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INVESTMENT MIGRATION FROM THE STANDPOINT OF INTERNATIONAL AND EU LAW

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ABSTRACT

Investment migration programmes are used by over eighty states globally and pose serious security and criminal risks. Their existence is additionally complex in the EU, as EU citizenship opens up its internal market and grants a set of political rights. Relying predominantly on the normative-legal method, the authors analyse the compatibility of investment migration with international and EU law. The purpose of this analysis is twofold. First, it determines whether national autonomy in citizenship matters is subject to limitations by international and EU law since they impact the legality of investment migration. Second, implications of the *Nottebohm* case are analysed to determine the relevance of the genuine link criterion for the international recognition of nationality. It was concluded that the genuine link criterion does not affect the legality of investment migration in international and EU law. Instead, legality is achieved if investment migration programmes comply with rules on combating corruption, money laundering, and tax evasion. While authors give due regard to the autonomy of EU law, the need to avoid the danger of the "vertical aspect" of international law fragmentation, i.e., incoherence between EU and international law, and to avoid the creation of an imbalanced legal environment is considered a priority.

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Introduction and Conceptual Background

Investment migration is defined by the Investment Migration Council as a form of legal migration used by more than eighty sovereign states globally. It encompasses various immigrant investor programmes (citizenship and residence by investment programmes), allowing individuals to gain citizenship or residence rights in exchange for investments in their host countries (Investment Migration Council 2019, 1). They are commonly referred to as golden programmes (Zhang 2024) or immigrant investor programmes (IIPs) (Džankić 2018).

Contemporary investment-based migration laid its roots in the early 1980s and has spread all over the globe in recent years. The first wave of IIPs emerged in the early 1980s when the government of Australia introduced its Business Migration Programme, granting residence rights based on investment (Stevens 2016). The concept was followed by numerous African, American, and European countries (Džankić 2018, 66). The second wave of wealth-based immigration programmes appeared in the aftermath of the Great Recession that began in mid-2007. It reflected a tendency according to which investment migration programmes were created during a crisis (Hartwig-Peillon 2021, 1). More specifically, certain island nations off the coast of Africa, North America, and Oceania introduced wealth-based immigration programmes at the time of the 2007-2009 global financial crisis. Most investment migration programmes in the European Union (EU) were launched or revived in the aftermath of the subprime mortgage crisis between 2011 and 2013. By 2016, each EU member state had launched at least one legal mechanism for facilitating investment-based migration, either through an investor citizenship scheme based on the state's discretion to naturalise or through a residence by investment programme granting "a path to citizenship" (Džankić 2018, 65-66). In 2019, there were only three EU member states (Bulgaria, Malta, and Cyprus) granting citizenship by investment (CBI) without requiring physical residence, while at that time, 20 EU member states were running residence by investment (RBI) schemes (Zabrocka 2023, 48).

Although the CBI and RBI schemes became more popular in the previous decade, the concept seems to have started fading out recently. By 2023, the respective landscape in the EU changed due to the multiple political pressures and criticism of the practice by EU bodies. Namely, since 2014, the European Parliament has persistently opposed the CBI and RBI programmes, calling for the termination of the CBI schemes and the comprehensive EU-level regulation of the RBI schemes (Zhang 2024). Two resolutions addressing concerns regarding investment schemes adopted by the European Parliament in 2014 and 2019 (Zabrocka 2023, 53) were followed by a European Commission

(Commission) Report in 2019 (2019 report). The 2019 Report comprehensively scrutinised the existing RBI and CBI schemes in the EU member states and identified risks they pose, but also asserted some of the Commission's positions regarding the CBI schemes in particular. Following up on the 2019 Report, in April 2020, the Commission reiterated its concerns and instituted infringement procedures against Malta and Cyprus (EC 2020). In November, following the suspension of the Cyprus CBI Programme, Malta introduced new policies based on constructive feedback. In March 2022, the European Parliament adopted a Resolution with proposals to the Commission on the CBI and RBI schemes in the EU (2022 Resolution) (EP Res. 2021/2026(INL)). The 2022 Resolution supported the Commission's endeavours aimed at the termination of the CBI schemes and called again on the Commission to establish EU standards that would govern the RBI schemes. Interestingly, the 2022 Resolution also called on the Commission to exert pressure on non-EU countries to abolish their CBI schemes and reform their RBI schemes in a way that would align them with EU law and standards (EP Res. 2021/2026(INL), para. 25). This request concerned those non-EU countries that have the CBI and RBI schemes in place and benefit from visa-free travel to the EU.

For now, there remains only one EU member state—Malta—granting the CBI programmes without the condition of physical residence and 12 EU member states running the RBI programmes in the EU. In September 2022, the Commission referred Malta to the Court of Justice of the European Union (CJEU) for its CBI scheme (EC 2022).

