality of a Member State of the Union. For the first time, informal pressure and the threat of infringement proceedings by the Commission led to substantive amendments of Member State law dealing with the acquisition of nationality. Few commentators had anticipated the ways in which the affair has developed and been settled.⁵² Still, the Commission successfully managed to intervene and persuade the Maltese authorities to amend the IIP. How did this happen?

A. SUPRANATIONAL STANDARDS AND JUDGE-MADE PRINCIPLES

One of the main subjects of controversy since the start of the Malta passport-for-sale affair was the outright selling of Maltese nationality and citizenship of the Union without the need for applicants to show any sort of ties with Malta. As the former Vice-President of the Commission expressed in her speech before the European Parliament: ‘In compliance with the criterion used under public international law, member states should only award citizenship to persons where there is a “genuine link” or “genuine connection” to the country in question’.⁵³ This was also a point taken by the Parliament’s Resolution on EU Citizenship for Sale of 16 January 2014.⁵⁴ The result of the Commission’s intervention was translated into a series of subsequent amendments to the IIP included in the Maltese Citizenship Act, which aimed at ensuring the fulfilment of a ‘genuine link’ through the introduction of an ‘effective residence’ status in Malta prior to naturalization.⁵⁵

The ‘genuine link’ argument used by the European institutions constitutes an import from a standard in public international law, according to which there must be an effective connection or some sort of tie between an individual and the state whose nationality the person acquires or possesses. While states keep their monopoly of action

⁵² J. Shaw, ‘Citizenship for sale: Could and Should the EU Intervene?’, in A. Shachar and R. Baübock (eds.), *EUI Working Papers RSCAS 2014/01* (2014), p. 33.

⁵³ Europa Rapid Press Release, *Viviane Reding, Vice-President of the European Commission responsible for Justice, Citizenship must not be up for sale*, 15 January 2014, SPEECH/14/18.

⁵⁴ European Parliament resolution on EU citizenship for sale, 2013/2995(RSP), 16 January 2014, para. 7.

⁵⁵ European Commission Press Release, *Joint Press Statement by the European Commission and the Maltese Authorities on Malta’s Individual Investor Programme (IIP)*, 29 January 2014, MEMO/14/70.

when determining who is or is not a national – the argument continues – international law has recognized the power to safeguard against arbitrary or artificial situations of naturalization and nationality-related decisions, where there are effects on the relations of states.⁵⁶ The International Court of Justice (ICJ) gave birth to this theory in the landmark ruling *Liechtenstein v. Guatemala* (“*Re Nottebohm*”) of 1955,⁵⁷ where it held that nationality constitutes:

(...) a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.⁵⁸ (Emphasis added).

The ICJ gave special relevance to the existence of an ‘effective link’ between the person and the state for determining that genuine connection, and ruled in favour of Guatemala not to recognize the nationality of Mr. Nottebohm as he lacked any prior ‘bond of attachment’ or had very marginal links with Liechtenstein. Amongst the factors playing a role in determining the existence of ‘the link’, the ICJ highlighted the need to take into consideration, amongst others, issues such as the habitual residence of the individual concerned. In the case of Mr. Nottebohm, this criterion was not met, as he neither enjoyed prolonged residence in that country at the time of his application for naturalization in Liechtenstein, nor had he the intention of remaining in the country. However, current interpretations of the *Nottebohm* decision consider that conferral of Liechtenstein nationality did not entitle Liechtenstein to give diplomatic protection; the conferral of nationality was in fact valid in spite of the lack of a genuine link.

Moving now to the European Union, the CJEU has controversially constrained itself from looking at issues related to the choices of Member States in deciding who has or does not have ‘the closest connection’ or link with their country, and consequently, who is entitled to the right of residence there and can be considered a European citizen for the purposes of Union law.⁵⁹ The CJEU has nevertheless reiterated in several rulings that Member States’ decisions laying down the grounds of acquisition and loss of nationality must be exercised in ‘due regard of [Union] law’.⁶⁰ As the 2010 *Rottmann* case demonstrated,⁶¹ even though the acquisition and loss of nationality remains regulated under the exclusive remits of Member States’ legal systems, the fact that the case at hand

⁵⁶ S. Hall, *Nationality, Migration Rights and Citizenship of the Union* (Martinus Nijhoff Publishers, 1995).

