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ANALYSING THE CONFORMITY OF INVESTOR CITIZENSHIP SCHEMES UNDER EUROPEAN UNION LAW: THE EVOLVING COMPETENCES OF THE EUROPEAN UNION IN THE FIELD OF NATIONALITY POLICY

Master's thesis
HAJM08/18 - Law — European Union and International Law

Supervisor: Jenna Uusitalo, MA in Law

Tallinn 2021

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The document length is 18482 words from the introduction to the end of summary.

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ABSTRACT

In the European Union (EU) — Investor Citizenship Schemes (ICS) are allowing wealthy third-country nationals to purchase a national citizenship which involves the sale of EU citizenship. The kind of practices may harm the concept of EU citizenship as well as create other areas of concerns. For the past, EU has had no competences to interfere in nationality matters. Regardless, the EU has displayed a growing intention to engage in the field of nationality. Largely as a consequence of the evolving case-law of the Court of Justice of the European Union (CJEU) delimitating the exact spheres of competences seems to have become a challenge.

It has long been established in international law that a citizenship should not be granted without the existence of a genuine link between a state and the applicant. Under ICS's, various requirements that apply for those seeking to naturalise are waived, including the genuine link requirement.

The thesis aims to examine the conformity of ICS's under European Union law, and to shed light for the evolving competences of the EU in nationality matters. The thesis is qualitative in nature, and approaches the study through a theoretical perspective.

ICS's illustrate the extent upon which the Member States may abuse their exclusivity in nationality matters — a call for a shift in competences must be realised. Whilst the concept of EU citizenship is a fluid concept. The competences should reflect that too. In addition, the 27 systems of nationality policy call for a co-ordinative approach.

EU law - Nationality policy - Competences - Genuine links - Investor Citizenship Schemes

INTRODUCTION

Over the past years, EU has witnessed some of the Member States (namely, Malta, Cyprus, and Bulgaria)[1] setting up programs that allow wealthy third-country nationals to purchase a national citizenship based on a monetary transfer to the Member State. The following fast-tracks for citizenship are usually referred to as 'Investor Citizenship Schemes' and have raised concerns amongst some of the Member States and the European Commission. While the Member States selling their national citizenship are in addition selling EU citizenship — the consequences of selling EU citizenship is yet to be seen.

Given the EU-wide implications that flow from those practices, it seems frankly strange, that the EU upon this date has had no powers to interfere in the field of nationality policy. Furthermore, where third-country nationals' naturalisation procedures are regulated by an EU instrument — the long-term statuses of third-country nationals have been *de facto* harmonised by the Directive 2003/109/EC. It seems odd, that the given Member States have been able to exercise such schemes without respecting the EU instrument in question.[2]

It will be central to this thesis to argue that the EU's role, in nationality policy, is becoming further apparent and that this movement is the normal continuation of the EU's project. EU shall, nevertheless, retain a distinct role in nationality matters and not trespass beyond its competence constraints. Wherein the Member States retain the following competence — they shall take into account the impact of their decisions as regards to the Union. In addition, Union law stands in a supremacy position and national laws cannot hinder nor contradict those laws.[3]

It calls for the Member States to engage in co-operation with the other Member States — in line with the Principle of Sincere Co-operation, to find a desirable solution — as opposed to a

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[1] Džankić, J. (2018). Immigrant investor programmes in the European Union (EU). *Journal of contemporary European studies*, *26*(1), 64-80., p 74.

[2] As shall be unveiled below, the transposition of the Directive 2003/109/EC seems to be poorly executed.

[3] The 'exclusivity' does not free the Member States from practicing policies as they please. It is common that Member States may come with justifications — but these cannot jeopardise Union attainments.

Member State establishing practices in 'vacuum', that may have adverse implications on the rest of the community. The Principle of Sincere Co-operation restricts Member States from taking action solely in their own position when it could jeopardise the attainment of the EU's objectives.[4] It follows, that the Principle is applicable regardless of the fact whether the EU has competences or not. It, therefore, protects the EU's interests by acting as a constitutional safeguard for the Member States as well as the EU institutions.[5] Finally, the Principle is drafted in a mandatory manner — *'shall'* in mutual respect, assist each other… The word 'shall' implies that the Member States bear the obligation of co-operating in a consistent manner and it is not a question of their willingness.

It is questionable whether the Member States practicing ICS's are complying with the Principle of Sincere Co-operation and are taking all the necessary measures to ensure that the attainments of the EU's objectives are not undermined. It seems that while ICS's are practiced through concealed ways, such practices may reduce trust amongst the Member States, and more significantly it may undermine the concept of EU citizenship while also causing potential disturbances for the uniform application of EU law.

Not only have the Member States possibly breached the Principle of Sincere Co-operation. ICS's undermine some of the core principles upon which the European Union is built. Specifically, those relating to equality, and non-discrimination. By waving the criteria that apply to an ordinary third-country applicant seeking to naturalise in the Union, it undermines the principle of non-discrimination and places an un-equal foot for those seeking to naturalise in a given Member State and, hence, becoming EU citizens. Furthermore, it signals a message to the international sphere, which is something as follows; wealthy people are more welcome to the European Union than poor ones.

The aim of the thesis is two-folded; to investigate ICS's from an EU law perspective and simultaneously shed light on the evolving competences. The primary research question that is under investigation is; *to what extent Investor Citizenship Schemes are in contrary to European Union law and what should be the relevant steps — in line of making them in conformity with European Union law?* For the purpose of this thesis, the Author attempts to justify that ICS's are

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[4] In accordance with the Treaty on European Union Article 4(3).
[5] Klammert, M. (2014). The Principle of Loyalty in EU Law, Oxford University Press., p 18.

in violation of EU law and that, therefore, the EU should be eligible to step in, to either put an end to the following schemes or propose great changes to them, or more significantly, participate in the field of nationality policy. At the end of the thesis, the reader will have a good understanding of the concerns that ICS's may pose from an EU law perspective.

The thesis will have great emphasis on the long-established principle in international law, requiring an applicant to have a 'genuine link' between the country that grants its citizenship. A brief disclosure, on why potentially, has the 'genuine link' requirement been set aside will be mentioned. This will allow the Author to develop the arguments further — for opposing the practice of ICS's. In line with this reasoning, the research will attempt to conclude to what extent are genuine links necessary to take into account in the European Union, if mandatory. Considering the fact, that the doctrine of genuine link has not been incorporated into the positive legal framework of the EU, it has possibly allowed the Member States practicing such behavior to depart from the traditional ways of granting citizenship. It would seem that the implementation of the genuine link requirement by the Member States could be a strong solution in addressing the matter. It follows that as a secondary research question, the thesis will investigate; *Are genuine links necessary for the smooth functioning of citizenship matters in the European Union?*

Given that the Commission has recently initiated infringement proceedings, it will be necessary to understand what are the steps following such proceedings. Chapter 4, on *Legal Means to interfere by the EU* shall shed light on the steps following the initial stages of the infringement procedures. Hence, the Author proposes changes in respect of ICS's — in conjunction with the Commission's view. On another token, while the discussion throughout the thesis revolves around matters justifying such interference. It will be necessary to attempt and bring the claim to the surface concisely — justifying such interference.

Understanding the competences of the EU in the field of national policy will be possible by highlighting some landmark case-laws, as they have had a great deal on nationality matters. It follows that the hypothesis of this research will be; *The European Union should have competences to participate in the field of nationality policy as the practice of Investor Citizenship Schemes illustrate the extent upon which the Member States may act in an abusive manner*. It must be noted that the competences of the EU to regulate the following schemes

should be understood broadly — encompassing not only those treaty provisions regulating nationality matters which provide with the legislative competences — but rather, taking also into consideration case-laws and general principles that could be invoked in order to justify EU's interference in the field of nationality policy. However, general principles solely cannot of themselves create new competences for the EU.[6] It will, therefore, be crucial to highlight the relevant case-laws, while also navigating through some EU policies, and values, in attempting to realise whether ICS's fall against EU laws, and whether there are sufficient grounds justifying Union interference.

The research will be of qualitative nature. The Author begins, by generating data in understanding the concept of EU citizenship; hence, the construction of the thesis will be based loosely on philosophical roots. Understanding the concept of EU citizenship allows to further develop the research and propose future direction in light of the matter. The chapter shall, therefore, lay a good starting point in the thesis — attempt to investigate the conformity of ICS's under EU law. In addition, given the evolving nature of EU citizenship and the EU's integration story. It is in the Author's interest to take a perhaps flexible view in carrying the thesis.

The thesis intends to targets policy-makers and other principal authorities at the EU-level. Especially, those working closely with the Internal Market (e.g. in the area of integration, and the relevant national authorities that are responsible for citizenship administrative procedures). In addition, the thesis is addressed for a wider public given the topicality of the research as well as in light to shed more transparency for Europeans.

Before going further, it must be noted here that the research will only consider ICS's where 'residence' in the host country is not required (or it may be only for a non-significant period). There are various programs providing applicants the right to 'buy' their passports, but for the purpose of this study, emphasis will be only on those programs where the investors are not required to reside in the host country — amongst other general requirements that are waived, thus where citizens integration is not required.

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[6] Leczykiewicz, D. (2017). Compensatory Remedies in EU Law: The Relationship between EU Law and National Law. In *Research Handbook On EU Tort Law* (pp. 63-92). Edward Elgar Publishing., p 70.

1. THE CONCEPT OF EUROPEAN UNION CITIZENSHIP

For the sake of clarity, it is necessary to attempt to define citizenship briefly. Understanding citizenship in-depth in the context of EU would prove to be excessive — a topic for a book. For the purpose of this thesis, a sufficient understanding is for the sake of clarity, and in addition, will allow to determine further what may be the consequences of selling EU citizenship.