The issue of investment migration schemes introduced by some states has been surrounded by controversy and is at the heart of a lively legal and socio-political debate over the last decade (Zabrocka 2023, 52). It has been argued by academics and policymakers that both CBI and RBI types of schemes pose serious security risks and risks of money laundering, tax evasion, fraud, and criminal activities, including corruption and the financing of terrorist activities (Weiler 2024; Hartwig-Peillon 2021, 8; Xu, El-Ashram, and Gold 2015, 8; Brillaud and Martini 2018, 31). In addition, concerns were raised due to the emerging trend of commoditising citizenship and treating it as nothing more than a sellable good, which implies that investors do not necessarily need to establish a "genuine link" with the country offering naturalisation for investment (Shachar 2021, 544; EC 2020). In that context, some scholars (Parker 2017; Tanasoca 2016; Shachar and Hirschl 2014) examined the ethical dimensions of the link between citizenship and money, underscoring the benefits and challenges of selling citizenship. Other scholars have explored the impact of investment migration schemes around the globe on global inequality (Boatcă 2015; Christians 2017; Zabrocka 2023, 72) and concluded that they pose a grave risk to vulnerable individuals and set a troublesome trend. Now, access to desirable

locations could be bought, and those who cannot afford it would be left behind. The schemes strengthen the existing distinction between "wanted" and "unwanted" immigrants and create first- and second-class citizens (Shachar 2021, 545).

Some scholars point out the apparent migration-sustainability paradox since migration plays a role as a driver of unsustainability, as a part of economic globalisation, while simultaneously representing a potential force for sustainable development. In other words, it has been argued that migration affects positively some sustainability dimensions in general while having adverse effects on others. Therefore, the net effect remains ambiguous. In that context, the economic, social, and environmental dimensions of sustainability were revisited in order to determine how they can benefit from improved migration governance (Gavonel et al. 2021, 98, 106). It is believed that the recognition of migration, including investment migration, as a core development consideration by the 2030 Agenda for Sustainable Development (2030 Agenda) will pave the way for greater collaboration between the migration and development sectors and thus contribute to overcoming the aforementioned paradox (IOM 2018, 14). From the standpoint of the 2030 Agenda, migration is considered "an important item in the toolbox for reducing poverty", which affects the implementation of Sustainable Development Goal (SDG) 1 (Hagen-Zanker, Postel, and Vidal 2017, 11). It also impacts multidimensional poverty (SDGs 1, 3, and 4), economic growth and employment (SDG 8), and innovation (SDG 9), which can have indirect effects on poverty. Finally, it can give rise to increases or decreases in inequality, relevant to SDG 10 (Hagen-Zanker, Postel, and Vidal 2017, 5). The proponents of investment migration programmes may also rely on the 2030 Agenda calling for the need for a strengthened framework for progress towards "coherence between migration and development agendas", considering that migration policies can improve development outcomes and development policies can improve migration outcomes. (IOM 2018, 14) Further, proponents of the CBI programmes posit that the granting of citizenship can potentially lead to economic growth (FATF/OECD 2023, 5). Also, they underline that since nationality matters constitute a "last bastion of sovereignty" (Shachar 2018, 69), states have been reluctant to accept any commitments that would limit their sovereignty in that respect.

The unique and complex character of the EU makes the problem of investment migration in the EU member states more important than in third countries. Namely, the EU is specific in terms of having a more emphasised cross-border nature of investment migration due to the unique character of the internal market lacking border controls. Further, the EU is based on the principle of cooperation and is also specific in respect of overarching EU law and a unique link between concepts of national and EU citizenships (Zabrocka 2023, 60).

Consequently, socio-political and legal implications of investment migration programmes in the EU differ from those applied to the same programmes on a global scale and require special attention.

Without getting into the socio-political arguments, the authors posit that the legal nature and implications of investment migration within the EU remain complex and that it is needed to explore to what extent the concept of investment migration is in line with international and EU legal frameworks. Firstly, the authors will examine to what extent the existing investment migration programmes are in line with international law instruments. In their research, they will rely on the premise that concepts of RBI and CBI schemes are mutually interlinked, since RBI schemes are often considered a prelude for CBI. Therefore, in case of the lack of applicable international legal sources governing the RBI schemes, findings reached with regard to the legality of the CBI schemes will be extended to the RBI schemes as well. Secondly, the authors will explore the compliance of the investment migration programmes with the EU law. This analysis is important for several reasons.

It should not be forgotten that all states, including the EU member states, are also subject to international law and that the EU member states often rely on international law standards to reinforce or complement the EU norms. Therefore, there are various sources of international public law, both regional and universal, which should be carefully taken into account by the EU member states when they develop their regulatory frameworks.

At the same time, in the research, due regard must be given to the concept of autonomy of EU law, which implies that the EU treaties lay down "a constitutional order" (Lindeboom 2021). However, the authors point out that EU-level rules governing investment migration schemes must be carefully aligned with international law to avoid incoherence between EU and general international law. In its reports, the International Law Commission (ILC) underlines the danger of the development of a "vertical aspect" of the fragmentation of international law, which amounts to the incoherence between regional and general international law and its serious adverse implications for legal certainty. The authors, therefore, give priority to the need to avoid the danger of the "vertical aspect" of fragmentation of international law.

Furthermore, it should be kept in mind that the legal norms and legal developments in the EU do not shape migration investment schemes only in the EU member states. They also influence the norms and practices of the countries in the EU accession process through external conditionality. In other words, changes in EU legislation, jurisprudence, and policies directly affect whether an accession country will adopt a given law on its path to joining the EU. This means the approach towards the RBI and CBI schemes taken by the

EU is reasonably expected to impact not only the EU member states but also the accession countries, the third countries having close relationships with the EU, and the general international legal arena. Against this background, the existence of various CBI or RBI schemes in the EU accession states is currently under close scrutiny of the EU, and the final stance that the EU bodies take *vis-à-vis* these schemes in the EU member states will be of considerable interest to them.[4] The authors will apply a normative-legal method combined with a sociological method to analyse the compatibility of the concept of investment migration with international and EU law.