⁵⁷ *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4 (6 April).

⁵⁸ *Ibid.*, p. 23.

⁵⁹ Case C-192/99 *Kaur* [2001] ECR I-01237. P. Shah, ‘Case note on *Kaur*’, 3 *European Journal of Migration and Law* (2001), p. 271–278. E. Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International, 2004), p. 76.

⁶⁰ Case C-369/90 *M. V. Micheletti and others v. Delegacion del Gobierno en Cantabria* [1992] ECR I-4239, para. 10; See also Case C-192/99 *Kaur*; Case C-200/02 *Zhu and Chen v. Secretary of the State for the Home Department* [2004] ECR I-9925; and Case C-148/02 *Garcia Avello* [2003] ECR I-1163.

⁶¹ Case C-135/08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-01449.

presented a foreign element or a 'cross-border dimension' brought it within the scope of European law, and hence could not be considered as a purely internal situation.⁶²

This judgment constituted one of the legal grounds used by DG Justice in its negotiations with Malta over the IIP.⁶³ The Luxembourg Court also reiterated that the obligation for Member States to have due regard to Union law in the exercise of the Member States' competence, which encompasses the obligation for national regulations setting the conditions for the acquisition and loss of nationality, to be compatible with the EU rules and to respect the rights of Union citizens.⁶⁴ One of the central aspects of the Advocate General's Opinion in the *Rottmann* ruling was the relevance of the general principles of EU law in restricting the legislative power of Member States in nationality matters, in particular the EU principle of sincere cooperation, which in the Advocate General's view 'could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalization of nationals of non-member states'.⁶⁵

B. THE PRINCIPLE OF SINCERE COOPERATION RE-LOADED

The general principle of EU law, which played a most decisive role in the Maltese citizenship-for-sale affair, was indeed the principle of sincere or loyal cooperation. This principle effectively means that the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks that flow from the Treaties. Further, it requires Member States to facilitate the achievement of the Union's tasks and to refrain from any measure that could jeopardize the attainment of the Union's objectives. As Lang has argued, Article 4 TEU obliges Member States to abstain from introducing measures jeopardizing the objectives of the Treaties, and the respect of general principles of EU law constitutes 'a necessary condition for the operation of Community law'.⁶⁶ The principle is formally enshrined in Article 4(3) TEU.

The provision includes two general duties or positive obligations for the Member States in their mutual relations as well as those with the EU:⁶⁷ First, a reciprocal obligation to assist each other and second, a duty to take any measure facilitating the fulfilment

⁶² Opinion of Advocate General Poires Maduro in Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, para. 10.

⁶³ EUobserver, 'EU Commission prepares legal challenge on Malta passport sales', 14 January 2014.

⁶⁴ Opinion of Advocate General Poires Maduro in Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, para. 23. For an analysis, see J. Shaw (ed.), 'Has the European Court of Justice Challenged Member State sovereignty in Nationality Law?', *EUI Working Papers RSCAS 2011/62* (2011), http://eudo-citizenship.eu/docs/RSCAS_2011_62.pdf.

⁶⁵ Opinion of Advocate General Poires Maduro in Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, para. 30.

⁶⁶ J.T. Lang, 'Community Constitutional Law: Article 5 EEC Treaty', 27 *Common Market Law Review* (1990), p. 645–681.