The Treaty on European Union signed in 1992 marked a landmark in the Union's integration story. Hence, citizenship of the Union was established. The purpose was to promote European values and its identity. The new concept of citizenship meant that any person holding the nationality of a Member State had to be also regarded as a citizen of the Union. EU citizenship confers various rights on the individuals which are in addition to those enjoyed under national citizenship. This implies that EU citizenship does not replace the individuals' national citizenship — but rather, it is only an addition to national citizenship.[7] It follows, that the citizenships of the Member States do not compete or are not supposed to compete between the EU citizenship.

Structures and experiences of national citizenship provide with some grounds and experience which potentially allow to understand further the concept of EU citizenship.[8] Historically, there have been various interpretations and many concepts of citizenship.[9] The predominant one being that citizenship usually refers to active participation in the social sphere. Certainly, citizenship is inherently tied to the idea of representation of a nation. In particular, the status given by citizenship acts as an objective indicator of integration.[10] Citizenship in the past has often been embraced to mean membership in a political community.[11] Illustratively, it makes no sense to speak of 'citizenship of mankind'.[12] On the other hand, citizenship makes sense only when it implies a specific community of which the person is a citizen.

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[7] Preub, U. K. (1995). Problems of concept of european citizenship. European Law Journal, 1(2), 267-281., p 267.
[8] Roche, M., & Van Berkel, R. (Eds.). (2018). *European citizenship and social exclusion*. Routledge., p 4.
[9] Preub, U. K. (1995)., *supra nota* 7, p 271.
[10] Yang, P. Q. (1994). Explaining immigrant naturalization. *International Migration Review, 28*(3), 449–477., p 450.
[11] Preub, U. K. (1995)., *supra nota* 7, p 269.
[12] *ibid*., p 267.

The idea that there is to be a link between a citizen and a community was as a matter of fact not the real starting point of EU citizenship.[13] Interestingly, the EU began its journey, in creating a supranational citizenship, by recognising a uniform legal status on individuals at the supranational-level and conferring them with rights and freedoms.[14] Many of these developments came through the case-law of the European Court of Justice (CJEU or the Court).[15] It must be acknowledged that the CJEU contributed significantly in the creation and development of EU citizenship.[16]

The EU citizenship has truly not developed in a linear manner. There have been various backstops in the European integration story, such as the current issue of Brexit. Truly, EU citizenship is not just a one-way track;[17] rather a multi-way track wherein elements of Member States' institutional 'styles' may greatly affect the process of developing EU citizenship. Hence, it should be acknowledged that the European integration story is closely related to the development of EU citizenship.

Although the forms, as well as the functioning of EU citizenship, are dispersed across the EU polity,[18] EU citizenship is established constitutionally in the primary sources of law in Article(s) 9 of the Treaty on European Union (TEU), and Articles 20, 21 of the Treaty on the Functioning of European Union (TFEU or the Treaty). It was first defined in the TEU and currently, under TFEU. This 'constitutionalism' of EU citizenship is not an end in itself; European Union law has accompanied the various stages in developing the EU citizenship, together with the respective CJEU.

The concept of EU citizenship goes beyond the expressed Treaty provisions. The evolving case-law of the CJEU has extended the content of EU citizenship;[19] the concept of EU citizenship is closely linked to aspects such as free movement of persons, the prohibition of discrimination[20]

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[13] Shaw, J. (2019). EU Citizenship: Still a Fundamental Status?. In *Debating European Citizenship* (pp. 1-17). Springer, Cham., p 3.
[14] *ibid*., p 3.
[15] Weatherill, S. (2016). *Law and Values in the European Union*, United Kingdom: Oxford University Press., p 15.
[16] Discussed below.
[17] Shaw, J. (2019)., *supra nota* 13, p 5-6.
[18] *ibid*., p 2.
[19] Jacobs, F. G. (2007). Citizenship of the European Union—A legal analysis. *European Law Journal*, *13*(5), 591-610., p 593.
[20] *ibid*., p 598.

on grounds of nationality, and the protection of fundamental rights. It follows, that various rights conferred by the EU citizenship are based on human dignity.

Even though Member States retain a monopoly position in determining who their citizens are — the right is not fully autonomous of EU law. As a matter of fact, there are various EU instruments regulating matters that touch closely upon the sphere of citizenship. For example, the Directive 2003/109/EC concerning the status of third-country who are long-term residents. While the Directive is not strict law in a sense — it is not a regulation. Member States must comply and have their citizenship matters in conformity with EU laws, or in other words, they have to have due regards on the relevant policies as established by the CJEU.

As traditionally Member States have had full control over who do they recognise as their citizens, the newly raised issue of ICS's illustrates, that the issue of access to (EU) citizenship is no longer a matter concerning only the Member States. Wherein, the EU is to have sight over the relevant matters, it will likely be a contested attempt. However, it must be borne in mind, especially for those closely participating in the 'life of EU' that, where the EU citizenship is to be seen as a form of experiment,[21] that this experiment may call for reinterpretation given the traditionally held 'black-and-white' line in competences. Consequently, matters relating to citizenship attribution and loss will likely be considered at the EU-level sooner or later.[22]

The plurality of concepts of citizenship leads to an assumption that there is not a strict definition of what the EU citizenship is; the primary laws provide the legal basis and clarify that EU citizenship is only an addition to national citizenship. It also spells down the rights flowing from EU citizenship. Any other EU instrument does not go into defining it. In the Author’s view, this may be for the sake of allowing the development of EU citizenship in a 'flexible' or 'dynamic' manner. Given the fact that defining a supranational citizenship may *de facto* restrict the possibilities of developing it. Hence, where the EU citizenship is yet of one kind — defining all of its functions and its concept would seem like an impossible task given the reality that what is under the creation is a new type of citizenship — citizenship of a supranational Union. Although this is true, it does not mean that EU citizenship would be established from scratch. As

[21] Shaw, J. (2019)., *supra nota* 13, p 2-3.
[22] Brun, A. (2019). A European or a National Solution to the Democratic Deficit?. In *Debating European Citizenship* (pp. 27-29). Springer, Cham., p 27.

mentioned above, the general ideas of citizenship have likely served the founding of EU citizenship.

It is safe to say that EU citizenship is to a large extent about identity — a feeling of belongingness to the Union. Moreover, it is also more than just about identity; it provides rights and duties and it is a legal status. Citizenship is therefore of relational value as well as instrumental value.[23] The latter describing the rights and duties flowing from citizenship whereas the former is tied with the idea of identity.

Owing to EU membership, the Union's impact has forced the Member States to interrogate the doctrine of sovereignty and learn to trust the Member States whilst accepting EU's impact.[24] Where integration of citizenship policies at the EU-level has been a great challenge given the fact that the Member States bear different policies regulating citizenship matters, reflecting their strong national identities.[25] The Union's continuous growth has changed Europeans' understanding of EU citizenship.[26] In the future, the possibility of Union's integration may induce further,[27] hence, the application of EU law in national citizenship matters may be greater. The citizenship of the Union is sort of a project to be realised, there is no full definition of what it is but various things that encompass its meaning are existing.

To this end, before going any further, it is necessary to dedicate a brief chapter on some of the greatest rights that flow from EU citizenship, precisely, the Free Movement of Persons and the Principle of Non-discrimination. Frankly, the investors that seek for EU citizenship are after the rights flowing from it.[28] The Author shall discuss the rights in a descriptive manner, attempting to illustrate how are the rights most likely been invoked by the investors.

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[23] Bauböck, R. (2019) Genuine links and useful passports: evaluating strategic uses of citizenship. *Journal of Ethnic and Migration Studies*, 45:6, 1015-1026, DOI: 10.1080/1369183X.2018.1440495., p 1015-1026.
[24] Kostakopoulou, D. (2007). European Union citizenship: Writing the future. *European law journal*, *13*(5), 623-646., p 628.
[25] *ibid*., p 625.
[26] *ibid*., p 628.
[27] *ibid*., p 634.
[28] Kochenov, D., & Lindeboom, J. (2018). Pluralism through its denial: the success of EU citizenship. In *Research Handbook on Legal Pluralism and EU Law* (pp. 179-198). Edward Elgar Publishing., p 14.

1.1. The Free Movement of Persons and the Principle of Non-discrimination

The European citizens seem to forget sometimes that they benefit from a bulk of rights. Maybe this is (so) as there are a number of Europeans that take these rights for granted, or because some Europeans may not travel so often — and, therefore, would be 'missing out' from these rights.[29] Where it is 'normal' for Europeans to have such rights. For some third-country nationals, the *European rights* seem like a dream. However, not everyone has to only dream about it.

Investor citizens may be eligible to buy their EU citizenship indirectly and, thus, acquire all of the rights — in all of the 27 Member States. The primary condition be that — wealth.[30] When Malta established its ICS in 2013, it bought in a lot of criticism. It was argued that Malta sought to deliberately sell its citizenship as a bundle, with frankly, the more valuable citizenship of the Union.[31] In any case, the investor(s) were likely to be after the status of EU citizenship.

Given the reality that a large portion of the investors are likely to carry on their journey to the country of their destination.[32] They would, therefore, benefit from the free movement right, to say the least. First, they would go through the most lenient procedure to gain their citizenship. This would take place in either of the countries practicing ICS's. After that, the investors are likely not to hesitate on their departure from their new 'residence state'.

The Principle of Non-discrimination, together with, the Principle of Mutual Recognition will ensure that the investors are able to move to their country of destination and get their citizenship recognised by the destination state. It seems that the investors will be able to move and benefit from EU rights without any additional barriers. This is actually in line with EU law.

The Member State of their destination are in a position where they shall not discriminate on the basis of nationality. Nor can they refuse to recognise the investors' EU citizenship. Thus, the

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[29] Some of the rights can be only exercised when travelling from a Member State to another.

[30] Tanasoca, A. (2016). Citizenship for Sale. *European Journal of Sociology*, *57*(1), 169-195., p 171.

[31] Mentzelopoulou, M. M., & Dumbrava, C. (2018). Acquisition and Loss of Citizenship in EU Member States: Key Trends and Issues., p 8. Retrieved from: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf as of 14th of February 2021.