Compliance of the Investment Migration Programmes with International Law

It is important to examine whether international law affects the power of sovereign states to adopt the CBI and RBI programmes. The purpose of such an analysis is twofold. First, the analysis will determine if national autonomy in matters of citizenship is subject to limitations by rules of international law since those may impact the legality of investment migration programmes. Second, the relevance of the genuine link criterion for the international recognition of attribution of nationality will be determined, as it also may affect the legality of investment migration programmes.

National Autonomy in Matters of Citizenship under International Law and its Impact on Investment Migration

When it comes to the legality of national investment migration schemes, they can be considered allowed in terms of international law if states retain national autonomy in matters of citizenship. As regards the sources of universal international law, the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930 (Hague Convention), adopted under the auspices of the Assembly of the League of Nations, was the first international attempt to ensure that all natural persons have a nationality (Inter-Parliamentary Union and UNHCR 2005, 8). Its Article 1 specifies that each State Party has the right to determine its nationals, and the laws governing nationality matters of that state must be respected by other states as far as they are consistent with "international conventions, international customs, and the principles of general law recognised with regard to nationality" (Hague Convention 1930).

[4] Serbia has proposed and, after the Commission's interventions, withdrawn a law that would allow fast-track acquisition of citizenship. (EC [2023]SWD/2023/695 final).

In other words, the so-called internal aspect of nationality, which refers to the acquisition and loss of citizenship, remains an exclusive attribute of states (Zabrocka 2023, 69). On the other hand, the international aspect of nationality, which pertains to the question of whether, and to what extent, states parties have a duty to recognise the granting or loss of the nationality of another state party, is partially limited under the above-mentioned Article 1 of the Hague Convention, considering that the nationality laws of that state must be respected by other countries as long as they are in line with "international conventions, with international customs and the principles of general law recognised with regard to nationality" (Weingerl and Tratnik 2019, 105).

This approach, designed to reduce statelessness, was subsequently employed and refined in various other international instruments aimed at improving the status of stateless persons and addressing citizenship stripping (Irving 2016, 1). These are the 1957 New York Convention on the Nationality of Married Women, the 1961 Convention on the Reduction of Statelessness, the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, and the aforementioned 1997 European Convention on Nationality (Weingerl and Tratnik 2019, 109-110).

Besides the aim of the reduction of statelessness, what the above-mentioned universal international conventions on citizenships have in common is a low number of state parties. Consequently, the guarantees against statelessness embedded in them do not "reach" many states, at least not as obligations stemming from treaty law (Weingerl and Tratnik 2019, 108). Such a record can be attributable to the fact that states are very cautious about accepting international obligations that limit their sovereignty in nationality matters (von Rütte 2022, 205).

Parallel to this development, the right to citizenship was proclaimed a human right in Article 15(1) of the Universal Declaration of Human Rights of 1948 (UDHR) (UN General Assembly 1948). Although declarations do not have a binding force under international law, a large part of the UDHR, including Article 15, has been codified in international conventions and has become international customary law (Weingerl and Tratnik 2019, 107).[5] Given the aforementioned limited reach of universal international conventions governing citizenship, it is noteworthy that the UDHR has also been incorporated in several international conventions in the area of human rights, which contain provisions concerning nationality and have a considerable number of state parties. These include the 1966 International Covenant on Civil and Political Rights, the 1979

[5] According to proponents of different approaches (de Groot and Vonk 2015, 41), Article 15(1) UDHR has no binding force under international law.

Convention on the Elimination of All Forms of Discrimination against Women, and the 1989 Convention on the Rights of the Child (Weingerl and Tratnik 2019, 108). Also, the preamble of the previously mentioned Convention on the Nationality of Married Women includes an affirmation of Article 15 of the UDHR (Irving 2016, 2). From the perspective of combating statelessness, however, the main shortcoming of Article 15 is that it does not impose the obligation on any state to confer citizenship. What is more, it does not provide a definite answer as to whether investment migration schemes are allowed. .

When it comes to European countries, including the EU member states, particular attention should be given to the European Convention on Nationality (ECN) of 1997, a relevant source of regional international law. This was the first comprehensive convention on citizenship ever concluded. Adopted under the auspices of the Council of Europe (CoE), the ECN is considered the most modern source of international law in the area of citizenship. However, the ECN was ratified by a total of 21 CoE Member States, while fifteen of them are EU member states. This still means that not all EU member states are its signatories (CoE 2024). Moreover, many provisions contained within the ECN constitute a mere systemisation of the pre-existing rules of customary international law. The national impact of the ECN has remained limited due to high numbers of reservations and a lack of an independent reviewing body (Pilgram 2011, 1). Even though not formally binding for non-state parties, the ECN serves as an example of good practice, which influenced recent amendments to their respective national legislations (Weingerl and Tratnik 2019, 110).

To sum up, it is indisputable that the analysed body of international legal norms does not tackle the issue of RBI. Considering that RBI is regularly considered a prelude to CBI, the findings reached regarding the existing national autonomy in CBI matters under international law are equally applicable to the RBI schemes.