⁶⁷ K. Mortelmans, 'The Principle of Loyalty to the Community', 5 *Maastricht Journal of European and Comparative Law* (1998), p. 86.

of obligations emerging from primary or secondary EU law. It also covers one specific prohibition or negative obligation, which consists of abstaining from adopting measures jeopardizing the Union's objectives. The principle of loyalty has configured itself as one of the most dynamic provisions in the Treaties, in particular its centrality in the regulation of EU-Member State relationships and cooperation in the functioning of the European law.⁶⁸ The role played by the CJEU here has been fundamental in understanding the principle as a *legal duty* for Member States to respect their obligations enshrined in Article 4(3) TEU in defence of the Union's interests.⁶⁹ The CJEU has considered the principle as a key component of the EU legal system, lying at its core,⁷⁰ and as a duty of general application across the various areas of European law.

As Craig and de Búrca have pointed out, the Court has often emphasized that the duty of genuine cooperation is of general application and is not dependent on whether the Community competence is exclusive.⁷¹ This indicates that the scope *ratione materiae* of the principle of sincere cooperation extends also to areas of intervention in domains of 'overlapping' competence between the Union and national arenas, or even in domains where Member States retain the monopoly of action. By analogy, could this also apply to nationality and citizenship matters?

C. SINCERE COOPERATION, NATIONALITY AND THE GENUINE LINK: LIVING APART TOGETHER?

The extent to which general principles of EU law have remodelled Member States' autonomy on the regulation of nationality matters has been subject to rich discussion in the literature.⁷² De Groot has argued that certain actions or inactions by EU Member States in regulating the grounds of acquisition and loss of nationality could be in violation of EU general principles, such as the principle of sincere cooperation. In his view, such confrontation could arise when a Member State would (by surprise) confer its nationality to a large or disproportionate number of persons holding the nationality of a non-EU Member State, without prior consultation with the other Member States and Brussels.⁷³

⁶⁸ M. Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, 2014).

⁶⁹ J.T. Lang, 'Developments, Issues and New Remedies – The Duties of National Authorities and Courts under Article 10 EC Treaty', 27 *Fordham International Law Journal* (2003), p. 1904–1939.

⁷⁰ Joined Cases 6/69 and 11/69 *Commission v. France* [1969] ECR 523, para. 16; see also Case 43/75 *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455, para. 28. See J.T. Lang, 27 *CMLRev* (1990).

⁷¹ P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (5th edition, Oxford University Press, 2011).

⁷² C. Gortázar Rotaèche, 'Identity, Member States Nationality and EU Citizenship: Restitution of Former European Nationals v. Naturalisation of New European Residents?', in E. Guild, C. Gortázar Rotaèche and D. Kostakopoulou (eds.), *The Reconceptualisation of European Union Citizenship* (Brill Nijhoff, 2013), p. 15–32.

⁷³ R.-G. De Groot, 'The Relationship between the Nationality Legislation of the Member States of the European Union and European Citizenship', in M. La Torre (ed.), *European Citizenship: An*

This was a position later followed by Advocate General Maduro in *Rottmann*.⁷⁴ D'Oliveira has been of a different opinion. In his view, the lack of consultation would not imply a violation of the principle of solidarity between the Member States in these cases,

owing to the fact that neither Member States, not the Commission, nor the Council or any other Community institution have called since 1957 for any revision or implementation (...), it appears that the lack of solidarity with the Community in this area is not an issue.⁷⁵

The Malta citizenship-for-sale affair provides us now with a tangible example where the European institutions, in particular the Commission and the European Parliament, have reacted against a national measure concerning the acquisition of nationality and called for its modification, and where the principle of loyal cooperation has been brought to the forefront of the discussions. The application of the sincere cooperation duty in the Maltese affair, however, is not exempt from a number of open questions, which call for further consideration and reflection.⁷⁶ Yet, how was the Union's interest affected in the Malta citizenship-for-sale affair? The first step in determining the applicability of this provision to the Maltese citizenship programme is identifying the objective at risk.