[32] Džankić, J. (2018)., *supra nota* 1, p 74.

CJEU stressed in its case-law *Micheletti*, that the Member States must recognise the citizenship of the other Member States without any additional conditions.[33]

Where the majority of the Member States have expressed their doubts about ICS's — they are likely to be stepped-on — given the unwillingness of the Member States' practicing those schemes to make them in line with EU law requirements. Hence, the investors may be welcomed by the host state, but the rest of the community is threatened and, more, are in a position where they cannot *de facto* oppose.

The brief chapter allows to understand that the investors are most likely to benefit from the status of EU citizenship, and further, the investors are likely to use the host Member State as a 'tool' to move forward with their intentions. In the next sub-chapter, the discussion will revolve around the relevant pathways on acquiring EU citizenship and the viewpoints amongst the Member States on immigration. The chapter will built upon the things discussed in Chapter 1.

1.2. The Relevant Pathways to Acquire EU Citizenship and the Shared Viewpoints Amongst the Member States

Access to EU citizenship is regulated by a variety of national policies. Citizenship laws vary greatly amongst the Member States.[34] In the EU, the major determining factors on the accessibility of citizenship are *ius soli* birthrights, residence requirements, language, and integration requirements.[35] Research has shown,[36] that states generally favour long-term residence over short-term ones. Thus, the duration of residence amongst the immigrants with regard to naturalisation, are expected to have a greater chance of being naturalised.[37]

Could it be that the long-term stayers that are preferred by the Member States over the short-term ones, reflect the legal Principle of Genuine Link, requiring a person naturalising to have ties to the state in question. If so, the duration would truly create links between the host state and the applicant. On the same token, the kind of practice may be implicitly reflecting the general ideas

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[33] Judgement of the Court of 7 July 1992, *Micheletti*, Case C-369/90, EU:C:1992:295., paragraph 10.
[34] Dronkers, J., & Vink, M. P. (2012). Explaining access to citizenship in Europe: How citizenship policies affect naturalization rates. *European Union Politics*, *13*(3), 390-412., p 392.
[35] *ibid*., p 393.
[36] *ibid*., p 393.
[37] The toleration of dual citizenship also plays a role — but this is not a central issue for this study.

of citizenship; a person shall become an active participant in the social sphere, of a particular state, in order to claim its citizenship. Either one it be, both paths stress upon the duration of stay as a precondition to gain citizenship. The kind of policy excludes the possibility of providing aliens with citizenship who lack ties and simultaneously allows the creation of a European Union, where the 'identity' becomes further clear.[38]

Anyhow residency requirement is not just a question of whether a Member State wants to have it in place. EU law regulates the matter through the primary sources of law. TFEU states in Article 79[39] that *"the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in the Member States…"* The Article follows with paragraph (2) providing the European Parliament and the Council the powers to adopt acts with the ordinary legislative procedure concerning *"the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits…"* The European Union has adopted a bulk of measures following the mentioned legal basis. For the purpose of this thesis, the Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents is of relevance.

In its reciprocal (6), the main criterion for acquiring the status of long-term residency should be the duration of residence in the territory of a Member State. The duration of residence is further highlighted in Article 4 stating that the *"Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application."* While those who hold a long-term residence permit are allowed to claim the citizenship of the Member States provided that they fulfil the relevant criteria. Hence, not only is the Principle of Genuine Link there to ensure that the applicants seeking for citizenship have established links to the state in question but also, EU laws protect the interest by seeking to set standards in light to ensure the uniform application of EU law and seemingly the development of EU citizenship in the right path.

In the case of ICS's, it seems that the Member States in question would have failed to implement the Directive by deriving from its goals. Although the Directive provides a possibility to issue a long-term residence permit on terms that are more favourable than those laid by the Directive, it

[38] Such policy is for the benefit of fostering social integration, or 'European identity'.
[39] Ex Article 63 of the Treaty Establishing the European Community.

yet remains unclear whether the Member States practicing ICS's have failed to implement the Directive. In any case, it seems as if the measures under ICS's are arbitrary and do not correspond to the spirit of EU law. The thesis will address the Directive below.

For the purpose of this thesis, great emphasis is on naturalisation — rather than other rights such as *ius soli* or *ius sanguinis.* It is central to this study to realise the pathways to EU citizenship by third-country nationals. Before highlighting the general conditions that apply to third-country nationals when naturalising within the EU — it is necessary to mention few words about integration.

The Member States have realised that immigration policy cannot be successful without effective integration.[40] That being said, if integration is left out, what is the purpose of naturalisation procedures? It is logical to assume that these two things go hand-in-hand. But for the investor citizens, integration may be just another obstacle if it is required. This raises the question, that where the Member States have realised the necessity of integration[41] — why is it left out of consideration in the case of ICS's. By attracting investors with the most lenient scheme, where integration is *de facto* left out of consideration would seem to contradict the realisation that effective integration is a key element in naturalisation procedures. Furthermore, the fact that a monetary transfer would in itself create genuine links between the host state and the applicant is questionable.

While the EU has increasingly stressed upon the incorporation of the genuine link requirement. In the case of ICS, no such requirement is mandated — or if it is, the requirement falls short from actual physical requirements of residency. Not only is the residency requirement waived, but also the integration requirements. Clearly, ICS's make a great distinction between the wealthy, and the regular third-country nationals. They seem by nature discriminatory and place an unequal-foot for those seeking to naturalise within the European Union. Thus, it has been observed that the practice represents a disruption of the Principle of Equality.[42]

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[40] De Bruycker, P. (2009). Laws for Legal Immigration in the 27 EU Member States: Belgium. *International migration law*, *16*, 153., p 31. Retrieved from: https://publications.iom.int/system/files/pdf/iml_16.pdf as of 8th of January 2021.
[41] Reciprocal (4) of the Directive 2003/109/EC.
[42] Dzankic, J. (2012). The pros and cons of ius pecuniae: investor citizenship in comparative perspective., p 11-12.

Back to the pathways. Most of the naturalisation procedures are rounded around the ordinary naturalisation procedure, but special procedures of naturalisation are not rare. These exceptional situations of naturalisation are often used by sportspersons, artists,[43] highly skilled professors, or scientists. In these circumstances, some of the integration criteria may be waived and, hence, other considerations will be taken into account. Such considerations may be, family links, ethnocultural connections, or special contributions.[44] Special procedures of naturalisations are in the interests of the Member States as they may improve their national educational system, strengthen the EU's competitiveness, as well as in general, the procedures recognise the respectful achievements of the eligibles — that go through the procedure.

Special procedures of naturalisation could also occasionally occur on wealthy investors. Particularly, the case of ICS's. These investors are likely not to be 'highly achieved' persons and get access to EU citizenship solely on the basis of their wealth — this does not seem to be in align with the general requirements under the special procedures of naturalisation.

Following the path of ordinary naturalisation, applicants will in most instances have to pass a cultural knowledge test, prove their language eligibility, amongst other criteria. The general conditions under these procedures are first, a requirement of physical residence, and secondly, as established in international law, a requirement of genuine links between the country. The residence requirements may vary amongst the Member States but generally, it is from 4 to 10 years.[45] Most of these conditions make the process of naturalisation a question of establishing actual genuine links. The integration requirements, therefore, act as a type of safeguard through which the ones who adapt to the society are welcome to settle.

The above-mentioned hints at the complexity of the system of naturalisation in the context of European Union. Truly, in the context of the Union having similar rules, as well as standards, are to facilitate the uniform application of EU law and the smooth functioning of citizenship matters. While this is true, it also sends an equal message to the international sphere where naturalisation is not a question of wealth — *but of settled law*.

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[43] Mentzelopoulou, M. M., & Dumbrava, C. (2018)., *supra nota* 31, p 8.
[44] *ibid*., p 3-4.
[45] Kochenov, D., & Lindeboom, J. (2018)., *supra nota* 28, p 17.

Given the complex hedges surrounding naturalisation — EU has not dealt with naturalisation in depth. It is a challenge to regulate naturalisation at the EU-level given the complexities and the very reality that nationality matters fall under the domain of Member States competences.

In the next sub-chapter, it will be necessary to analyse further in depth the Principle of Genuine Link and its relevance in the EU. To begin with, the chapter discusses the Nottebohm case-law and in addition highlights some of the case-laws that could be seen as supportive ones — these are to allow the development of a further cohere argumentation opposing the practice of ICS.

1.3. Genuine Links

EU citizenship describes a bond between the EU and its citizens.[46] At least, this seems to be the emerging trend. The EU citizenship provides the citizens with identity — the feeling of belonging. Hence, to a far extent, EU citizenship is about relational value — as opposed to instrumental.[47] It follows that, where a Member State grants its citizenship without the existence of a genuine link, in cases where the citizenship is for sale, the value would be only instrumental, relating only to those 'EU-wide' rights that flow from EU citizenship. Such movement threatens the social-contractarian imaginary of citizenship while introducing a new form of belonging, neoliberal form.[48] This on the first glimpse would seem to contradict the general understanding of citizenship and seems to clash with the European approach.

Moving on to the case-law in which the International Court of Justice (ICJ) gave rise to the Principle of Genuine Links. In its judgement of Nottebohm, the ICJ held that it is the sovereign right of nations to determine their citizens, but the applicant(s) applying for citizenship must prove a meaningful connection to the state in question.[49] As such, an 'effective link' between the state and the applicant must be established in order for a person to claim for citizenship. The significance of the case lies in that of the establishment of the Principle of Genuine Link but that

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[46] Worster, W. T. (2018). The Emergence of EU Citizenship as a Direct Legal Bond with the Union., p 1. Retrieved from: *SSRN 3111841* as of 17th of February 2021., *See also:* Judgement of the Court (Grand Chamber) of March 2011, *Ruiz Zambrano,* Case C-34/09, EU:C:2011:124., paragraph 44.

[47] Bauböck, R. (2019) Genuine links and useful passports: evaluating strategic uses of citizenship. *Journal of Ethnic and Migration Studies*, 45:6, 1015-1026, DOI: 10.1080/1369183X.2018.1440495., p 1021 - 1022.