Relevance of Genuine Link Criterion for Investment Migration under International Law

In the academic literature, the concept of citizenship is understood as a form of defining national identity that presupposes some form of a link or connection between an individual and the country in question (Maftei 2015, 225–226). Such an understanding is further supported by some traditionally practiced and predominant methods of citizenship acquisition, such as *ius sanguinis* ("the right of blood" or "citizenship by descent") and *ius soli* ("birthday citizenship"), both of which can be deemed to be different forms of the genuine link criterion (Weil 2001, 19). This recognition of the importance of an "individual's genuine link" with a state adds a new component to the right to nationality (von Rütte 2022, 133).

The commonly cited the *Nottebohm* case of the International Court of Justice (ICJ) (ICJ Judgement 1955, 23) also serves as a strong argument brought by the supporters of the necessity of the genuine link requirement for citizenship acquisition (Maftei 2015, 225–226). However, some scholars rightly notice that the impact of the *Nottebohm* decision has been exaggerated in the past and therefore must be reconsidered (Sarmiento 2019; Spiro 2019). Namely, the genuine link requirement in the *Nottebohm* case was only applied *vis*-à-*vis* the recognition of Liechtenstein's nationality for the purpose of diplomatic protection. Therefore, this was a case about diplomatic protection, not about citizenship in general. Consequently, the concept of genuine link applied in *Nottebohm* was of very "limited" scope (Weingerl and Tratnik 2019, 105-106). Moreover, the concept was even not applied in the context of attribution of nationality, since it was not "and never was a requirement for international recognition of the attribution of nationality" (Spiro 2019, 2). Also, the genuine link requirement does not have any bearing on residence matters, and consequently, no bearing on RBI schemes. Although the judgement in the *Nottebohm* case was rendered more than half a century ago, it is interesting that the genuine link test was not applied in the subsequent case law of the ICJ. This criterion has also been disregarded in the context of international law, *inter alia* by the ILC, which expressly rejected the genuine link criterion as a ground for the exercise of diplomatic protection (Weingerl and Tratnik 2019, 106-107). Consequently, there is no relevant body of international case law that would shape the development of investment migration schemes.

International public law instruments are also silent as to whether the genuine link constitutes a strict requirement for granting nationality. Hence, the exact scope of the genuine link concept has remained debatable in the scholarly literature. Some authors are in favour of a more restrictive approach to the scope of the genuine link criterion. They identify the factors of birth and descent as connections that "are sufficient to establish a link between the individual and the state" as a requirement for international recognition of the attribution of nationality (Batchelor 1998, p. 161). In that context, it is further argued that the *ius pecuniae*, or, put differently, "the right to money" or "the sale of citizenship", which includes citizenship through investment schemes, cannot be treated as a "genuine link" for the purpose of citizenship acquisition (Zabrocka 2023, 69).

The second group of supporters of the genuine link requirement for the attribution of nationality argue in favour of its more extensive scope. Toth (2014, 47), for instance, claims that the concept of the genuine link should be widely formulated as to include "property or investment in the receiving state" as one of its key components. In other words, a broad approach to the concept of "genuine link" also allows the application of *ius pecuniae* as a valid ground for the attribution of nationality, and by doing so, it legitimises the CBI practices

(Džankić 2019, 8). Such a broader approach appears more convincing, as the practices where the granting of nationality is exclusively based on *ius sanguinis* ("the right of blood" or "citizenship by descent") and *ius soli* ("birthday citizenship") are outdated. For instance, the national legal frameworks of many countries provide for granting nationality to distinguished artists or athletes. Such comparative practices go far beyond the *ius sanguinis* and *ius soli* criteria. Furthermore, the aforementioned broader approach to the concept of "genuine link" may also serve as a convincing justification for the introduction of the CBI programmes.

Compliance of the Investment Migration Programme with European Union Law

The issue of investment migration in the EU is characterised by additional layers of complexity compared to international law, which stems from the delimitation of competencies between the EU and its member states regarding the rules on the acquisition and termination of nationality. In light of the multi-layered structure of the EU legal system, the question of whether the CBI or RBI schemes are compatible with EU law needs to be assessed against a number of considerations: the relationship between EU citizenship and the nationality of a member state; the impact of this relationship on the autonomy of the EU member states in prescribing rules on acquisition or their nationality; the requirement of existence of a genuine link when awarding nationality in the context of the principle of sincere cooperation between the EU member states.[6] Most of these concerns were raised in the context of the infringement proceedings pending against Malta. Different approaches towards the RBI and CBI schemes within EU law will also be examined.

Different Approaches towards CBI and RBI

It is needed to assess whether the CBI and RBI schemes implemented in the EU member states are to the same extent compatible with EU law. So far, EU bodies have not been consistent in their approach to this issue. Although the 2019 Report points to the fact that the CBI and RBI schemes differ from each other, it still identifies joint risks that equally result from the CBI and RBI schemes. Nevertheless, in its subsequent infringement proceedings initiated against Malta and Cyprus, the Commission focused only on the legality of the CBI schemes while paying no regard to the RBI schemes in other member states,

[6] This paper shall not delve into the examination of the issue of proportionality.

although they pose almost identical risks and, what is more, are quantitatively more serious.

