

The Protection of Member State Interests in the EU Citizenship Regime:

The Janus-Faced Nature of EU Citizenship in a Time of Economic and Financial Crisis*

International and EU Legal Issues Concerning the Selling of EU Citizenship

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Abstract:

The pressure exerted by the economic and financial crisis has led EU actors to reshape the way in which some of the most relevant features of EU law are interpreted and applied. A significant example of such a “resilient approach” is given by the EU citizenship regime, which has revealed a Janus-faced attitude vis-à-vis the crisis. On the one hand, the contents of EU citizenship—and in particular the right to free movement—have been considered by some EU countries to pose a threat to the national interest in protecting the state budget. On the other hand, some EU countries have modelled the EU citizenship regime as a tool that could help them face the budget constraints brought on by the crisis. A clear example of this latter attitude is represented by the investor and citizenship schemes that have been recently adopted by Cyprus and Malta, where EU citizenship is reshaped as a “commodity” that can be sold—subject to certain conditions—by member states. This article tries to shed light, from a legal point of view, on the practice of selling EU citizenship. After a short illustration of the schemes involved and the reaction they have provoked from EU institutions (notably, the European Parliament and the European Commission), this contribution will consider the possible limits to the selling of EU citizenship: I will first assess possible limits under international law, and then consider the specific obligations arising out of EU law. The article closes with a summary of my main findings.

Keywords:

Selling of EU citizenship; international law; genuine link; fundamental EU values; loyal cooperation

1. THE JANUS-FACED NATURE OF THE EU CITIZENSHIP REGIME IN A TIME OF CRISIS

The economic and financial crisis Europe is still experiencing has revealed some major inadequacies of the current legal framework of the European Union (EU, or Union). This has led several commentators to call for a further comprehensive effort to reform the Treaties, so as to enable the EU architecture to deal with crisis scenarios (see, extensively, Rossi and Casolari, 2014). But the pressure exerted by the crisis has also led EU actors (starting from the member states) to reshape—*à droit constant*—the way in which some of

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the most relevant features of EU law are to be interpreted and applied. One of the major examples of such a “resilient approach” is given by the EU citizenship regime,¹ which has revealed a Janus-faced attitude *vis-à-vis* the current economic and financial crisis.

On the one hand, the contents of EU citizenship—and in particular the right to free movement—have been considered by some EU countries (like Belgium, Germany, and the United Kingdom) to be a potential threat to the national interest in protecting the state budget. Of course, this attitude is nothing new. As is well known, the fear that EU citizens might use their free movement rights to relocate to EU states with better social welfare programs—living as “parasites” reliant on government largesse—forms the very basis of the “self-sufficiency” standards that certain classes of EU citizens have been required to meet under EU law if they are to exercise their movement rights.² At the same time, the so-called “Polish plumber syndrome,” that is, the fear that low-wage workers from Eastern Europe should migrate en masse to western member states, is thought to have been an important reason why the 2004 French referendum on the EU Constitutional Treaty failed (Editorial Comments 2005, 910).

Although criticisms directed at the free movement rights linked to EU citizenship are not new, and, as official figures show, are also largely ill-founded,³ they have rapidly regained momentum in the current public debate on the European integration process (Ghimis, 2015), and several EU countries have begun to advocate—and apply—a narrower conception of such rights,⁴ introducing national mechanisms for dealing with free movement abuses. Most importantly, some EU institutions have decided to face those criticisms by reinterpreting the benefits of EU citizenship—once more narrowing their scope. Noteworthy in this respect is the judgment the Grand Chamber of the European Court of Justice (ECJ, or CJEU) recently delivered in the *Dano* case,⁵ where the court was asked to determine the valid interpretation of EU rules on access to social welfare benefits by EU citizens moving to another EU country, and it found that competent national authorities should *only* look at the financial situation of the person concerned, without taking into account the social benefits available.⁶ This legal argument marks a significant shift in the ECJ’s case law (Costamagna 2014; and Thym 2015, 25–27), considering, on the one hand, that in previous cases the ECJ found that “competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that

¹ This intertwining between the logic of resilience and the functioning of EU citizenship has already been highlighted in other contexts by Nic Shuibhne (2010).

² See Articles 6, 7 and 14 of Directive 2004/38, on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states (OJ 2004 L 158, 77).

³ See, *inter alia*, ICF GHK in association with Milieu Ltd, *A fact finding analysis on the impact on the Member States’ social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, 14 October 2013 (available at: http://ec.europa.eu/employment_social/empl_portal/facebook/20131014%20GHK%20study%20web_EU%20migration.pdf); European Parliamentary Research Service, *Freedom of movement and residence of EU citizens—Access to social benefits*, 2014 (text available at http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140808/LDM_BRI%282014%29140_808_REV1_EN.pdf). The lack of any statistical correlation between the generosity of welfare systems and the inflows of mobile EU citizens has also been stressed by the European Commission in a recent communication titled “Free movement of EU citizens and their families: Five actions to make a difference” (doc. COM(2013) 837 final, 4).