[48] Oosterom-Staples, H. (2018). The triangular relationship between nationality, EU citizenship and migration in EU law: a tale of competing competences. *Netherlands International Law Review*, *65*(3), 431-461., p 448.

[49] Judgement of the International Court of Justice of 6 April 1955, *Nottebohm* Case, (Liechtenstein v. Guatemala); Second Phase. Judgement Second Phase.

is not all. In this case — international law recognised the power of safeguarding against arbitrary or artificial situations of naturalisation as well as nationality-related decisions.[50] Such recognition within the context of European Union could be seen as a safeguard type; it limits the Member States' capabilities from practicing arbitrary nationality policies.

In its reasoning, the ICJ highlighted that while considering what constitutes an 'effective link' great consideration shall be given to aspects such as the habitual residence of the concerned. While scholars debate even today as to the actual meaning of the genuine link requirement, what seems to have become clear over time is that a bond between the host state and the applicant must be established in order for the person to claim for a citizenship of a particular state. The very fact that there is uncertainty as to the exact meaning of the genuine links requirement, may have allowed Member States a certain degree of arbitrariness and a margin of manoeuvre in the domain of nationality attribution matters.[51] Regardless, upon this date, the Nottebohm case is still relevant. Although the Principle of Genuine Link has not become a customary international norm, it is a general principle that should be followed by the Member States.

The following claim follows a logical pattern; in the case Rottman, the CJEU was asked to rule on the legality of the loss of EU citizenship. The significance of the case lies in that that the CJEU made it clear that although Member States have the freedom to determine who their nationals are, such decision must take EU law fully into account.[52] In other words, the CJEU made it clear that wherein the Member States have the powers to decide on nationality matters, that they do not have an unfettered right to regulate the loss of such legal status, but rather, the loss of such legal status must be done with due regards to EU law. The CJEU, therefore, confirmed that EU law can review Member States decisions concerning the revocation of nationality. On the parallel, EU law seems to be evolving to also have sight over decisions on the attribution of nationality.[53] Wherein international law demands that naturalisation is conducted in case a genuine link is established. And where the CJEU has also implied upon the significance of

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[50] Carrera, S. (2014). The price of EU citizenship: The Maltese citizenship-for-sale affair and the principle of sincere cooperation in nationality matters. *Maastricht Journal of European and Comparative Law*, *21*(3), 406-427., p 418.
[51] *ibid*., p 427.
[52] Judgement of the Court (Grand Chamber) of 2 March 2010, *Rottman,* Case C-135/08, EU:C:2010:104., paragraph 62.
[53] Pending C-118/20 Jy v. Wiener Landesregierung. Depending on the decision, the case may have far-reaching consequences on EU's powers to review the attribution of nationalities by the Member States.

that requirement,[54] while maintaining that the Member States should observe international standards.[55] Member States who fail to take it into account may be subjected to a review by the EU, in respect of those policies, so far as such review is proportional.

In the Rottman case the 'cross-border dimension' brought the case within the scope of Union law, and, hence, the CJEU made it clear that citizenship matters could not be considered as a purely internal situation.[56] Truly, the case is revolutionary. Although the CJEU reiterated in several rulings that decisions concerning the acquisition and loss of nationality must be exercised in 'due regard to Union law'. The Rottman case further highlighted the very fact that such matters have a cross-border element and, therefore, Member States bear the obligation to exercise such powers cautiously.

While the Member States are in a position where they are *de facto* forced to recognise the EU citizenship of a person, that was acquired in another Member State.[57] Not to mention, Member States cannot question the citizenship decision of the other Member States.[58] Hence, they cannot question the validity of such national decision. It leaves them in a position where they must trust that the Member States remain truthful in their nationality attribution procedures. Remaining truthful in other words means that the Member States must exchange best practices and this includes abiding by EU, and international law standards — incorporating the genuine link requirement in their nationality attribution decisions.

It was mentioned at the introduction that the Member States practicing ICS's have established them frankly in a vacuum from the knowledge of the other Member States. In line with the following, the Principle of Sincere Co-operation has been undermined by the Member States in question. Where does this leave the rest of the community? Where it is established case-law that the Principle of Mutual Recognition applies in citizenship matters,[59] and where the Member States must refrain from questioning the validity of national decisions concerning nationality attribution. It would seem, that the unprecedented nature of ICS's has and will cause disturbance

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[54] For example, in a recent case; Judgement of the Court (Grand Chamber) of 12 March 2019, *Tjebbes,* Case C-221/17, EU:C:2019:189.
[55] Oosterom-Staples, H. (2018)., *supra nota* 48, p 446.
[56] Carrera, S. (2014)., *supra nota* 50, p 418 - 419.
[57] Judgement of the Court of 7 July 1992, *Micheletti*, Case C-369/90, EU:C:1992:295., paragraph 10.
[58] The Principle of Mutual Recognition acts as an *de facto* 'immediate' recognition in nationality matters.
[59] Judgement of the Court of 7 July 1992, *Micheletti*, Case C-369/90, EU:C:1992:295., paragraph 10.

for the smooth functioning of citizenship matters. The very fact that the Member States are under an obligation to recognise one-another national citizenships should not be associated with risks. Such movement may not just reduce the trust between the Member States, but in addition, it may be a block for further integration within the Union given the conflicting nature of ICS's and EU law.

Finally, highlighting once more — the Principle of Genuine Link is not just any principle. Although initially it derived through ICJ, it has found its way into EU's legal polity in a form or another.[60] In addition, it seems that the principle is becoming increasingly important in the context of the EU. Hence, given the deceptive arrangements of acquiring EU citizenship, the application of the Principle in the context of EU should be valid. It is, therefore, frankly strange that the Member States practicing ICS's have been able to bypass the requirement.

Malta is a great example of a Member State practicing ICS's without taking into account the Principle of Genuine Link. Malta has faced pressures from both the EU Commission and the parliament[61] to include the genuine link on the foreign investors.[62] Claims from the opposing side are rather straight-forward being that where genuine links are mandatory, this would lead to ethnic nationalism. In other words, those who support the schemes are likely to claim that the Principle is only fuelling nationalism to EU's legal order. Furthermore, as was argued by Peter Sapiro, *"Nottebohm is a remarkable decision in one respect only: there may be no other judgement of an international tribunal that has had so much purchase on the imagination at the same time as it has had so little traction on the ground."*[63] That being said, some scholars amongst other respective academics claim upon this date, that Nottebohm has been interpreted wrongly and that while the initial case considered the loss of nationality, the Principle of Genuine Link is not as 'settled' as others may argue.

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[60] Not necessarily explicitly mentioned, but references to it can be found, for example, in the Directive 2003/109/EC.

[61] In its resolution of 2019, the European Parliament criticised the Maltese programme on a number of grounds. Firstly, it argued that citizenship should not be a tradable commodity, and thus, cannot have a price tag attached to it. Secondly, the Parliament argued that citizenship should be dependant on people that have ties with the EU.

[62] The 'genuine link' argument used by the European Parliament and the Commission constitutes a standard in Public International Law.

[63] Sarmiento, D., EU Competence and the Attribution of Nationality in Member States, Investment Migration Working Paper, ISSN 2504-1541./ 2019., p 26. Retrieved from: https://investmentmigration.org/wp-content/uploads/IMC-RP-2019-4-Tratnik-and-Weingerl-2.pdf as of 8th of February 2021.

In the Author's respective view. A strong belief that while the EU is supranational — it calls for common rules to ensure that the Internal Market functions smoothly. On the parallel, if an independent third-country would have a genuine link requirement, claims of 'nationalism' would be much stronger. Given the reality that the EU, together, is formed of states with completely different cultures and traditions — 'fuelling nationalism' would seem to miss the point.[64] In the Author's view, the EU is attractive as to the very fact that it is a place of diversity. Whilst the EU attempts to mitigate matters that may arise within the system of citizenship, and while its driving values are based on principles of equality, solidarity, and non-discrimination, it seems that such claims miss the actual point on why are genuine links necessary in the EU's legal order. The Author takes the view that genuine links by nature are crucial in light to ensure that while the Member States are forced to recognise one-another citizenships — such recognition shall be based on a great level of trust amongst the Member States and the recognition of those citizenships shall not become a 'burden' for the Union Member States. 'Burden', because a level of standard is crucial to ensure that there are no lenient ways to gain EU citizenship — but rather, access to EU citizenship should be made through a procedure that is non-discriminatory and that places applicants on the same foot.

Where traditionally Member States reserved the powers to regulate citizenship matters — throughout the case-law of the CJEU, the EU's competences have gradually broadened the scope of EU citizenship in relation to national citizenship.[65] These, cautious 'steps' taken by the CJEU[66] have imposed certain limits to the powers of the Member States in nationality matters.[67] The traditionally held sovereignty right is subject to increasing dynamism and pressure in the European Union.[68] EU citizenship is becoming increasingly more valuable, contributing to EU citizens' legal statuses, while Member States' nationalities as a legally meaningful status is diminishing — at least within the context of European Union.

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[64] The Author acknowledges that there are forms of 'nationalism' and that it may not only refer to a nation but also to a group of nations. However, the following claims seem to fail to recognise that the EU is a place of solidarity; the EU welcomes third-country nationals to its territory but these people have to go through naturalisation in order for them to claim for EU citizenship. Naturalisation in this context is not about 'nationalism' but about ensuring that those who naturalise, genuinely want to live a considerable length of their lives in the EU, and do not seek solely, to take advantage of EU citizenship as an 'instrumental tool'. Integration requirements in this context are to foster the European identity.

[65] Mentzelopoulou, M. M., & Dumbrava, C. (2018)., *supra nota* 31, p 8.

[66] Shaw, J. (2011)., *supra nota* 13, p 8-9.

[67] Mentzelopoulou, M. M., & Dumbrava, C. (2018)., *supra nota* 31, p 8.