The key difference between the RBI and CBI schemes relates to the fact that the existence of the former does not have anything to do with the legal issues of genuine link and national autonomy in nationality matters, which are affected by the complex balance between European and national citizenship. Weiler (2024) rightly notices that in practice, the RBI schemes are quite often a prelude to naturalisation. However, while the RBI schemes enable free movement and other benefits of the EU internal market, they do not entail a full set of rights that stem from EU citizenship. The Commission seems to oppose the CBI schemes more fervently as they appear to circumvent the existing EU acquis related to the residence of third-country nationals (Directive [EU] 2003/109). Notwithstanding these differences, it appears that both types of schemes can be potentially in line with EU law as long as they are carefully implemented in a manner that fully respects all the existing preventive measures against the identified risks, already available under EU law, such as the Schengen Information System (EC 2024) and the Anti-Money Laundering Directive (Directive [EU] 2015/849).

EU Citizenship and National Citizenship of the EU Member States

In the complex setting of delimitation of competences between the EU and its member states, nationality is seen as a prime example of an exclusive member state competence. (Oosterom-Staples 2018). The concept of EU citizenship, referred to as "multi-level citizenship" by some authors (Parker 2017), has gradually evolved both in normative terms and through the jurisprudence of the CJEU. Introduced by the Maastricht Treaty (TEU 1992, Article 8), EU citizenship was clearly set as a consequence of national citizenship, which is therefore a prerequisite element of EU citizenship (Weingerl and Tratnik 2019, 111). The concept of EU citizenship gradually evolved—the Amsterdam Treaty included an additional norm stating that it "complements and does not replace national citizenship" (TEC 1997, Article 17). Currently, Article 20 of the Treaty on the Functioning of the European Union (TFEU) explicitly states that citizenship of the Union is additional to and does not replace national citizenship. It goes on to list some of the rights stemming from EU citizenship, such as the right to move and reside freely within the territory of the member states; the passive and active voting rights in the European Parliament and municipal elections in the member state of residence; diplomatic protection; the right to petition the European Parliament, etc. This means that EU citizenship entails a set of additional rights. Some scholars argue that the departure from complementarity of EU citizenship to it being firmly established

as an addition to national citizenship has, on the one hand, confirmed that EU citizenship is dependent on national citizenship but, on the other hand, has rendered EU citizenship "paradoxical in nature" (d'Oliveira and Ulrich, 2018). While Article 20 TFEU may give the impression that EU citizenship is somehow secondary to national citizenship of a member state, in fact, the CJEU has consistently underlined that EU citizenship is intended to be the fundamental status of nationals of the EU member states (CJEU Judgement C-184/99, para. 31; CJEU Judgement C-291/05, para 32; CJEU Judgement C-50-/06, para 32).

Legal scholars have criticised this stance of the CJEU (Weiler 2024) as unsubstantiated and a "judicial invention arising *ex nihilo"*. It seems that, while the text of the TFEU takes a more restrictive position, underlining that EU citizenship is only an addition to the national citizenships, where the Member States have autonomy in prescribing the conditions for acquisition of national citizenship and also its loss, the CJEU takes a more expansive approach to the issue. This expansive stance may be attributed to the fact that, so far, the CJEU jurisprudence vis-à-vis national citizenship and EU citizenship has been mostly focused on the issues of loss of national citizenship and protection of EU citizens, or, in other words, on the issues of conflict of nationality. (Šišková 2023). In this body of case law, CJEU has utilised a rather concrete approach aimed at protecting the rights guaranteed to the citizen. In doing so, the CJEU has affirmed two positions: first, it is on each member state to lay down the conditions for the acquisition and loss of nationality. Second, when the member states exercise their powers in the sphere of nationality, they must have due regard to European Union law (CJEU Judgement C-369/90, para.10; CJEU Judgement C/179/98, para. 29). This is why some scholars observe that the CJEU case law on this issue seems to simultaneously erode national autonomy and reaffirm the core of retained powers of the member states (Bellenghi 2023). Other scholars assert that the CJEU has employed an "interpretative exercise" to identify the limits of the member states' rights to determine their nationality and reinforced the relationship between nationality and EU citizenship (Wagner 2024). However, it is still undisputed that EU citizenship's existence independently of national citizenships is impossible (Kochenov 2019) or, in other words, that it remains *ius tractum* (Kochenov 2009). Nevertheless, it seems that the Commission, in its 2019 Report referring to European citizenship as a fundamental status of nationals of the member states, has exaggerated the relevance of European citizenship over the relevance of national citizenship. By doing so, it endangered the delicate balance that should have been maintained between the two in the sense of the TFEU provisions. Moreover, such a stance implying that the European interest should prevail over the member states' prerogatives was wrongly labelled by the Commission as consistent with the Treaties. It opened the door to further EU pressures towards revoking the

investment migration programmes in the EU, although it was inconsistent with the Treaty provisions.

When refracted through the lens of the compatibility of the CBI schemes with EU law, it remains clear that all naturalisation rules remain firmly within the purview of the member states but with a caveat of due regard to EU law. It is interesting to notice that due regard in the relevant CJEU case law concerning nationality is, in some cases, cited as a general principle rather than in the context of some specific facets of EU citizenship, other than the importance attached to it by the Founding Treaties (CJEU Judgement C-135/08, paras. 41/56).

The Genuine Link Requirement in the Context of EU Law

In strictly normative terms, the EU acquis remains completely silent on the issue of whether a genuine link, be it *ius sanguinis* or *ius soli*, is necessary for a legitimate award of the nationality of a member state. Also, the bodies of the EU failed to define the scope of the general link criteria. Consequently, one could be led to an easy conclusion that the genuine link requirement remains within the domain of national laws in terms of acquisition and termination of nationality and the domain of international law when it comes to the recognition of nationality awarded by other EU member states. The situation, however, is not so straightforward, and some conclusions may be inferred from the existing case law of the CJEU and the positions taken by the European Parliament and Commission regarding CBI.