⁴ See, in this regard, the important speech on immigration delivered by David Cameron on 28 November 2014 in Rochester, Staffordshire (full text available at <http://www.bbc.com/news/uk-politics-30250299>).

⁵ ECJ, Case C-333/13 *Dano*, nyr.

⁶ *Ibid.*, para 80.

Member State's social assistance system as a whole,"⁷ and, on the other hand, that the member states' margin for manoeuvre had hitherto been regarded by the ECJ as a concrete example "of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary."⁸ It is thus not without reason that Steve Peers (2014), in a recent comment on the *Dano* ruling, stressed that the "tone of the judgment suggests that the CJEU's judges, as Americans say, read the morning papers."

But EU citizenship has not only been conceived as a possible threat to the EU states' welfare systems. On the other hand, some EU countries have reinterpreted the EU citizenship regime as a tool that could help them face the budget constraints brought on by the crisis. A clear example of this attitude is given by the investor and citizenship schemes that have recently been adopted by Cyprus and Malta, where EU citizenship has been reshaped as a "commodity" that can be sold—subject to certain conditions—by member states. Unlike the former trend, this latter trend has sparked pointed criticism and a strong response by the EU institutions (notably by the European Parliament and the European Commission), which have taken the view that the selling of national citizenship, and, consequently, the selling of EU citizenship, is inconsistent with both international law and EU law.

As is apparent, both of the aforementioned trends highlight the emergence of a possible *liaison dangereuse*—a reference to the French epistolary novel by Pierre Choderlos de Laclos—between EU citizenship and money. Indeed, in both cases, the implications of reinterpreting EU citizenship in light of economic considerations can be understood as a threat to the complete fulfilment of such citizenship, which as the European Court of Justice repeatedly points out in its case law, ought to be the fundamental status of nationals of the member states. To some extent, as things stand right now, it looks as if the evocative and celebrated passage in Advocate General Mazák's opinion in *Förster v. IB.-Groep*—"It is thus fair to say that the concept of Union citizenship, as developed by the case law of the Court, marks a process of emancipation of Community rights from their economic paradigm"⁹—needs to be reworded as follows: "It is thus *too early* to say whether the concept of Union citizenship, as developed in EU practice, marks a process of *complete* emancipation of Community rights from their economic paradigm."

Due to space constraints, we cannot devote here any deep or comprehensive analysis to both of the trends just illustrated and their implications (that will be an effort to be taken up elsewhere). This article will thus only try to shed light, from a legal point of view, on the practice of selling EU citizenship. A narrow focus on this phenomenon is not without interest, however. In fact, such an analysis will enable us to assess (*a*) what margin for manoeuvre member states still enjoy under EU law in regulating the acquisition and loss of nationality (at least as far as nationalization procedures are concerned) and, consequently, (*b*) the extent to which the applicable legal framework of international law has been (or should be) remodelled in light of EU aims. The analysis will proceed as follows. After a short illustration of the contested citizenship schemes and the reaction

⁷ ECJ, Case C-140/12 *Brey*, nyr, para 72.

⁸ *Ibid.* See also the 2013 Commission Communication on the free movement of EU citizens and their families, where the Commission asserts that "Member States cannot refuse the grant of these benefits automatically to non-active EU citizens, nor can they automatically consider those claiming these benefits as not possessing sufficient resources and thus as not having a right of residence. Authorities should assess the individual situation taking into account a range of factors such as the amount, duration, temporary nature of the difficulty or overall extent of the burden which a grant would place on the national assistance system." See doc. COM(2013) 837, *supra* n. 3, 6.

⁹ ECJ, Case C-158/07 [2008] ECR I-8507, para 54.

they have provoked at the EU level (Sec. 2), I will consider the possible limits to the selling of EU citizenship, discussing the possible limits under international law (Sec. 3.1) and then the specific obligations arising out of EU law (Sec. 3.2). The article closes with a summary of my main findings (Sec. 4).

As a matter of methodology, it is important to stress that moral considerations on the selling of citizenship will be set aside in the present analysis. My working assumption will be that, as much as the issue is undeniably morally sensitive, the framing of it within a legal context means that an objective assessment must proceed first and foremost in light of the existing legal framework. Indeed, only a strict legal analysis will enable us to clearly appreciate the range of possibilities available to us in dealing with this phenomenon in the future, and only then can we begin to think about the comparative desirability of those possible avenues.

2. SETTING THE SCENE: INVESTOR AND CITIZENSHIP SCHEMES ACROSS EUROPE

The occasion for a general discussion on the limits of selling EU citizenship at the EU level was initially provided by the naturalization measures that some EU countries adopted in 2013. In May 2013, the government of Cyprus adopted a decision on the acquisition of Cyprus citizenship by naturalization.¹⁰ Under that decision, a non-Cypriot citizen may apply for Cypriot citizenship if he or she meets any of the following criteria:

- 1) The applicant must have made both an investment of at least EUR 2 million—purchasing shares and/or bonds of the Cyprus Investment Company—and a donation of at least EUR 5 million to the Cyprus Research and Technology Fund; *or*
- 2) He or she must have direct investments in Cyprus amounting to at least EUR 5 million; *or*
- 3) For at least three years the applicant must hold a personal fixed-term deposit account of at least EUR 5 million with a Cyprus bank; *or*
- 4) He or she is required to meet a combination of the above criteria, with assets amounting to at least EUR 5 million.