[68] Carrera, S. (2014)., *supra nota* 50, p 425.

2. COMPETENCES OF THE EUROPEAN UNION IN THE FIELD OF NATIONALITY POLICY

Citizenship is generally viewed as a key element of state sovereignty and international law allows states to recognise and clarify their own citizens.[69] As a matter of fact, nationality could not be conferred by any other than national law.[70] Although international laws role is rather restricted, thus, it does not offer concrete standards for the recognition or attribution of citizenship, it may nevertheless have a hypothetical role wherein it may influence state decisions concerning nationality matters.[71]

Supposing that international law is to be seen as the backstage of a cinema (EU's legal order) — it frankly does not serve much, when attempting to delimitate the competences. Within the EU, there is a continuous balance of powers between the Member States and the supranational core.[72] Indeed, EU law is much about the conflict of laws.[73] Interestingly the majority of CJEU case-laws could also be viewed through a lens of resolution of competences.[74] This applies to citizenship matters too. Thus, the division of competences within the EU is a central constitutional issue of EU law.

For a starting point, it is good to mention that the Lisbon Treaty spells out the distinctions between competences. The categories of competences are laid in Title I of the Treaty. Put it simply, competences can be categorised into three different categories which are as follows; shared, exclusive, and co-ordinative, supportive or supplementary. Traditionally, citizenship and nationality matters have been the matter of sovereign states to decide. Hence, nationality matters fall under the exclusive competence reserved for the Member States. However, it must be called that the co-operation as well as the integration of policies between the Member States and the

[69] Kochenov, D., & Lindeboom, J. (2018)., *supra nota* 28, p 3.
[70] *ibid*., p 3.
[71] *ibid*., p 3.
[72] *ibid*., p 5.
[73] *ibid*., p 5.
[74] *ibid*., p 5.

European Union, since the establishment of EU citizenship has meant that the legal orders, both, the Member States and the European Unions have become so intertwined, that the traditional exclusive competence of the Member States can no longer be separated from an EU competence.[75] This in practice means, that it is inevitable, that where a Member State is to introduce changes to its nationality law, it is likely to impact on ares belonging to the EU's competences.[76]

As mentioned above, the CJEU has held various times, that when a Member State exercises its exclusive competence it may not frustrate EU policies and objectives. Where a Member State would do so without consulting the other Member States — it would likely breach the Principle of Sincere Co-operation.[77] Although nationality law is one issue, it is closely related to the functioning of the Internal Market — given the Intra-EU mobility rights or the so-called 'freedoms' of the EU. This sheds light on the very fact that nationality laws of the Member States may impact on EU's competences[78] and further, it may impact the other Member States simultaneously.

Even though the CJEU has laid down some general rules, such as the above-mentioned principles, it has, however, abstained from imposing any significant rules on the Member States' competences in nationality matters.[79] The principles, however, are sufficient to impose limitations on to the Member States capabilities, whether they require the Member States to treat applicants on the same foot, by way of non-discriminatory treatment, or whether they oblige Member States to co-operate as stipulated in the treaties, or even more significantly, where they oblige Member States to have their nationality laws in align with EU and international law standards. It follows that although Member States may have the exclusive competence, the CJEU is endowed with the task of monitoring and ensuring the observation of EU law.[80] This in practice means that there is a possibility to review nationality policies, and thus, observe — that while the Member States within their capabilities are eligible to modify their nationality laws, they must nevertheless take into account the principles that form a standard of EU's legal order.

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[75] Oosterom-Staples, H. (2018)., *supra nota* 48, p 433.
[76] *ibid*., p 433.
[77] *ibid*., p 434.
[78] To point out; Internal Market, Immigration Policy.
[79] Oosterom-Staples, H. (2018)., *supra nota* 48, p 446.
[80] In accordance with the Treaty on European Union Article 19(1).

To highlight, the CJEU has used its competence in a manner to mould Member States' competences in nationality matters.[81] It has done so by requiring the Member States to observe international and EU standards when they amend their nationality laws.[82]

It must be reminded, that the EU is subject to the Principle of Conferral, according to which, all the powers of the EU are the result of an explicit and unequivocal transfer enacted by its Member States.[83] The Principle stresses that the Union shall not overstep its powers and it shall respect Member States' territorial integrity while stressing on the Principle of Sincere Co-operation as a tool on handling matters that may arise from the treaties; Article 4 paragraph 3 of TEU goes on to mention that, *the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*. In light of ICS's — could it be claimed that such schemes pose a risk to; i. uniform application of EU law, ii. the credibility and the integrity of EU citizenship, and may jeopardise the attainment of the Union's objectives?

If the EU was to interfere, the Principle of Conferral is a limitation for EU's scope in handling nationality policies. However, simultaneously, the Principle of Sincere Co-operation should lead the Member States to take into account the impacts on the Member States and the Union as a whole when amending their nationality laws.[84] Hence, Member States must act in a responsible manner, while the CJEU, and the European Commission, should observe developments concerning nationality laws of the Member States.

2.1. Immigration Policy

Immigration policy and nationality matters are closely related and it is, therefore, beneficial to spell few words about immigration policy. Understanding the distinction between the fields is important as the fields are very much connected and have implications to one-another. For the sake of efficiency, these two branches need to co-exist and function well.

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[81] Oosterom-Staples, H. (2018)., *supra nota* 48, p 446.
[82] *ibid*., p 446.
[83] In accordance with the Treaty on European Union Articles 4 and 5.
[84] Carrera, S. (2014)., *supra nota* 50, p 425.

Immigration policy is an area that has brought-in various debates at the EU-level. Despite EU's lack of full-fledged rights to tackle matters within the sphere, events such as the 2016 refugee crisis have forced the EU to act in light to embrace its ambitious goals. Hence, immigration policy lies at the heart of the EU's concerns,[85] and the competence constraints imposed by the Treaties will likely be exploited in the near future given the EU-wide concerns.

For now, it is good to know, that the EU is competent to lay down the conditions governing entry into and legal residence in the Member States.[86] Evidently, immigration policies are exactly about controlling the terms of admissions of third-country nationals. Managing immigration flows properly entails ensuring fair treatment of third-country nationals residing legally in the Member States.[87] In addition, it is also in line with the objectives of the EU to establish a uniform level of rights and obligations for both regular and irregular immigrants. ICS's in this context seem strongly to be contrary to the objectives of the EU — to ensure fair treatment of third-country nationals. The very fact that a distinction is made based on one's wealth, does not entail the goal of the EU and consequently goes against the Principle of Equality.

The EU has adopted a number of directives in the sphere of immigration policy.[88] The EU's approach to immigration addresses the issue of integration.[89] Thus, integration is a question of successfully integrating third-country nationals into a given society while maximising the opportunities for them. While it has been claimed that cultural integration is more crucial than economical — in the light of naturalisation procedures.[90] This is in the Author's view also true. 'Economic integration' does not seem to reflect *de facto* the Principle of Genuine Link. In the Author's opinion, economic contribution to a given society does not establish links to that society, or if it does — such link is purely based on a monetary transfer which is not in line with the general understanding of 'integration'. Illustratively, it makes no sense to 'buy relations' to a state. Wealth may allow applicants to have a higher chance of naturalising successfully[91] — but

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[85] Sarmiento, D. (2019)., *supra nota* 63, p 2.
[86] In accordance with the Treaty on the Functioning of European Union Article 79.
[87] European Parliament., (2020) Immigration Policy., *Fact Sheets on the European Union*. Retrieved from: https://www.europarl.europa.eu/factsheets/en/sheet/152/immigration-policy as of 8th of January 2021.
[88] Long-term Residents, Family Reunification and EU Blue Card Directive etc.
[89] It must be noted that the EU's competence in the field of integration is limited. However, in its communication of 2011 (COM(2011) 455 final), the European Commission highlighted that the management of integration (of third-country nationals) is a shared responsibility.
[90] Yang, P. Q. (1994)., *supra nota* 10, p 472.
[91] Given the reality that wealthy third-country nationals are likely not to become a burden for the society.

on the other hand, naturalisation should not be a question of wealth nor should wealth be a determining factor on the success rates of naturalisation.[92]

The EU has adopted the Directive 2003/109/EC on the sphere of immigration. The Directive sets a common standard on third-country nationals' long-term residence statuses. Hence, the Directive has harmonised some foundational aspects of immigration law at the EU-level. Such harmonisation is for the benefit of all of the 27 Member States given the very fact that harmonising the terms of long-term resident statuses promotes mutual trust between the Member States. It must be nevertheless called that the harmonisation was not intended to be fully-fledged. This is evident given the means of harmonisation — a directive. Whereas, a regulation would have likely failed to meet the objectives, given the various divergent regimes of nationality.

To this end, immigration policy, and nationality policies, have come closer than ever, and while the EU has the means to adopt legislation in the former field, in the latter, the EU has no means, at least, according to the strict reading of the Treaties. A 'fragmented' system of citizenship may lead to adverse outcomes.[93] The ongoing integration within the Union calls for common standards. On the same token, while immigration has been a rising trend in the EU[94] — the EU must work together in light to enhance, and improve, the functioning of the 27 different nationality policy regimes. Whilst the Commission's role in promoting new thinking, particularly, with respect to enhancing the rights of immigrants, allows the Commission to come up with, for example, initiatives. There are grounds, which are likely to call for changes in the near future — as to the matter of citizenship policy.[95]

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[92] Furthermore, as it is highlighted in the Directive 2003/109 reciprocal (9), economic considerations should not be considered as interfering with the relevant conditions when applying for a long-term status.
[93] In the Author's view, citizenship and immigration matters have to function simultaneously 'smoothly' given the close relation between the two branches. Realising the impact that the branches have on one-another, it is pivotal to ensure that they function well, and that one branch does not undermine the other, in terms of efficiency.
[94] Arcarazo, D. A. (2011). The long-term residence status as a subsidiary form of EU citizenship: an analysis of directive 2003/109. Brill., p 80.
[95] Elsmore, M. J., & Starup, P. (2007). Union Citizenship–Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy. In *Yearbook of European law*, *26*(1), (pp. 57-113). Oxford University Press., p 111.