First, one of the decisive cases on the member states' nationality and EU citizenship, the *Micheletti* case (CJEU Judgement C-369/90), did impose on the member states the obligation to recognise the granting of nationality by another member state. However, the CJEU has done so without relying on the genuine link test (Weingerl and Tratnik 2019, 114). Recently, the CJEU seems to be pivoting towards recognising the importance of a connection between residence and enjoyment of EU citizenship (Kochenov 2019). Namely, it has ruled that EU law does not preclude national legislation whereby the nationality of a member state may be lost by virtue of law in cases that also entail the loss of residency in the given member state. Despite this, it cannot be claimed that the genuine link requirement is clearly set within EU law nor accepted in the CJEU case law.

The 2019 Commission Report (EC COM [2019]12 final) can be seen as a pivotal point in the determination to reduce or fully eliminate the CBI schemes by reliance on EU law. While some point out that the report was written in a "sober" tone (Weiler 2024) and as a result of a comprehensive study, at closer

inspection, the report seems to come with some predetermined positions about the existence and implications of the said schemes.

First and foremost, the 2019 Report asserts its position that the granting of citizenship of a member state against a monetary payment without requiring the existence of a genuine link with the given state is a practice contrary to the principle of sincere cooperation between EU member states. (EC COM [2019]12 final, 5-6). Sincere cooperation, a principle embedded in the Treaty on the EU (TEU 2016),[7] aims to ensure that when the member states exercise their exclusive competence, they do not encroach on the policies and objectives of the EU (Oosterom-Staples 2018). In the context of the award of nationality, this principle could be deemed negatively affected if the member states carry out large-scale unjustified naturalisations (Opinion of AG Poiares Maduro C-135/08). However, it was rightly observed by some scholars that in the 2019 Report, the Commission gave due regard to the principle of sincere cooperation while fully ignoring the relevance of Article 4(3) TEU (TEU 2016), which determines that the EU shall also respect the equality of the member states before the Treaties, their national identities, and the safeguarding of national security. To recall, national security, which the Report identifies as a key concern in terms of the application of the CBI schemes, remains the sole responsibility of each member state. Therefore, it can be concluded that the Commission has applied a rather piecemeal approach instead of utilising a recourse to a better-balanced interpretation of those clauses by reading one in conjunction with another.

In arguing that the CBI scheme is in contravention of the principle of sincere cooperation, the 2019 Report unconvincingly invokes the judgement in the *Nottebohm* case (ICJ Judgement 1955, 4) and elaborates on what is traditionally considered to be a genuine link: descent, origin, marriage, or effective prior residence in the country for a meaningful duration. In doing so, it also neglects a broader approach to the genuine link requirement, as elaborated earlier in this paper. The approach taken in the report thus seems somewhat disingenuous, as it chooses to focus only on the rules and implications of the CBI schemes in three countries—Bulgaria, Cyprus, and Malta—which do not require what the Commission finds to constitute a sufficiently genuine link. Conversely, the report neglects the fact that not only do the CBI naturalisation schemes fail to require the existence of a genuine link, such as prior residence, but that this also applies to other instances of privileged naturalisation, such as those awarded to prominent athletes, scientists, and artists, as discussed previously in this paper. All these cases also may not require previous residency in the state granting

[7] Article 4 of the TEU reads: Pursuant to the principle of sincere cooperation, the Union and the member states shall, in full mutual respect, assist each other in carrying out tasks that follow from the Treaties.

citizenship. Furthermore, the report seems to preclude the position of the CJEU with regard to the compatibility of the CBI or RBI schemes with EU law. After all, the CJEU has not ruled on this issue explicitly so far. This, however, will soon change. As indicated above, the Commission has initiated proceedings against Malta before the CJEU for failure to fulfil its obligations under the Treaties in connection to Malta's CBI scheme.[8] In doing so, the Commission firmly relies on two concepts: the concept of a genuine link, which it finds to be lacking from Malta's CBI scheme, and the principle of sincere cooperation.

The proceedings, which are still pending at the time of writing this paper, have produced a lively scholarly debate in anticipation of the CJEU decision. Two main lines of reasoning can be identified regarding the expected stance of the CJEU in the Malta "golden passport" scheme.

One group of scholars (Wagner 2024; Chamon 2024) finds that the case presents an opportunity for the genuine link principle to be fully integrated into EU law. However, even these scholars recognise that such a decision could give rise to additional problems, as other preferential nationalisation rules and practices (fast-track issuing of passports to athletes and others) would surely come under the EU's scrutiny, particularly if they are not strictly residence-based nationalisations.[9]

The second, larger group of scholars, led by Spiro (2019), stands firmly on the position that the EU bodies should not rely on the *Nottebohm* case (ICJ Judgement 1955, 4) or the narrowly understood concept of genuine link when deciding on the member states' rules on acquisition of nationality. In supporting this stance, they first address the positions related to the effects of *Nottebohm* in international law in general. Their arguments follow similar reasonings as those elaborated earlier in the paper: they argue that this decision should have never been read as mandating the existence of a genuine link for the international recognition of attribution of nationality (Spiro 2019, 2) and that the *Nottebohm* case (ICJ Judgement 1955, 4) is not suited as a key element of an argument against Malta's CBI scheme as it concerns recognition, not acquisition of nationality. Additionally, scholars such as Jessurun d'Oliveira (2018) posit that international law is silent about the role of EU law in controlling the competence of the member states in matters of nationality, meaning that reliance on the *Nottebohm* case (ICJ Judgement 1955, 4) is not mandated by international law. The second argument put forward by this group of scholars concerns the relevance of the *Nottebohm* case (ICJ Judgement 1955, 4) and the

[8] The procedure is launched under Article 258 of the TFEU (TFEU 2016).