In December 2013, Prime Minister Muscat of Malta announced an Individual Investor Programme (IIP)¹¹ based on three main prerequisites:

- 1) The applicant must pay a national contribution of EUR 650,000; *and*
- 2) He or she must invest a total of EUR 150,000 in stocks or bonds sanctioned by the government; *and*
- 3) He/she must invest in property worth at least EUR 350,000.

¹⁰ Cf. Council of Ministers Decision dated 24 May 2013, “Scheme for naturalization of investors in Cyprus by exception on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002–2013” (English text available at <http://www.ciba-cy.org/assets/mainmenu/371/docs/NATURALISATION%20june%202013.pdf>).

¹¹ Cf. “Citizenship: Government presents ‘a radically changed scheme’”, *Malta Independent*, 23 December 2013 (<http://www.independent.com.mt/articles/2013-12-23/news/citizenship-government-presents-a-radically-changed-scheme-3528753154/>). The scheme as presented in the original version of the bill raised some concerns by the opposition party (Carrera 2014, 409–411).

In both cases, the investors citizenship programmes are based on clear economic and social rationales: on the one hand, they are designed to facilitate the recovery of the industrial sector, which was hit hardest by the economic and financial crisis; on the other, they help pay for social programmes the national authorities provides for the Maltese population. But while the two schemes are essentially based on similar criteria and are aimed at the same purposes, they have provoked a range of different reactions by EU institutions.

Unlike the Cyprus programme, the Maltese IIP bill has been severely criticized by the European Commission.¹² After the programme was announced by the Malta government, the European Commission entered into direct negotiations with the Muscat government, which was finally persuaded to modify the investor programme through the introduction of a residence requirement of at least twelve months as a precondition for obtaining citizenship.¹³ In fact, the major criticism highlighted by the European Commission was that the Maltese scheme did not require applicants to have any substantive tie to the EU or to the member state. To that end, the Commission drew on two sources. On the one hand, it invoked international law, pointing to the principle that citizenship cannot be granted to people who cannot demonstrate a “genuine link” with their new country. As is well known, this genuine-link requirement was expressly invoked by the International Court of Justice in the 1955 *Nottebohm* case,¹⁴ and that doctrine has often been used since then in matters of citizenship. On the other hand, the Commission invoked the principle of loyalty to the EU enshrined in Art. 4.3 TEU, the latter requiring member states to act in good faith in carrying out the tasks that flow from the founding Treaties.

The European Parliament (EP) also took exception to the Cypriot and Maltese citizenship schemes, but did so partly on different grounds and taking a different strategy: in January 2014, it decided to open a general debate on the practice of selling EU citizenship. The EP’s decision is based on the fact that the Cypriot and Maltese schemes are not isolated initiatives. Indeed, an increasing number of member states are considering the possibility of introducing similar measures (Austria adopted a citizenship-by-investment scheme in 1985, while Bulgaria and Portugal introduced similar measures in 2013).¹⁵ On the other hand, a significant number of member states (including Greece, Ireland, Italy, Portugal, Spain, and the United Kingdom) are already issuing temporary or permanent residence permits to third-country nationals investing in those countries, and these permits very often work as a fast-track to naturalization.¹⁶

¹² “EU Commission prepares legal challenge on Malta passport sales”, *EUobserver*, 23 January 2014 (<https://euobserver.com/justice/122843>).

¹³ Cf. Joint Press Statement by the European Commission and the Maltese Authorities on Malta’s Individual Investor Programme (IIP), MEMO/14/70, 29 January 2014 (http://europa.eu/rapid/press-release_MEMO-14-70_en.htm). On 28 February 2014, in reply to a question by MEP Andreas Mölzer, Mrs. Reding, former Commissioner for Justice, Fundamental Rights and Citizenship, stated that the Commission was analyzing similar schemes adopted by other member states to see if any further action was required, so as to make sure that the requirement of a “genuine link” to the country is met (see doc. E-013318/2013).

¹⁴ *Nottebohm* Case (second phase), Judgment of 6 April 1955: *I.C.J. Reports* 1955, 4.

¹⁵ See European Union Democracy Observatory of Citizenship – EUDO (2015), Global Database on Modes of Acquisition of Citizenship, available at <http://eudo-citizenship.eu/databases/modes-of-acquisition>.

¹⁶ “Want To Live in Europe? ‘Buy’ a Residency Permit”, *Forbes*, 29 September 2013 (<http://www.forbes.com/sites/ceciliarodriguez/2013/09/29/want-to-live-in-europe-buy-a-residency-permit/>).