2.2. State Sovereignty and Nationality Policy

Defining state sovereignty has been a struggle for countless observers. It is neither in the Author's interest to define it but rather only to rely on a traditional notion of state sovereignty. According to the classical notion of international law, state sovereignty is the basis allowing nations to claim the legal right to manage their own affairs to the exclusion of others.[96] It follows, that according to this notion, states enjoy exclusive jurisdiction over their subjects and matters within their territorial boundaries.

The traditional notion of sovereignty may not apply to the Member States of the European Union given the fact that Union law is the supremacy law and the Member States have to have due regards on Union law, even if, the competence is exclusively on the Member States.[97] It follows, that the integration story within the EU has meant that various areas, traditionally held by the Member States are now dealt by the EU. As such, it has been claimed that state sovereignty in some of the very essential areas of national citizenship has to a far extent vanished into thin air.[98] Given the very reality that immigration matters and some nationality matters have been dealt by the EU or even through international law.[99] The Member States no longer have the unfettered right to practice policies in the sphere as they would wish to. As a consequence, the era of absolute sovereignty in the EU may have come to an end.[100] The smooth functioning of matters within the EU may call for the Member States to give up their full autonomy in respect of particular fields.

The EU's unique system has meant that the EU is becoming the first polity in which citizenship has moved away beyond the boundaries of a nation-state to a supranational approach.[101] Thus, the national sovereign component in the field of nationality has become less apparent[102] while

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[96] Lee, H. E., & Lee, S. (2018). Positivism in International Law: State Sovereignty, Self-Determination, and Alternative Perspectives. In *Asian Yearbook of International Law* (pp. 1-24). Brill Nijhoff., p 4.
[97] Judgement of the Court (Grand Chamber) of 2 March 2010, *Rottman,* Case C-135/08, EU:C:2010:104., paragraph 41.
[98] Kochenov, D., & Lindeboom, J. (2018)., *supra nota* 28, p 13-16.
[99] For example, the Nottebohm case-law upon which the Principle of Genuine Links derived from.
[100] Besson, S., & Utzinger, A. (2008). Towards European Citizenship. *Journal of Social Philosophy*, *39*(2), 185-208., p 194.
[101] Kochenov, D., & Lindeboom, J. (2018)., *supra nota* 28, p 8-9.
[102] *ibid*., p 8.

EU's graduation in the field has meant that further things must be dealt at the EU-level. It follows, that in the contemporary European Union, the Internal Market and EU citizenship together has transformed the national policies of the Member States and thus, changed the meaning of the Member States' nationalities.[103]

While EU citizenship is altering the essence of the Member States' nationalities,[104] the powers of the Member States in the area of citizenship law is severely weakened;[105] the Member States may have the illusion that they fully control access to EU citizenship but they do not.[106] EU law does not in any way attempt to harmonise the nationality laws of the Member States, nor does it have the competences to do so. However, a sufficient level of common policies as regards some of the very *foundational* aspects serves to ensure that EU citizenship is not undermined by the Member States and that its attribution is made through a procedure that is non-discriminatory in light of the Principle of Equality.

It will be interesting to see what will the integration story bring on to the sphere of nationality. The EU citizenship is of one kind — and its development, in the right path, is partly in the hands of the Member States. While the Member States may have to give up some traditionally held sovereignty powers, the Author does not believe that in any circumstances would the EU take fully over the sphere of nationality — but rather, the EU may act as a guardian to ensure that the substance of EU citizenship is not undermined while ensuring that EU citizenship develops in the rights path.

2.2.1. The Case-laws Impact on EU Citizenship and State Sovereignty

Finally. The case-laws of the CJEU and their implications on EU citizenship are worth mentioning. The Chapter will address the underlying implications, of the evolution of case-laws in the sphere, while attempting to understand how has the CJEU contributed to the development of EU citizenship.

As discussed above, the CJEU has been able to contribute to the development of EU law in various manners. It has done so on a case-by-case basis where, sometimes, it has successfully

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[103] *ibid*., p 9-10.
[104] Besson, S., & Utzinger, A. (2008)., *supra nota* 100, p 196-197, 199.
[105] Kochenov, D., & Lindeboom, J. (2018)., *supra nota* 28, p 13.
[106] *ibid*., p 13.

established new principles which later have become part of the EU's legal order. While the CJEU's approach has been closely related to the content of the rights attached to EU citizenship, it has not addressed who may benefit from those rights attached to EU citizenship.[107]

Member States hold the powers to attribute citizenship, as such, they may choose who benefits from the rights attached to EU citizenship, while the EU has been the one to determine the content of the rights attached to EU citizenship. The CJEU's contribution has meant that it has strengthened its position as an actor, and simultaneously held some of its promises made in 1992.[108] Particularly, the constant development of the social dimension of EU citizenship has gradually shaped EU citizenship into its own source of rights.[109] Many of these developments came through the combined reading of the right of free movement and the prohibition of discrimination.[110]

Although EU citizenship has developed in a non-linear — but influential manner. The various modes to acquire the nationality of the Member States, together with EU citizenship, illustrates inequality and may jeopardise the inclusive nature of EU citizenship.[111] Thus, the CJEU's case-law has not been able to do much in this regard. Although assumed, the Principle of Due Regards as well as the Principle of Sincere Co-operation together, should lead the Member States to take into account the relevant EU policies when introducing changes or amendments to their respective nationality laws. It seems that the principles solely are not sufficient to combat such behavior by some of the Member States.

Despite this, the recent case-laws have had a tendency of extending the rights of long-term third-country nationals.[112] The proposition is that facilitating naturalisation as well as integration on long-term residence — at the national-level — would lead to a further cohere system of citizenship and simultaneously reduce discrimination on those seeking to naturalise within the EU.[113]

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[107] Oosterom-Staples, H. (2018)., *supra nota* 48, p 435.
[108] Besson, S., & Utzinger, A. (2008)., *supra nota* 100, p 191.
[109] *ibid*., p 191.
[110] *ibid*., p 192.
[111] *ibid*., p 193.
[112] *ibid*., p 198.
[113] *ibid*., p 201.

2.3. Delimitating the Competences — A Possibility?

Above, the Author has shedded light on the evolving competences. The considerations above, serve at this point of the study — the attempt to make a rough delimitation of the competences. 'Rough,' because what is clear, is that the evolving nature of the concept of EU citizenship makes it a challenge to delimitate the exact substantive sphere of EU's competences. As it was called, EU citizenship is a project and the integration story is closely related to the development of that. Hence, the integration story has meant that the Member States have to adapt their nationality laws with the growth of EU citizenship.[114] It appears as if EU citizenship with its concepts — plurality of concepts — is a *fluid* concept. What it may be now, may likely change in the near future. On the parallel, the competences may call for a shift in the near future given the evolving nature of EU citizenship.

Approaching the delimitation as follows. Firstly, strictly speaking, if relied on the Treaty itself, it must be highlighted that it is the exclusive competence of the Member States to deal with nationality matters. It would threaten the sovereignty of the Member States if the EU was to take over the sphere. Furthermore, the EU would not likely be able to manage the sphere solely, given the reality that the nationality policy regimes of the 27 Member States are a complicated matter to be dealt by a *de facto* 'outsider' — the EU. It is neither in the EU's interest to take over the sphere.

However, common standards are to facilitate a uniform approach in the European Union. It follows that while EU citizenship comes as a bundle with national citizenship. There need to be some common standards to ensure that the Member States do not exercise policies at the expense of the Union.[115] As established, a naturalisation decision by a Member State is not neutral with regard to the rest of the community.[116] It, therefore, calls for common rules to ensure the smooth

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[114] Maas, W. (2016). European governance of citizenship and nationality. *Journal of Contemporary European Research*, *12*(1), 533-511., p 541.
[115] "Member States are selling something they do not own" — life in the other Member States. Such sale is not desired by the majority of the Member States. As Sergio Carrera questioned in (Carrera, S. (2014)., *supra nota* 49, p 416, 422, 424.); Could these Member States be classified as "free-riders". Wherein, they are using the benefits of the EU citizenship to gain capital — unjustly selling something they do not own — life in the other Member States.
[116] National citizenship affects the scope of EU citizenship.

functioning of citizenship matters and, in addition, in light of improving mutual trust — a uniform approach would be for the benefit of the Member States.

The principles could be seen as forming a part of these 'standards'. In certain circumstances, the principles may be sufficient to establish state liability and thus could be seen as limiting the autonomy of state powers in the relevant matters. Take for example the Principle of Sincere Co-operation. In its opinion on the Rottman case, it was argued by Advocate General Maduro that domestic citizenship rules can in, certain circumstances, breach the principle of Sincere Co-operation.[117] In the case of ICS, it was questioned by the European Parliament as well as the European Commission that whether the Maltese government had failed to respect the duty of sincere co-operation.[118]

While it was confirmed by the EU's Parliamentary Research Service as regards the report of 2018 on the acquisition and loss of citizenship in EU Member States — that the EU lacks formal powers to interfere with the nationality laws of the Member States.[119] The compatibility of ICS's with EU law could, however, give rise for a potential EU action, and illustrate the need for a shift in competences to be realised.