A likely candidate for any attack on the Maltese passport-for-sale programme could be the coherence of the internal market. Selling passports to people who want to enjoy free movement within the EU could be regarded as inconsistent with the spirit of the internal market.⁷⁷ Malta was viewed as taking advantage of the margin of manoeuvre on grounds of nationality to design a citizenship investor scheme for its own economic interests, whose main attractiveness included the possibility for applicants to move and reside elsewhere in the EU. It would be difficult for the internal market to be disproportionately perturbed by the arrival or intra-EU mobility/residence of a few thousand people on newly purchased Maltese passports. Yet, what may be learned from the Malta citizenship-for-sale affair is that when determining the compatibility of Member States' actions/inactions on grounds of acquisition of nationality, their *qualitative* effects may sometimes take precedent over quantitative ones. While the consequences of the Maltese IIP would be indeed marginal in pure numerical terms, the qualitative or substantive effects of the IIP seemed to be given far more weight.

The commercialization of Union citizenship even went a step further in the case of Malta by the introduction of a private-sector actor as the intermediary between the state and foreigners seeking to purchase citizenship. This was a point that the Commission did

Institutional Challenge (Kluwer Law International, 1998), p. 115–147; R.-G. De Groot, 'Towards a European Nationality Law' (Inaugural Lecture, University of Maastricht, 2003), p. 20–21.

⁷⁴ Opinion of Advocate General Poiares Maduro in Case C-135-08 *Janko Rottmann v. Freistaat Bayern*.

⁷⁵ H.U. Jessurun d'Oliveira, 'Nationality and the European Union after Amsterdam', in D. O'Keefe and P. Twomey, *Legal Issues of the Amsterdam Treaty* (Hart, 1999), p. 395–412, p. 405.

⁷⁶ E. Neframi, 'The Duty of Loyalty: Rethinking Its Scope Through its Application in the Field of EU External Relations', 47 *Common Market Law Review* (2010), p. 323–359.

⁷⁷ Article 3.3 TEU.

not particularly emphasize, yet it was one of the most objectionable aspects of the sale of Maltese citizenship from the perspective of the EU. The operational implementation of the IIP was put in the hands of a concessionaire. A private business was charged with finding wealthy people who would like another passport and selling to them the idea of buying a Maltese one. The bargain for citizenship and the merits and weaknesses of purchasing Maltese citizenship fell to a commercial enterprise. From the way in which the concessionaire advertises the Maltese programme, one could conclude that the people whom the business is targeting do not particularly want to live or reside in Malta. The company anticipates that the possibility to move and live in some other EU Member State or even the US will attract 'the customer'.⁷⁸ Thus, the price of Maltese citizenship is based on the acquisition of EU citizenship, and the rights and freedoms that it bestows. The people buying Maltese citizenship really want to live somewhere else in the EU and are willing to pay the price to Malta. From this perspective, Malta could be seen as a free rider charging a hefty price for people to buy something that other EU Member States provide and pay for – residence in their country and Union citizenship.

Therefore, the main EU objective at risk by the Maltese IIP was the very status of citizenship of the Union. In light of the kind and the scope of the responses by the European Commission and the European Parliament, tagging a price to citizenship of the Union by the Maltese IIP was deemed by European institutions to jeopardize the substance of citizenship of the Union and its common nature to nationals of EU countries. Allowing the richest third-country nationals to obtain fast-track EU citizenship was additionally considered discriminatory in nature.⁷⁹

In order to address these concerns, one of the main demands by the Commission for Malta to address its duty of sincere cooperation was to introduce a 'genuine link' or 'genuine connection' developed in the above-mentioned ICJ *Nottebohm* judgment for awarding Maltese citizenship to any applicants under the IIP. The Commission's understanding of 'the link' was a requirement calling Maltese authorities to introduce 'an effective residence status in the country' requirement prior to the acquisition of Maltese nationality. The 'linking factor' in nationality matters however bears some reflection. What is that genuine link really about? What are the exact grounds for determining that a link is *de facto* 'genuine'? How to determine those links or 'bonds' in an objectively verifiable manner? The line of argumentation by the ICJ in *Nottebohm* has been in fact subject to rich and critical scholarly debate, and there are various ways to interpret it.