Against this background, the EP plenary adopted a resolution on the selling of EU citizenship,¹⁷ a resolution that, partly echoing the European Commission's reaction to the Maltese scheme, strongly criticized that practice on broad principled grounds. The vast majority of the criticisms expressed by the EP concern the selling of EU citizenship *per se*. In this regard, the EP stresses, in the first place, that such a practice discriminates between third-country nationals on the basis of their wealth, since people of ordinary means are shut out of the naturalization process by virtue of the sheer size of the investment required under the schemes.¹⁸ In addition, insofar as EU citizenship is conceived as one of the major achievements of EU law,¹⁹ the EP argues that it should never become a tradable commodity.²⁰ To the EP, again, its sale undermines the very concept of EU citizenship.²¹ And, as a consequence, such sale is also inconsistent with EU values and objectives, on the one hand,²² and with the principle of loyal (or sincere) cooperation, on the other.²³ In the second place, the EP's criticisms also concern the criteria at the basis of the contested citizenship schemes. In particular, like the Commission, the EP criticizes the lack of a person's ties with the EU and with member states.²⁴

As can be appreciated from this overview of the EU's objection to the member states' investor schemes, the arguments against them have been formulated on the basis of both EU and international law. In the following sections these arguments will be discussed in detail. Although the two sets of arguments are closely intertwined, they proceed from partly different premises, and for this reason, as well as in the interests of clarity, they will be taken up separately.

3. THE LIMITS ON THE SELLING OF EU CITIZENSHIP

3.1. *The Selling of EU Citizenship under International Law*

It is commonplace to describe the interplay between international law and the EU citizenship regime by reference to the celebrated title of a French song by Serge Gainsbourg: *Je t'aime, moi non plus*. To illustrate that interplay, we can begin by quoting a passage from the *Micheletti* judgment, one of the leading cases of EU citizenship law: "Under international law," the ECJ finds, "it is for each Member State, *having due regard to Community [now EU] law*, to lay down the conditions for the acquisition and loss of nationality."²⁵ This passage, taken in isolation, appears to be saying that international rules on the acquisition and loss of nationality are *always* subject to a test of compliance with EU law *as a whole*. But in reality, if we consider the ECJ's ruling in light of its other judgments concerning the relation between international and EU law, it proves perfectly consistent with the dualistic approach that characterizes the latter. Indeed, according to the ECJ's settled case law, international law (including international rules on nationality) is deemed

¹⁷ European Parliament Resolution of 16 January 2014 on EU citizenship for sale. Doc. P7_TA-PROV(2014)0038.

¹⁸ Recital K of the Resolution.

¹⁹ *Ibid.*, recital M.

²⁰ *Ibid.*, para 7.

²¹ *Ibid.*, para 1.

²² *Ibid.*, para 2.

²³ *Ibid.*, para 4.

²⁴ *Ibid.*, para 7.

²⁵ ECJ, Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* [1992] ECR I-4239, para 10 (emphasis added).

part of EU law so long as it is compatible with the EU's constitutional law.²⁶ From a dualistic perspective, then, the passage from the *Micheletti* judgment may be taken to mean that since international law recognizes state discretion in defining the conditions for the acquisition and loss of nationality, such discretion must be exercised by member states in light of the obligations they have assumed under EU primary law (*in casu*, the Treaty provisions on the freedom of establishment).²⁷

Having said that, the position expressed by the European Commission and the European Parliament in regard to the investor schemes adopted by Malta and Cyprus seems to suggest a relevant shift in the way these EU institutions reconstruct the international legal framework applicable to EU citizenship. Indeed, for the Commission and the EP, the discretion states enjoy under the *Micheletti* formula has been further restricted by two different categories of international norms: by international provisions on the protection of fundamental rights, and by the genuine-link requirement as recognized by the ICJ in *Nottebohm*. So, before we turn to the limits that EU law may impose on the sale of citizenship, we should analyze how international law articulates current limits on naturalization mechanisms.

The first element deserving attention is the interaction between naturalization and the international rules on the protection of fundamental rights. As a matter of fact, while it is generally recognized that the freedom of states to grant nationality may come up against some limits under human rights obligations, including limits stemming from the prohibition of discrimination (Dörr 2006; Clerici 2013, 846; and Forlati 2013, 18ff.),²⁸ it is only a limited impact that human rights law has on naturalization. Apart from some treaty obligations designed to facilitate naturalization for certain groups of person (especially stateless persons),²⁹ the only limits this practice clearly faces lie, on the one hand, in an applicant's resolve and, on the other, in the sovereignty of other states (Dörr 2006).

As for the "genuine-link" argument, which the EU institutions have deployed to justify a further limitation of states' discretion in introducing naturalization schemes, it must be stressed first that the EU institutions' reading of the ICJ's *Nottebohm* ruling seems imprecise, and it is arguably also incorrect. As has rightly been pointed out by several scholars—among whom Dörr (2006), Sloane (2009, 16), and Gestri (2012, 31)—the ICJ's use of the genuine-link criterion is specific to only *one* of the states concerned, namely, Liechtenstein, and pertains to its right to exercise diplomatic protection on behalf of Mr.

²⁶ See, for instance, ECJ, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, paras. 282 ff. For a more detailed analysis of the ECJ's dualistic approach, see Casolari (2008).