In the Author's opinion, the fact that the very idea of this is true — a potential EU action — sheds light on the fact that 'exclusivity' as it is known, does no longer apply in the contemporary nationality affairs. Such pressure flowing from the European Union gives an impression that the Member States are subject to mandates flowing from the supranational. Illustratively, the integration of policies seems to always find their way to EU-level when matters have an EU-dimension.[120]

As pointed, in light to enhance the mutual trust amongst the Member States, a need for a collaborated approach is crucial and further, while the development of EU citizenship is partly in the hands of the Member States, they shall refrain from introducing national policies that could hinder the smooth development of that. It is on these grounds, a realisation arises — the smooth

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[117] Judgement of the Court (Grand Chamber) of 2 March 2010, *Rottman,* Case C-135/08, EU:C:2010:104., paragraph 30.
[118] European Parliament., (2014) *On EU citizenship for sale - European Parliament resolution of 16 January 2014,* (2013/2995(RSP))., Retrieved from: https://www.europarl.europa.eu/doceo/document/TA-7-2014-0038_EN.html?redirect as of 14th of February 2021.
[119] Mentzelopoulou, M. M., & Dumbrava, C. (2018)., *supra nota* 31, p 2.
[120] Maas, W. (2016)., *supra nota* 114, p 537.

functioning of citizenship matters in the European Union is not possible where the competence is purely exclusive. Thus, there exists a functional need[121] for a co-ordinative body to ensure that nationality rules of the Member States are compatible with the European values and more significantly, to reflect the co-ordinative difficulties that have come to exist through the simultaneously functioning citizenship regimes and the supranational citizenship.[122]

Strictly speaking — EU cannot act in areas where the competence has not been transferred to it in line with the Principle of Conferral. EU may nevertheless have some 'broad' rules in place that must be respected by the Member States, regardless of the exclusive nature of the competence.[123] Although the EU may not impose legislation on the Member States, at least for now, the EU is to observe and ensure that the Member States act in a sincere manner to ensure the Union's attainments. Given the fact that what may be at stake is at least, the credibility of the EU citizenship — the EU is seemingly attempting to ensure that the Member States do not undermine the EU citizenship.

The Author, therefore, derives to a conclusion, that the traditional notion of exclusivity may apply only to satisfy the Member States. In reality, the 'exclusivity' is far from what it used to be.

The EU has already stepped into the sphere of nationality and has adopted secondary legislation from a field that goes by very close — immigration policy. As discussed, nationality matters are very much connected to other spheres — the competence of the Member State in the field of nationality cannot be separated from EU competences. It, therefore, signals that a co-ordinative body, together, with common standards, would be for the benefit of ensuring that the smooth functioning of citizenship matters is not disrupted. Hence, the EU Commission as the guardian of the treaties will not tolerate the reality that some Member States are seeking to take advantage of the EU citizenship by attracting wealthy investors and simultaneously by undermining European values.

For the reasons mentioned above, it is in light to embrace the Internal Market, and simultaneously, the smooth functioning of citizenship matters that call for a shared or more particularly, a co-ordinative approach. It follows that moves towards a co-ordinative or shared

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[121] *ibid*., p 538.
[122] *ibid*., p 538.
[123] Shaw, J. (2011)., *supra nota* 13, p 6.

approach of governance was sawn in the response to Malta's announcement of ICS.[124] As in various policy fields, the functional needs may over time place limits on national sovereignty.[125] Balancing the diverging policies serve to promote mutual trust amongst the Member States as well as to ensure that the EU values are respected.

To this end, 'exclusivity' may be diminishing away, but on the same token, the EU is graduating to ensure that EU citizenship is not something that can be tossed around as the Member States wish to. A co-ordinative EU shall ensure that Union policies are abided by, as well as ensuring the smooth functioning of citizenship matters within the European Union. The EU Commission as the guardian of the treaties is embedded with the task of ensuring that European Union law is respected amongst the Member States.

[124] Maas, W. (2016)., *supra nota* 114, p 540.
[125] *ibid*., p 537.

3. EU POLICIES AND CONFORMITY WITH INVESTOR CITIZENSHIP SCHEMES

The discussion turns to assert the conformity of ICS's under European Union law. Since an early stage, the thesis was constructed from a semi-positional stand — it appeared as if the outright sale of EU citizenship is contrary to EU law. It will now be in line with the objectives of the thesis, to go through EU laws and policies and, to succinctly conclude, whether those schemes go against them. First. The general principles.

3.1. General Principles of EU Law

General principles of EU law — or the *dark matter* of EU's legal order. Principles are known to fill gaps, unify the law, and be broad in nature. It may be a challenge to pin down and describe them in great detail.[126] On the same token, given the broad nature of the principles, the fluidity and flexibility may allow them to develop along new realities,[127] and they may be re-interpreted when necessary and plausible.

Some principles are eventually codified. Such act leaves no doubt as to the nature of the principle; they become *de jure* binding. In the context of EU law, a number of principles can be called that were eventually codified. One of these, which is in the scope of the research is the Principle of Sincere Co-operation. Once a principle is codified they are certainly considered as primary law. Otherwise, principles are above all other EU laws but just below primary laws.[128]

These principles may form an independent basis for Member States' liability.[129] Hence, in the context of EU law, breaching a principle may count as a breach of EU law. However, EU law has

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[126] Cuyvers, A. (2017). General Principles of EU law. In *East African Community Law* (pp. 217-228). Brill Nijhoff., p 217.
[127] *ibid*., p 217.
[128] *ibid*., p 219.
[129] Discussed above., *See* p 34.

a tendency of applying only in situations that fall under the 'scope of EU law'. As it was already established, the following practices have an EU dimension, and further, affects spheres of competences that are within the domain of EU. Hence, the principles are of great relevance, especially the ones highlighted below.

3.1.2. Principle of Sincere Co-operation

The following principle has a central role. Truly, it played the most decisive role in the Maltese citizenship-for-sale affair.[130] The principle has proven to be one of the most dynamic provisions in the Treaty.[131] The discussion above represents that the Member States' practicing ICS's have done a bad job in consulting the European Commission as well as in co-operating with the other Member States. It was also underlined, that the principle has been codified in a strict manner, wherein, it is not a question of the Member States' willingness to co-operate, but of an obligation which they must comply regardless of the exclusive nature of their competences.

The principle covers a specific negative obligation; the Member States must abstain from adopting measures which could jeopardise the Union's objectives. The applicability of the principle could depend upon identifying the objective risks that ICS's may pose.[132] As it was discussed, ICS's may pose a threat to the smooth functioning of citizenship matters, uniform application of EU law and simultaneously may harm the credibility as well as the integrity of EU citizenship. It, therefore, seems that the Member States in question have violated the principle.

It would seem that the lack of communication by the Member States to establish those schemes would have contradicted the principle. It was only retrospectively when the Commission took action — the potential damage had already begun. Furthermore, as to the transparency of ICS's, it yet remains unclear for the majority of the Member States how are those schemes operated, and how is the genuine link requirement incorporated[133] — another hint for undermining the principle.

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[130] Carrera, S. (2014)., *supra nota* 50, p 419.
[131] *ibid*., p 420.
[132] *ibid*., p 421.
[133] *ibid*., p 414.

3.1.3. Principle of Genuine Links

Secondly, the following principle had a central role here too. A full chapter was dedicated to it. Although the relevance of the principle is disputable; some argue that the principle is bad-law or that it has been interpreted wrongly. In addition, those who supported ICS's were likely to argue that where genuine links are made mandatory, it would only fuel ethnic-nationalism to EU's legal order.

While the Author had faith on the principle, the principle was established precisely to safeguard against arbitrary or artificial situations of naturalisation as well as nationality-related decisions. Hence, the principle acts as a limitation to the Member States' capabilities from practicing arbitrary nationality policies. In the context of ICS's it should be applicable. If the Principle is to be left out of consideration — it is likely to lead to an incoherent system of citizenship in the EU.

The European Commission also followed this line of reasoning in its report of January 2019 where it treated the principle as established case-law.[134] The Author strongly concurs with its reasoning. Given the Commission's manner of treating the Principle as 'established case-law', the Author has added the principle under the Chapter on *'General Principles of EU Law'*. Although the Principle initially derived from the hearings of the ICJ. It is not uncommon that ICS's rulings become widespread and applicable in the international sphere too.[135] Following this line of reasoning, the CJEU has stressed on various occasions that the Member States should observe international laws standards.[136] In other words, domestic rules should not be inconsistent with the general principles of international law. It would seem that the Principle stands in a 'hybrid' position, wherein it is evolving to become a general principle of EU law. The EU institutions' reference to the principle can be expected to strengthen the application of the principle in the EU's contemporary affairs.

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[134] European Commission, Directorate-General for Justice and Consumers. (2019). Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Investor Citizenship and Residence Schemes in the European Union., COM/2019/12 final., Retrieved from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2019:0012:FIN as of 14th of February 2021.
[135] Tams, C. J. (2017). The Development of International Law by the International Court of Justice., p 25. Retrieved from: *SSRN 3086269* as of 14th of February 2021.
[136] Oosterom-Staples, H. (2018)., *supra nota* 48, p 446.

Owing to the fact that the Member States practicing ICS's have *de facto* set aside the principle — it seems that they have failed to fulfil their obligations under EU law. Accordingly, the Principle of Due Regards would *de jure* oblige the Member States to take it into account in nationality attribution-related decisions. In addition, the Principle of Sincere Co-operation abstains the Member States from jeopardising Union attainments — the exclusion of the genuine link requirement could jeopardise the smooth functioning of citizenship matters in the European Union.

It seems that while the principle is widely recognised in the international sphere — that in the context of the EU it is specifically of utmost importance. The EU citizenship is of one kind and its attribution should be facilitated — not only by the Member States — but the EU too. Hence, the EU should be able to prevent the attribution of EU citizenship through discriminatory or phoney ways.

3.1.4. Principle of Equality

Few words was spelled about the Principles of Non-Discrimination and Equality. What is clear, is that ICS's frankly, make a great distinction between the wealthy and the poor ones. Both of the principles are at the very core of the EU's legal order, but the application of the latter is of greater relevance. Ensuring fair treatment of third-country nationals while refraining from making distinctions on the basis of wealth should be common practices. Given that the following schemes send a clear message to the international sphere — successful naturalisation is a question of wealth. It contradicts the general principle of EU law.