Scholars like Hall have argued in favour of the ICJ doctrine and emphasized that the duty of sincere cooperation would be breached when a Member State grants its nationality to a person who does not possess a genuine link with that state, as his/her clothing as a national of that Member State could be considered to be ephemeral, abusive

⁷⁸ Malta Independent, 'Malta's VWP impact on US immigration to be reviewed in 2014', 24 November 2013.

⁷⁹ European Parliament resolution on EU citizenship for sale, 2013/2995(RSP), 16 January 2014, para. K.

or simulated, and hence contravening the standard enshrined in *Nottebohm*.⁸⁰ Others have been critical about the narrowness of the genuine link concept and the high level of subjectivity left in the hands of the nation-state in trying to determine the existence of links such as ‘bond of attachment’ or other ‘social ties’, which has in the past posed fundamental rights challenges.

Guild has alluded to the ways in which states have misused the genuine link requirement to exclude certain groups of people from their citizenship and security of residence status in a manner contrary to non-discrimination on the basis of race and ethnicity.⁸¹ The case of the British nationals from East Africa who were excluded from residency in the UK under the Commonwealth Immigrant Act of 1968 constitutes a case in point. The European Commission of Human Rights (ECmHR) of the Council of Europe declared the Act to be contrary to Article 3 of the European Convention of Human Rights, meaning it is inhuman and degrading treatment by discriminating on the basis of race or colour.⁸² This did not preclude the UK from passing the British Nationality Act in 1981 and re-allocating citizenship to those persons presenting ‘a link’ to the UK which was dependent on whether a parent was born in the UK, and therefore categorized the East African Asians as ‘British Overseas Citizens’ without a right of residence and falling outside the meaning of UK nationals for the purposes of Union citizenship law.

The European Parliament’s and European Commission’s insistence on the link as the most important dimension within the larger context of the principle of sincere cooperation can therefore be seen as a double-edged argument raising a fundamental dilemma from the angle of Union citizenship. The residence criteria could arguably constitute one of the more objectively verifiable factors of the relationship between a person and the country granting naturalization. Yet, what is precisely ‘habitual’, ‘effective’ or ‘functional’ residence for the purposes of European citizenship law? As the Maltese citizenship-for-sale affair illustrates, the exact meaning and scope of residence remains grey or contested, and is still subject to a certain degree of arbitrariness and flexible application with respect to wealthy foreigners. On the other hand, by supporting the *Nottebohm* standard the European institutions may be in fact fuelling nationalistic misuses by Member States of the genuine link as a way to justify restrictive domestic policies on the acquisition of nationality – such as those culturally-driven components of the ‘genuine link’ related to integration/assimilation tests – whose compatibility with other EU general principles (such as fundamental rights) remains at stake.⁸³

⁸⁰ S. Hall, *Nationality, Migration Rights and Citizenship of the Union*. See also S. O’Leary, ‘Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows’, 12 *Yearbook of European Law* (1992), p. 353.

⁸¹ E. Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, p. 68–81.

⁸² *East African Asians v. United Kingdom* [1973] 3 EHRR 76.

⁸³ S. Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (Martinus Nijhoff Publishers, 2009), p. 383–387.

Consequently, the dilemma that emerges from the insistence by the European Parliament and the Commission on the need for Member States to ensure and strengthen the genuine connection could paradoxically lead to the reinforcement of nationalism in determining who is or is not an EU citizen, and the possible exclusion of certain groups of people from EU citizenship in a manner that is inherently in tension with non-discrimination. A similar dilemma can be found in the critical analysis carried out by Shachar and Hirschl on cash-for-passport programmes in the EU which put up for sale what they call '*Olympic citizenship*' to the world's moneyed elite.⁸⁴ By advocating the prohibition of these programmes and instead over-valuing the public act of naturalization and the need for the existence of a '*just nexi*' or '*real connections*' between the state granting nationality and the individual, these authors may be indirectly supporting the uses of exclusionary and nationalistic citizenship practices focused on testing 'the link' or integration of the applicant in a constructed set of national liberal democratic values.