²⁷ In his opinion in *Rottmann*, Advocate General Poiares Maduro held that, in theory, *any* rule of the EU legal order may be invoked against the exercise of state competence in the sphere of nationality if the conditions for the acquisition and loss of nationality laid down by a member state are incompatible with it (ECJ, Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449, para 28). In the judgment itself, however, the ECJ significantly did *not* take a clear stand on that point. More recently, the ECJ also found that in some cases the citizenship regime under EU law may be derogated from under *special* international rules (*in casu*, the international provisions on the status of heads of state): ECJ, Case C-364/10 *Hungary v Slovak Republic*, nyr, paras. 49ff.

²⁸ Worthy of mention in this regard, at the European level, is the recent judgment in *Genovese v Malta*, where the European Court of Human Rights clearly found that access to nationality falls under the scope of the European Convention of Human Rights: *Genovese v Malta*, No 53124/09, Judgment of 11 October 2011, para 30.

²⁹ See, for instance, Art. 1 of the 1961 Convention on the Reduction of Statelessness, and Art. 6.4.g of the 1997 European Convention on Nationality.

Nottebohm, who acquired Liechtensteinan nationality by means of naturalization. Stated otherwise, the ICJ recognizes that

nationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests, sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred [...] is in fact more closely connected with the population of the State conferring nationality than with that of any other State.³⁰

The ICJ further argues that

Naturalization is not a manner to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it.³¹

However, these two *dicta* must be read bearing in mind the scope of the question of the applicant state (i.e., Liechtenstein), a scope that the ICJ accurately circumscribes in its judgment, by stressing that,

in the first place, what is involved is not recognition [of the acquisition of nationality] for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala. The Court does not propose to go beyond the limited scope of the question which it has do decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceeding instituted before the Court.³²

Any effort to generalize the conclusions reached by the ICJ would thus be a misinterpretation of its decision. Most importantly, such a generalization appears inconsistent with the relevant international practice, which, at least as far as naturalization is concerned, still recognizes states as having much room for manoeuvre.³³ In this respect, the EU institutions' clear assertion of the existence of an international law obligation imposing respect for the "genuine link" requirement does not amount to anything more than a further example of the (rather questionable) Eurocentric attitude EU institutions generally show with respect to international law. Indeed, EU institutions typically determine the content and the effect of the international law that is binding on the Union and its members states by considering, first and foremost, its potential impact on EU law (Casolari 2008).³⁴

At the same time, it is noteworthy that the contested national measures do not rule out in absolute terms the establishment of a link between the applicant and the state concerned: the fact that the former must significantly invest in the latter, contributing to

³⁰ *I.C.J. Reports* 1955, 23.

³¹ *Ibid.*, 24.

³² *Ibid.*, 17.

³³ For the states' relative practice, which is consistent with the discretionary nature of the naturalization procedure, see EUDO, Global Database on Modes of Acquisition of Citizenship, *supra* n. 15; and Dzankic (2012).

³⁴ As is correctly pointed out in Cipolletti (2014), 474–475, this attitude also characterizes the ECJ's case law on EU citizenship.

the recovery of its economy, may *de facto* give rise to a tie that is relevant for naturalization purposes (see Magni-Berton 2013, which in this regard refers to a stockholder principle).³⁵

3.2. *The Selling of EU Citizenship under EU Law*

As noted, the theory that member states are in breach of EU law if they introduce investor and citizenship schemes rests in particular on two grounds: (i) the assumption that this practice is inconsistent with the Union's values, and (ii) the principle of loyal cooperation.

The first argument, centred on the protection of EU values, is based on the view that "EU citizenship implies the holding of a stake in the Union and [...] should never become a tradable commodity."³⁶ Yet Art. 2 TEU, listing the values on which the Union is founded—namely, human dignity, freedom, democracy, equality, the rule of law, and respect for human rights—does not expressly mention EU citizenship. Even so, it is possible to maintain that an indirect reference to EU citizenship is enshrined in the concept of human dignity, and more importantly in that of democracy. Indeed, Art. 10 TEU stipulates the principle that the EU is founded on representative democracy (para 1) and that every EU citizen has the right to participate in the Union's democratic life (para 2). Viewed from this angle, the nationally established rules by which citizenship may be gained or lost can thus influence the way in which the Union's democratic life operates. But, is that enough to conclude that the selling of citizenship *in itself* breaches EU values?

The answer to that question depends in large part on the concept of EU citizenship one espouses. We cannot here enter into an in-depth assessment of the current idea of EU citizenship. What is important to note, for our purposes, is that the European Court of Justice continues to describe EU citizenship as a set of rules that is "*destined [or intended] to be* the fundamental status of nationals of the Member States."³⁷ In other words, to this day EU citizenship continues to be conceived as a *process*, one that sooner or later should wind up modelling the fundamental status of individuals under the legal order of the Union, thus becoming to some extent independent from the concept of national citizenship. Meanwhile, it is clear that such a regime will continue to experience pressure under the national