[9] For an overview of the member states nationalisation practices, see Kochenov and van den Brink (2023).

genuine link requirement in the specific context of EU law. Namely, they point out that, so far, the CJEU has consistently rejected the *Nottebohm* case (ICJ Judgement 1955, 4) in its case law (van den Brink 2022), and that would be ill-advised for that jurisprudence to be reversed, as it would jeopardise freedom of movement guaranteed to EU citizens. They also agree that acceptance of the genuine link requirement deemed to stem from the *Nottebohm* case (ICJ Judgement 1955, 4) would necessarily spill over to other naturalisation schemes while at the same time rendering the EU and the member states' legal framework unfit for the realities of the modern world. Some scholars oppose the very approach utilised by the Commission in both its reports and the pursuit of legal action against Malta as being based on its moral positions rather than on sound legal reasoning, pointing out that opposition to the RBI schemes is inconsistent with other EU values (Kochenov 2020). We should recall that the Commission introduced the title "European Values are Not for Sale" in its recent press release as a mere rhetorical device and moral statement in the part of the press release where it explains the reasoned opinion (Weiler 2024).

Some scholars also indicate that the Commission is utilising the Malta case to regulate an issue that is essentially outside its competence (Weingerl and Tratnik 2019, 122). In addition to this line of reasoning, there are also calls for the EU to regulate the minimum requirements for the acquisition of the nationality of the member states (van den Brink 2020) and thus substantively address both qualitative and quantitative risks posed by various naturalisation schemes. The position proposed by the European Parliament, where the RBI schemes are harmonised on the EU level while the CBI schemes are left within the purview of the member states but put through more robust scrutiny, seems better balanced. Furthermore, it should be kept in mind that a narrower approach taken by the EU *vis-à-vis* the genuine link requirement and the limits of national autonomy in setting rules on naturalisation could have three sets of consequences that would spill over the EU itself. First, it would affect the national autonomies of EU candidate countries with regard to their naturalisation rules. Second, it could induce a further race to the bottom of the RBI and CBI schemes among countries not directly influenced by the EU, creating further security, corruption, and money laundering risks. In the long term, it could also affect the approach in international law in general terms of unilateral refusals by certain states to recognise naturalisation based on the CBI schemes that would not be supported by rules of international law but based solely on reliance on EU law. That could create an imbalanced approach between the relevance of EU law and international law in the global legal arena. Such an imbalanced approach would further lead to the development of incoherence between EU and general international law and create serious adverse implications for legal certainty within international legal order. It should

not be forgotten that the autonomy of EU law, implying that the EU treaties lay down "a constitutional order", is given due to legal theory (Lindeboom 2021). Such autonomy has been instrumental in protecting the internal institutional and constitutional structure of EU law against normative interference by public international law and was developed through the case law of the CJEU (former European Court of Justice) (Lindeboom and Wessel 2023, 1248). However, it is in stark contrast with legal certainty, which constitutes one of the foundational rule of law principles. Therefore, the EU-level rules governing investment migration schemes must be carefully aligned with international law to avoid incoherence between EU and general international law and limit the wide discretionary powers left to the CJEU in deciding on the definitive meaning of EU law.

Conclusion

The CBI and RBI schemes and programmes are burgeoning around the world. The occurrence, labelled as the commodification of citizenship, has been seen as problematic for several socio-political reasons: it goes in favour of a select wealthy few, it can present a fertile ground for corruption and money laundering, and thus presents a serious security risk. The existence of such schemes is additionally complex when employed by the EU member states, as they open the EU internal market benefits, where CBI additionally awards a set of political rights connected with EU citizenship in addition to benefits stemming from the acquisition of the nationality of an EU member state.

While the socio-political implications of investment migration schemes raise valid concerns, the issue of their formal legality in the context of international law and EU law must be carefully considered. This is because the rules on the award of nationality mostly remain a sovereign power of any given state. In terms of international law, attempts have been made to regulate the issue through conventions, but their reach remains limited and the principle of national autonomy in matters of citizenship remains dominant. More specifically, the so-called internal aspect of nationality, which refers to the acquisition and loss of citizenship, remains an exclusive attribute of states, meaning that the national autonomy in nationality matters remains fully untouched. On the other hand, the international aspect of nationality, which pertains to the question of whether, and to which extent, State Parties must recognise the granting or loss of the nationality of the other specific State Party, is partially limited under Article 1 of the Hague Convention, considering that the nationality laws of that/one state must be respected by other countries as long as they are in line with "international conventions, with international customs and the principles of general law recognised with regard to nationality.