After all, when moving within the EU legal system, EU Member States had been specifically prohibited by the Luxembourg Court from questioning the citizenship decisions of other Member States and strictly following the *Nottebohm* line of reasoning on the genuine link. In the *Micheletti* case, the CJEU held that as long as a Member State acknowledges someone as its citizen,⁸⁵ other Member States are not permitted to look past that decision, for including the existence of a link, in order to justify restrictions to EU citizenship rights and freedoms.⁸⁶ Also, the Commission might not have taken due consideration that, while the ICJ did not consider that *Nottebohm* was entitled to diplomatic protection by Liechtenstein, the conferral of nationality was in fact valid despite lacking a 'genuine link'. By bringing back a certain reading of the ICJ argumentation on the genuine link enshrined in the *Nottebohm* ruling in nationality matters for the purposes of Union citizenship, the Commission may be providing Member States with the possibility to re-use or misuse the lack of the 'real links' argument for limiting and/or restricting EU citizenship freedoms.

A way to address this conundrum could instead have been to underline the contravention of the principle of sincere cooperation from the free-riding logic; so that Malta and other EU Member States with similar programmes are acting as free riders, charging a price for people to buy something that other EU Member States provide and pay for – residence in their country and/or Union citizenship freedoms. In addition, the outright selling and commercialization of citizenship by the intervention of a private sector actor as intermediary affects the very concept and substance of European citizenship. Moreover, in understanding and interpreting the genuine link standard, the

⁸⁴ A. Shachar and R. Hirschl, 'On Citizenship, States and Markets', 22 *Journal of Political Philosophy* (2014), p. 231–257.

⁸⁵ J. d'Oliveira, 'Note of the Case C-390/90 Micheletti v Delegación del Gobierno de Cantabria', 30 *Common Market Law Review* (1993), p. 623.

⁸⁶ See also Case C-200/02 *Zhu and Chen*.

Commission could have more carefully considered the jurisprudence by the European Court of Human Rights in Strasbourg on citizenship-related rights, which has usefully underlined the incompatibility between some of the uses given by some EU Member States of the genuine link or connection with non-discrimination and equality treatment principles in the field of citizenship. True, the residence requirement may well constitute one of the few available ways to reduce the arbitrariness enjoyed by states selling citizenship of the Union. Yet, the risk of the genuine link argument is to take us closer to nationalism in the domain of citizenship, which defies the purposes of citizenship of the Union as the fundamental status of nationals of EU Member States.⁸⁷

As regards the procedural components of the principle of sincere cooperation, the question could be posed whether Malta should have consulted other EU Member States and the European institutions prior to the adoption of the IIP. The mere act of informing or consulting the European counterparts and institutions would not have excused Malta's breach of general principles of EU law. That notwithstanding, the Commission could have put more emphasis on the necessity for any current and future national decision affecting (directly or indirectly) EU citizenship rights and freedoms, and hence the substance of citizenship of the Union, to be subject to exchange of information and/or prior consultation to other EU Member States and its own Commission services. The Commission could have also provided clear guidance on what kinds of restrictions exist on Member States when granting citizenship which result from their duty of sincere cooperation in EU law.⁸⁸

The Maltese citizenship-for-sale affair has perhaps most importantly revealed the relevance of a set of European and international principles providing a 'post-national constellation' of normative and accountability channels and venues affecting the state's discretion on the attribution, limits or revocation of citizenship rights to individuals.⁸⁹ 'Post-national' is here used as meaning the increasing deprivation of the classic nation-state of its formally enshrined and autonomous attributes and competences, such as enforcing individual and citizenship rights. This transformed constellation of post-national citizenship principles is exerting ever more influence over the boundaries of 'who' is a foreigner and 'who' is a citizen in the European Union, as well as the traditional sovereign right of states to determine who are nationals and who are citizens, and the delivery of supranational citizenship rights, which is subject to increasing dynamism and pressure in Europe. It is here that the Maltese citizenship controversy might have constituted more of a breakthrough in the changing facets of citizenship of the Union.

⁸⁷ Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

⁸⁸ J.T. Lang, 'Developments, Issues and New Remedies – The Duties of National Authorities and Courts under Article 10 EC Treaty', 27 *Fordham International Law Journal* (2003), p. 1904–1939.