³⁵ According to Magni-Berton, that principle may be identified in the statement through which an investor-applicant explains the degree of his or her involvement in the fate of the state at issue: "I want to share the responsibility of my failures and achievements with you, and I'd like to invest in you and to be partly responsible of your achievements and your failures." Although a statement like that may be based on an excessively romantic understanding of personal ties to states, it is undeniable that investor citizenship schemes do in themselves give rise to linkages to the country's economic fate. That seems to undercut the example that Bauböck (2013) uses to demonstrate that the selling of citizenship corrupts democracy *per se*. Bauböck recalls the story of Frank Stronach, a billionaire and Austrian investor-citizen who became a much-discussed politician and funded his own party. Whether or not Stronach corrupted Austrian democratic life, it suffices to recall the several billionaire nationals who have started a political career in EU member states, often raising problems similar to—or even more relevant than—those depicted by Bauböck. That circumstance warrants the conclusion that an investor-citizen's political stance does not in itself pose a threat to democracy. On the contrary, it shows that even investor-citizens can have ties to the country they wish to become citizens of, and that they may thus be interested in participating in its political life.

³⁶ European Parliament Resolution of 16 January 2014 on EU citizenship for sale, *supra* n. 17, para 8.

³⁷ ECJ, Case C-333/13 *Dano*, *supra* n. 5, para 58 (emphasis added). Quite significantly, this passage is also present in the *Zambrano* judgment, which is often mentioned as one of the most relevant cases where the ECJ recognized EU citizenship as having a primary and exclusive role in itself (see, for instance, Clerici 2013, 850). It is also noteworthy that the ECJ has not reworded the EU citizenship formula, even though some Advocates General have maintained in their opinions that such citizenship already "constitutes 'the fundamental status of nationals of the Member States'" (see, for instance, Advocate General Maduro's opinion in the *Rottmann* case: ECJ, Case C-135/08 *Rottmann v Freistaat Bayern*, *supra* n. 27, para 9).

understanding of what citizenship is. And, as explained in the previous section, this understanding does not *a priori* rule out the possibility of selling citizenship.

With that in mind, if we look at the approach that EU institutions have taken to national investors citizenship schemes, we come away with the impression that, at least in part, these institutions have dealt with that issue as if the ongoing process of EU citizenship had already reached its final stage. This impression is particularly strong if we consider the language of the EP's resolution on citizenship for sale, where, as noted, the EP describes EU citizenship as "one of the EU's major *achievements*."³⁸ This also explains why the EP asserts that such citizenship "should not be bought or sold at any price."³⁹ Less clear-cut is the position of the European Commission, which seems not to exclude the possibility of selling of EU citizenship. Indeed, what the Commission argues is that such a practice must be governed by the principle of loyal cooperation enshrined in the founding Treaties (see more *infra*).⁴⁰ The reasons behind the more rigid approach the EP has taken to the selling of EU citizenship probably have to do with the EP's mandate, namely, to directly represent EU citizens at the EU level (Art. 10.2 TEU). But the fact that the EU institutions concerned address the issue by taking a view of EU citizenship that essentially depends on their political mandate makes it clear that the argument based on the need to protect the Union's fundamental values is substantially inspired by a *political* view of EU citizenship. The argument therefore proves difficult to maintain from a *legal* perspective. It is thus not surprising that even the EP's resolution, while conceding a possible threat to EU fundamental values, does not make any reference to Art. 7 TEU, which is the provision that enshrines the legal mechanism that could be triggered in all cases involving either "a clear risk of a serious breach by a member state of the values referred to in Article 2 [TEU]" (para 1) or "the existence of a serious and persistent breach [of those values] by a member state" (para 2).

The other major argument for the view that investor citizen schemes are inconsistent with EU law rests on the theory that these schemes violate the loyalty principle (see also Carrera 2014; and Cipolletti 2014, 477–481). As is well known, this principle is a cornerstone of the EU integration process (Klamert 2014), for it is strictly linked to the basis "of the whole of the Community [now EU] system."⁴¹ The Lisbon Treaty has significantly reshaped the Loyalty Clause enshrined in primary law (Art. 4.3 TEU), for on the one hand it has clarified the nature of loyalty as a general principle of the EU legal order, and on the other it has codified the existence of mutual duties of loyal cooperation between the Union and its member states (Casolari 2014, 93). Moreover, the emphasis the Loyalty Clause lays on the mutual nature of loyalty duties has been reinforced by the inclusion of an Identity Clause in the same Treaty (Art. 2.2 TEU), requiring the Union to respect the member states' national identities (Martinico 2013, 93).

That said, it is worth recalling that the ECJ's case law on duties of loyalty reveals a significant imbalance between the position of member states and that of EU bodies. More to the point, while the case law on the member states' duties of loyalty has singled out four different classes of duties (namely, the duty to adopt all appropriate measures to ensure the fulfilment of EU obligations, the duty to assist EU institutions and facilitate their action in carrying out EU tasks, the duty to abstain from measures that may jeopardize EU

³⁸ European Parliament Resolution of 16 January 2014 on EU citizenship for sale, *supra* n. 17, recital M (emphasis added).

³⁹ *Ibid.*, para 7.

⁴⁰ Cf. the Joint Press Statement by the European Commission and the Maltese Authorities on Malta's Individual Investor Programme (IIP), MEMO/14/70, *supra* n. 13.