Furthermore, various international bodies monitoring the implementation of international law do not have developed jurisprudence in this regard. The *Nottebohm* case, decided back in 1955 by the ICJ, remains pivotal for understanding the requirement of the existence of a genuine link between the host country and the person to whom nationality is being awarded, which is introduced herewith. However, this case is challenged by legal scholars for several reasons, most notably due to its limited applicability and incompatibility with the modern world. Moreover, it is considered an isolated case that was not followed by subsequent case law of the ICJ and supranational courts. These same critiques become even more pronounced when attempts are made to rely on the *Nottebohm* case in assessing the legality of the CBI schemes from the standpoint of international law. Currently, there seems to be an overwhelming consensus that the rules on the award of nationality remain firmly a sovereign right of states, and the genuine link requirement should not be interpreted strictly since comparative practices of some/selected European countries prove that the notion of genuine link also includes connections attributable to investments (Toth 2014). Although international hard law instruments do not contain relevant guidelines for the legality of the RBI programmes, we find that findings reached regarding the CIB schemes are also relevant for the RBI schemes since they are mutually interdependent and RBI is often considered a prelude to CBI.

On the other hand, the legality of the CBI schemes has additional layers of complexity in the EU. While, nominally, the EU member states have exclusive competence to adopt rules relating to the acquisition and termination of their nationality, the existence of EU citizenship and related rights, coupled with the principle of sincere cooperation and facilitated cross-border dynamics, seems to warrant some level of intervention from the EU. Raising the same concerns related to security, corruption, and money laundering, the European Parliament and the Commission seem set on abolishing the CBI schemes. The pressures put by the Commission have so far resulted in Bulgaria and Cyprus forgoing their schemes. The Maltese CBI programme is currently being challenged by the Commission before the CJEU. Curiously enough, when bringing proceedings against Malta, the Commission has failed to mention any of the universally acknowledged faults and risks of the CBI schemes both worldwide and in the EU and instead has chosen to rely on what is seemingly an antiquated and isolated ruling of the ICJ in the *Nottebohm* case. The prevailing view of legal scholars is that such a legal underpinning against the Maltese CBI programme is not convincing and will not be upheld by the CJEU.

The situation, however, calls for a rethinking of the EU approach to migration rules; an introduction of the minimum standards *vis*-à-*vis* various types of naturalisation schemes, regardless of whether they are offered on the grounds

of investment or other grounds such as sports prowess or cultural contributions, could be a way forward. Minimum standards should also be equally applied to the CBI and RBI schemes, as both pose equal security risks. At the same time, it is evident that all naturalisation schemes would need to be supported by a more robust utilisation of the existing EU-level pre-vetting and monitoring mechanisms in terms of risks already identified by the EU bodies, i.e., security risks, money laundering, and tax evasion. Therefore, it seems that on the road to achieving legality and legitimacy, the EU bodies should offer clear rules on investment migration schemes that will be properly interlinked with the existing broader rules on measures combating corruption, money laundering, and tax evasion. Given that the EU does not function in a legal vacuum, the standards that would be introduced concerning the CBI and RBI schemes would also have to be carefully aligned with the predominant approach in international law so as not to create an imbalanced legal environment and incoherence between EU and international law. If such a balance is not achieved, it will have adverse consequences for legal certainty within international legal order. This issue is particularly important given that the effects of the EU acquis extend beyond its borders and influence the legislation of countries partaking in the EU accession process. Finally, the introduction of minimum standards at the EU level could additionally boost efforts in addressing the migration-sustainability paradox.

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INVESTICIONE MIGRACIJE U SVETLU MEĐUNARODNOG PRAVA I PRAVA EVROPSKE UNIJE

Apstrakt: Više od osamdeset država u svetu koristi programe investicionih migracija, koji sa sobom nose ozbiljne bezbednosne i krivičnopravne rizike. Programi investicionih migracija dodatno su složeni u kontekstu Evropske unije, budući da građanstvo EU otvara njeno unutrašnje tržište i sa sobom nosi i važan set političkih prava. Autorke, koristeći se dominantno normativnopravnim metodom, analiziraju usklađenost investicionih migracija sa međunarodnim pravom i pravom Evropske unije. Svrha ove analize je dvostruka. Kao prvo, njome se utvrđuje da li u međunarodnom pravu i pravu EU postoje ograničenja nacionalne autonomije država u oblasti državljanstva, budući da ona mogu uticati na zakonitost investicionih migracija. Kao drugo, analiziraju se implikacije presude u predmetu *Nottebohm* kako bi se utvrdio značaj kriterijuma stvarne veze za međunarodno priznanje državljastva. Autorke zaključuju da kriterijum stvarne veze ne utiče na zakonitost investicionih migracija u međunarodnom pravu i pravu Evropske unije. Umesto toga, zaključuje se da su ovi programi zakoniti pod uslovom da je u njima obezbeđeno poštovanje pravila o suzbijanju korupcije, pranju novca i izbegavanju plaćanja poreza. Iako u radu autorke uvažaju načelo autonomije prava EU, prioret daju potrebi da se izbegne vertikalna fragmentacija međunarodnog prava, odnosno neusklađenost međunarodnog prava i prava Evropske unije, i izbegne stvaranje međusobno neusklađenih pravnih pravila.

Ključne reči: investicione migracije; državljanstvo putem investicija; boravak putem investicija; međunarodno pravo; Evropska unija; državljanstvo; stvarna veza; građanstvo Evropske unije; iskrena saradnja.