⁸⁹ J. Habermas, *The Postnational Constellation: Political Essays* (MIT Press, 2001), p. 58–112.

§6. CONCLUSION

The Malta citizenship-for-sale affair has reopened a question that has been outstanding since the origins of citizenship of the Union in 1993 and its progressive development to date: Can EU Member States' actions on the acquisition and loss of nationality still be freely practiced without any EU supervision and accountability? The Maltese Individual Investor Programme (IIP) provoked tremendous criticism both domestically and by European institutions. The price of Maltese citizenship was largely based on the acquisition of EU citizenship, and the free movement rights that it confers on the beneficiaries. In an unprecedented move in nationality matters at EU level, the European Parliament and the Commission expressed their opposition against the adoption of the investors' citizenship scheme and called on Malta to implement a series of amendments in the IIP initiative.

While Malta has been the only EU Member State expressly singled out by European institutions to bring its citizenship scheme in line with the 'EU's values', Malta is by far not the only Member State that has investor/donor citizenship programmes in the EU. There at least two other Member States where EU citizenship has a price tag, namely Cyprus and Bulgaria. These Member States may be taking advantage of their exclusive competence on questions of acquisition/loss of nationality to implement 'attractive' schemes for wealthy foreigners pursuing their own national economic advantages and interests to the detriment of those of the Union as a whole. One of the key components that is advertised for these programmes to be attractive is the possibility to move and reside somewhere else in the EU other than in the state that has pocketed the money. This positions these Member States as free-riders unjustly benefiting from the attractiveness of life elsewhere in the Union and the substance of citizenship of the Union. It is striking to see that no other EU Member State has been called to attention by the European institutions, which could give rise to arguments of inequality of treatment.

This essay has argued that the EU responses could be viewed as a legal precedent in ascertaining the lawfulness of current investor citizenship programmes across the Union as well as future nationality-citizenship disputes related to Member States' actions/inactions on the acquisition of nationality. Contrary to preliminary assumptions, the Commission and the European Parliament have successfully claimed co-ownership over citizenship matters, especially when domestic regulations have an impact over supranational citizenship, individual freedoms and the EU general principle of sincere cooperation. While the quantitative implications of the IIP would be limited in relation to the number of applicants benefiting from the scheme and potentially moving/residing in other EU Member States, the European institutions gave preference to the qualitative repercussions of selling nationality over the substance of citizenship of the Union. The Maltese citizenship-for-sale programme jeopardized the duty of sincere cooperation by putting at risk the substance of Union citizenship. The European institutions made special reference to a set of supranational legal standards and judge-made general

principles of law, in particular the need for Maltese nationality law to ensure a 'genuine link' between the applicant for naturalization and the country in the form of an effective residence requirement. The lack of this 'link' was viewed as a violation of the EU principle of sincere cooperation.

The European institutions' insistence on the genuine link as a key component of the larger context of the principle of sincere cooperation poses a fundamental dilemma: what is this genuine link really about? While effective residence could constitute one of the most objective ways to ensure legal certainty in the citizenship by investment naturalization in Malta, the actual concept of genuine link and effective residence are still open to a certain degree of arbitrariness and margin of manoeuvre by Member State authorities in the domains of nationality and citizenship. The genuine connection argument has also justified Member States' use of discriminatory practices and naturalization conditions calling upon applicants to show societal ties or assimilation to the receiving country. By insisting mainly on the genuine link standard, European institutions may be fuelling nationalism by Member States in the determination of who is or is not a EU citizen.

The Maltese citizenship-for-sale affair represents a first direct incursion of European institutions in a previously exclusive terrain of competence belonging to EU Member States. It has shown the increasing importance of a set of European and international general principles limiting the discretion of Member States in citizenship matters. This set of general principles has been designed along an institutional system scrutinizing Member States' actions in light of their implications for citizenship freedoms, and limiting their discretion in determining the scope of the citizenry.