⁴¹ ECJ, Joined Cases 6/69 and 11/69 *Commission of the European Communities v France* [1969] ECR 523, para 16.

objectives, and the duty of mutual assistance), the ECJ's case law on EU duties of loyalty confines itself to general assertions without specifying the practical implication the loyalty principle has for EU institutions, agencies, and organs (Casolari 2014, 106). The considerations that EU institutions have made in arguing that member states violate their duties of loyalty by introducing investor and citizenship schemes give the impression that these institutions have intended to replicate this unilateral paradigm. The underlying rationale of their assertions does not give rise to doubts: the practice of selling EU citizenship, they argue, carries the risk of lowering the standard set by the Union's values and objectives; *ergo*, the practice violates the duties of loyalty under Art. 4.3 TEU. Member states are therefore under an obligation to intervene in order to put an end to the violation. As noted, while the European Parliament takes this to mean that EU citizenship cannot be sold at any price, the European Commission argues that respect for the Loyalty Clause only requires citizenship schemes to comply with the "genuine-link" requirement. Neither the European Parliament nor the European Commission seems to take into account the need to balance the content of the member states' duties of loyalty with that of the Union, particularly with reference to Art. 4.2 TEU, requiring the EU to respect the member states' constitutional identities, essential to which, writes Advocate General Maduro in his opinion in *Rottmann*, is "the composition of the national body politic."⁴²

There is another part of the *Rottmann* opinion where Maduro offers a useful insight toward a more even-handed solution to the balance that under the Loyalty Clause needs to be struck between the conflicting interests involved in the citizenship domain. Here Maduro, in turn drawing on a view expressed in the legal literature (De Groot 1998, 123, 128–135), argues that the principle of loyal cooperation "could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalisation of nationals of non-member States."⁴³ Proceeding from this assumption, it is possible to maintain that the loyal cooperation principle may impose further obligations on member states, but *only* on condition that the naturalisation mechanism at issue does not violate other EU (primary-law) obligations and yet (a) is unjustified and (b) gives rise to considerable adverse effects at the EU level. Quite obviously, a decision by a member state to pass a mass naturalization measure of third-country nationals would meet both conditions (a) and (b), since it would pose a significant threat to the functioning of the free movement of EU citizens. But does the same argument also apply to the investor and citizenship schemes adopted in Europe? My assessment is that it does not, since it is hard to see how such measures could give rise to any considerable effect at the EU level. When the Maltese scheme was announced, Prime Minister Muscat declared that it was capped at a maximum of 1,800 applicants and dependents.⁴⁴ Similar caps apply to the other national measures. That makes it difficult to make the case that these measures can undermine the rights stemming from EU citizenship and would place an undue burden on other member states, considering as well that (*contra* Cipolletti 2014, 482) investor-citizens are by definition wealthy enough that they are not likely to be an unreasonable burden on host state's the social welfare system.

Having said that, and even assuming that the contested citizenship schemes may *potentially* perturb the implementation of the EU citizenship regime, I would argue that if the duties of loyalty invoked by EU institutions make *substantive* demands on member

⁴² ECJ, Case C-135/08 *Rottmann v Freistaat Bayern*, *supra* n. 27, para 25.

⁴³ *Ibid.*, para 30.

⁴⁴ Cf. "International citizenship schemes: how do they compare", *MaltaToday*, 16 January 2014 (<http://www.maltatoday.com.mt/news/national/33186/international-citizenship-schemes-how-do-they-compare-20140116#.VNeFUUIW6Xo>).

states—correspondingly restricting (as noted) the discretion the latter still enjoy in modelling naturalization mechanisms—they are to that extent excessive. By contrast, as Maduro rightly points out in *Rottmann*, loyalty to the Union could in a similar scenario require member states to meet *procedural* obligations, and in particular the obligation to (a) notify the Commission and other member states of the citizenship scheme (as well as its rationale) before adopting it, and, if necessary, to (b) start a genuine dialogue on its contents.⁴⁵ Quite regrettably, however, neither the European Parliament nor the European Commission have felt the need to clarify the procedural implications that, in the case at hand, arise out of the EU Loyalty Clause (Carrera 2014, 425).

Viewed from this angle, the solution proposed by EU institutions seems to be inspired by the same “accordion” logic that characterizes the most recent judicial practice on the loyalty principle. On this logic, while the member states’ duties of loyalty become increasingly demanding, the corresponding duties of EU institutions remain limited. As I have stressed on a previous occasion (Casolari 2014, 110–111), that systemic trend entails in general terms the concrete risk of setting the stage for a definitive imbalance between the position of member states and that of EU institutions, and that imbalance could threaten the survival of the European integration process itself.

But there is another element, closely bound up with the implementation of the EU citizenship regime, that suggests a more cautious approach to the naturalization measures implemented by member states. Indeed, as is usually noted, the ECJ’s attitude to the acquisition and loss of nationality does not assign any particular role to the principle of effective nationality (Clerici 2013, 847ff.; and Ciolletti 2014, 472–477): the ECJ is normally guided by the need to allow the individual concerned to enjoy rights arising out of EU citizenship. This is apparent in the *Micheletti* ruling, where the ECJ argued *in general terms* that “it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.”⁴⁶ What is even more relevant in the case at hand is that the ECJ recognizes that the enjoyment of EU citizenship rights take the precedence over the genuine-link criterion, whose origin, as Advocate General Tesauro states in his opinion to this case, “lies in a ‘romantic period’ of international relations and, in particular, in the concept of diplomatic protection.”⁴⁷ This has been the ECJ’s attitude since *Micheletti* in all cases concerning the citizenship decisions of member states.⁴⁸ The position adopted by both the EU Parliament and the European Commission with regard to the genuine-link criterion thus raises a serious problem of consistency with the present ECJ’s paradigm on EU citizenship.

4. CONCLUDING REMARKS

The front page of the *ChinaDaily European Weekly* issue of 14–20 November 2014 prominently features an advert of an international legal advisory group on citizenship solutions advertising the Citizenship by Investment Programmes in Dominica and St. Kitts

⁴⁵ See also in this regard Gestri (2011), 922, discussing the regularisation programmes unilaterally adopted by member states.

⁴⁶ ECJ, Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, *supra* n. 25, para 10. Criticisms of the ECJ’s solution have been expressed by Ruzié (1993), among others.

⁴⁷ Para 5 of the opinion.

⁴⁸ See, for instance, ECJ, Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen* [2004] ECR I-9925, para 39.

& Nevis, the oldest such program in the world. The advert is evocatively taglined “Your choice, our expertise,” leaving no doubt as to the fact that its underlying logic does not fit the rationale of European Union citizenship.

That said, in the previous sections I have tried to clarify that the current legal framework at the international and the EU level does not seem to rule out the possibility of selling EU citizenship (see also Kochenov 2013). More to the point, as far as EU law is concerned, the celebrated *Micheletti* formula—under which “it is for each Member State, *having due regard to Community [now EU] law*, to lay down the conditions for the acquisition and loss of nationality”—seems to have so far been interpreted to mean that (a) member states have a duty to ensure the enjoyment of EU rights by the “new” EU citizens and (b) they cannot restrict or modify the grant of nationality by other EU states. Possible limitations may derive from the Loyalty Clause, but only when national naturalization measures may affect or perturb the implementation of the EU citizenship regime. Even in this case, however, it is doubtful whether substantive obligations could be imposed on member states.

In this scenario, the solutions the European Parliament and the European Commission have come up with in dealing with the member states’ investor citizenship programmes suggest an unconvincing and incoherent reading of the relevant set of rules. Of course, these solutions may be regarded as an attempt to modify the current understanding of EU citizenship so as to speed up the process by which Union citizenship can become the fundamental status of nationals in each member state (the sooner, the better). There are, however, some elements that deserve careful consideration in this respect.

First, neither the 2014 nonbinding EP resolution on citizenship for sale nor the negotiation that took place between the European Commission and Malta on its IIP bill seem sufficient to reverse the current trend. Suffice it here to recall that at the EP’s plenary debate on the selling of EU citizenship, the Greek Presidency of the Council of the European Union offered warm support for Malta’s arguments in favour of states’ discretion to determine naturalization mechanisms. On the other hand, it is difficult to imagine how the ECJ could fully overturn previous case law—according to which the principle of effective nationality is not to be conceived of as decisive for the question of the enjoyment of rights flowing from the EU citizenship—in short order.

Second, acceptance of the arguments highlighted by the European Parliament and the European Commission would likely raise practical problems in cases where the citizenship scheme has already been adopted and used by third-country nationals to acquire the nationality of a EU country, and thus that of the European Union. Indeed, in such cases, it would be necessary to apply the proportionality test the ECJ formulated in *Rottmann*, and thus assess the consequences that a possible decision to withdraw or modify a naturalization programme would entail for the person concerned and, if relevant, for the members of his or her family (see Nascimbene 2013, 313–315).⁴⁹ This might also explain why to date the European Commission seems to have essentially focused its attention only on the announced Maltese IIP. It is true that the former European Commissioner for Justice, Fundamental Rights and Citizenship declared before the European Parliament that the Commission was analyzing similar schemes adopted by other member states,⁵⁰ but the results of that assessment seem to be far from leading to any practical results.

But there is another, more important point that needs to be stressed. The emphasis the European Parliament and the European Commission have both placed on the genuine-

⁴⁹ ECJ, Case C-135/08 *Rottmann v Freistaat Bayern*, *supra* n. 27, para 55.

⁵⁰ *Supra* n. 13.

link criterion carries the risk of stoking a nationalistic approach to the European citizenship, which would be totally incompatible with its integrationist purpose and the functional attitude it expresses (Sloane 2009, 58), and which (as has rightly been pointed out in Carrera 2014, 424) would not prevent member states from adopting discriminatory practices. In deciding how to deal with investor and citizenship programmes, EU institutions should therefore ask whether the solution they are calling for may wind up acting as a “backdoor” poison for the European Union, helping to form a new *liaison dangereuse* in the domain of EU citizenship.

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