The Principle of Equality is a fundamental element of International Human Rights and EU law. And in simple terms, the Principle of Equality requires the Member States to treat applicants on the same foot, without discrimination. Although similar situations are to be treated similarly — while different situations differently;[137] wealthy people may get different treatment than poor ones. The distinctions made on attributing EU citizenship does not seem to be proportional and, hence, appears as a radical one; investor citizens may bypass nearly all of the salient criteria that should apply to persons naturalising within the European Union. Such an extreme distinction seems to truly fall against the Principle.

[137] Horspool, M., & Humphreys, M. (2012). *European Union Law*. Oxford University Press., p 137 - 138.

Essentially, if governmental powers result in unequal treatment — it should be objectively justified.[138] ICS's do not seem to bear a *de jure* legitimate justification, nor have the Member States forwarded any 'rationale' justification. Where the Member States seem to be fully responsible for promoting naturalisation at the state-level — such promotion shall be in conformity with EU law requirements. The Union goals have frankly moved beyond 'economic goals,' and the Principle's application has shifted to cover extended areas.[139] Member States should recognise the following.

3.1.5. Principle of Due Regards

All of the above mentioned indicates that the Principle of Due Regards should be invoked in justifying Union interference. The principle obliges the Member States to take into account the relevant EU policies, and in some instances, the relevant international laws, when implementing EU laws. Not to mention, that the Directive 2003/109/EC on the long-term statuses of third-country nationals remains in force which means that Member States who fail to implement it to a sufficient extent may face troubles before the CJEU.

Regardless, implementing EU law may also mean, taking into consideration the general principles that form a standard of EU's legal order. As discussed, the schemes seem to be strongly against some of the very pivotal principles. Along these lines, there are great indicators that while the Member States practicing ICS's have not taken fully into account EU's general principles — establishing liability and a failure to meet their obligations under EU law is clear.

3.2. Directive 2003/109/EC

As mentioned, the Directive has harmonised the common statuses of long-term third-country nationals residency terms. Common set of rules should apply for the grant of long-term residency subject to some conditions. The conditions that are central to this study are; i. they must have resided legally and continuously for a period of five years in the territory of a Member State, and ii. if the Member State require, they must comply with the integration criteria.

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[138] McCrudden, C., & Prechal, S. (2009). The concepts of equality and non-discrimination in Europe: A practical approach. *European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G*, *2*., p 12.
[139] *Ibid*., p 18.

Under ICS's, in Bulgaria, Cyprus, and Malta, the residence requirement is much lower than the threshold set by the Directive (e.g. approximately one year for the investors, and up to ten years for other applicants). Frankly, as established there are no *de facto* integration requirements under the schemes. Where the Member States may apply more favourable rules, in line with the spirit of the Directive; given that the five-year residence requirement is now contained in EU's secondary sources of law, it cannot be applied as flexibly as some Member States would assume. Safeguarding such arbitrary deviance from the terms, Recital (17) provides, that "it should be provided that permits issued on more favourable terms do not confer the right to reside in the other Member States." Recital (17) goes further in providing that, harmonisation of the long-term resident status is to promote mutual confidence between the Member States. Hence, without a sufficient level of approximation, such mutual confidence is at risk — and causes disturbance to the smooth functioning of citizenship matters in the European Union.

It would seem that the very aim of the Directive is diminished if a Member State does not require actual residence in the host state — for a reasonable length of time. While the Member States may derive from the exact terms when implementing a Directive[140] — the aim of the Directive must remain. Directives remain the most powerful EU legal tool,[141] and the undermining of thereof could see light in procedures before the respective CJEU. As the CJEU has clarified, Member States' actions fall under the scope of Union law where they implement Union law(s) — for example, a directive, — and that is sufficient to bring action against them.[142]

At the time of writing, the Commission has initiated infringement procedures against Cyprus[143] and Malta.[144] As the Author assumed, such interference could see light, given the widespread breach that the practice represents. In the next Chapter, great emphasis shall be placed in considering the steps following the initial stages of the infringement procedures. The thesis shall

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[140] Craig, P., de Búrca, G. (2011). *EU Law Text, Cases, and Materials,* 5th ed. United Kingdom: Oxford University Press., p 106.
[141] Duina, F. (1997). Explaining legal implementation in the European Union. *International Journal of the Sociology of law*, *25*(2), 155-179., p 155.
[142] Cuyvers, A. (2017)., *supra nota* 126, p 227.
[143] Only a week before the Commission launched infringement proceedings, and in response to the allegations. On 13 October 2020, the Minister of Interior announced that Cyprus will suspend its citizenship program for investment. The Commission, nevertheless, plans closely to inspect all of the investors that have gone through the programme since 2007 while keeping a close-eye to ensure that such practices are not practiced surreptitiously.
[144] Bulgaria has also received a letter from the European Commission asking for clarification on its ICS programme, and calling for the program to be phased out.

propose what needs to change, in respect of those schemes, or if a radical end has to be stroked. In addition, it will be necessary to shed light on the research questions as well as the hypothesis.

4. LEGAL MEANS TO INTERFERE BY THE EUROPEAN UNION

The European Commission remains the 'guardian of the treaties' prompting it to act whenever a Member State fails to transpose EU laws in a good manner. The EU could step in even where a Member State fails to communicate measures that transpose directives. Undeniably, the European Commission assumes great transparency whenever EU laws get transposed to the domestic context.[145]

Whilst the infringement procedures have begun at the time of writing.[146] If the Member States in question fail to provide a satisfactory response, recourses to CJEU may be established which in return, may mean the imposition of financial penalties.[147] On the same token, the formal letter forwarded in conjunction with the initiation of the procedure should be clear enough to allow the Member States' to rectify the suspicious violations that have been sought by the Commission.[148]

The extensive elaboration carried, hints, that the violation may have been more extensive than what the Commission sought. Nevertheless, the Commission significantly found that the practice has implications on the whole Union — calling for a Union approach to solve it.

The initiation of the infringement proceedings is the result of various things, but particularly, the undermining of European Union law. As to the question of competence, it was realised, that the development of EU citizenship has resulted in somewhat an emerging actor in the field of nationality policy — the EU — to ensure that the integrity of the EU citizenship is not undermined. Member States' actions fall under the scope of Union law when implementing Union laws, and while the principles of subsidiary and proportionality must be observed by the

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[145] Zhelyazkova, A. (2020). Justifying enforcement or avoiding blame? The transparency of compliance assessments in the European Union. *West European Politics*, 1-27., p 6-7.
[146] On October 20, 2020.
[147] In accordance with the Treaty on the Functioning of the European Union Article 260 TFEU.
[148] The Commission identifies particularly a violation of the Principle of Sincere Co-operation, Principle of Genuine Links, and in general, a threat to the credibility and integrity of EU citizenship.

EU — the Author believes that the interference is founded and does not abuse the boundaries of competences.

The practice represents a breach of various Union policies which, grouped together,[149] justify Union interference. Besides, the practice seems to be intentional — as opposed to non-intentional. Hence, it represents a clear breach of best practices.

4.1. Changes on the Horizon

In line with the Principle of Certainty, it would be naive to assume that the Member States are subjected only to positive laws. While the general principles form a standard of EU's legal polity — the significance of those cannot be disputed. It follows, that although some of the policies may not be mentioned in the primary sources of law.[150] It is natural to assume that the political integration and the proliferation of legislation do not arise necessarily from positive laws.[151] Hence, the infringement procedures do not just refer to the non-implementation or poor transposition of legislation, but in addition to the lack of adherence to Treaty obligations.[152]

The EU has relied heavily on a further collaborative or softer approach in promoting European integration; directives.[153] While directives bear the risk of resulting in a bulk of varying levels of laws,[154] the EU has established mechanisms to limit such inconsistency.[155] The initiation of the infringement procedures is the first step of such correction process. The phase that shall be witnessed in the coming months is concerned with re-interpretation, or the shaping of national laws.[156]

In the Author's view, the rectification of the Directive will call for the integration of the genuine link requirement and in addition to that. A further collaborative approach in the sphere of

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[149] Grouped together; the Principle of Due Regards acts as an umbrella under which it is possible to group the anticipated violations.
[150] For example, the Principle of Genuine Link.
[151] Zingales, N. (2010). Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?. *German Law Journal*, *11*(4), 419-438., p 419-420.
[152] Thomson, R., Torenvlied, R., & Arregui, J. (2007). The paradox of compliance: Infringements and delays in transposing European Union directives. *British Journal of Political Science* (pp. 685-709). Cambridge University Press., p 686.
[153] Zingales, N. (2010)., *supra nota* 151, p 420.
[154] *Ibid*., 420.
[155] *Ibid*., 420.
[156] *Ibid*., 420.

nationality, in line with the Principle of Sincere Co-operation. The genuine link requirement would ensure uniformity of Union law while smoothing citizenship matters in the EU. It is of utmost importance to facilitate the attribution of EU citizenship through procedures that ensure the credibility of EU citizenship, and that reflect the values upon which the Union is built.

On another token, as to the hypothesis, it seems that the Member States cannot prevent the EU from acting when the latter is acting to ensure that the Member States do not undermine the concept of EU citizenship. In addition, where the EU has adopted the Directive 2003/109/EC. National policies cannot be applied in such a vague manner that would derive from the objectives of the Directive. Finally, the case-laws indicate that nationality policy is no longer under the sole competence of the Member States. The EU, therefore, is acting rightly, where it attempts to step-in and mitigate the relevant matters. Hence, policies which may jeopardise Union attainments shall be prohibited — and it should not be a question of competences whether such policies survive in the Union.

If changes are not to be seen soon, recourses to the CJEU can be anticipated. CJEU is likely to challenge the validity of those national policies,[157] which is likely to follow with financial penalties. Penalties solely, however, would not seem to suffice — if anything, the sale of EU citizenship is a matter of credibility, and mutual trust amongst the Member States and money cannot revert the potential damage that has occurred. Nevertheless, the sooner the EU is able to strike an end — the less harm will be caused while preventing any potentials for spillover. It seems that while ICS's are likely not to survive in the European Union. It should prompt the Member States to act in a spirit as laid in Article 4(3) of the Treaty to ensure that they rectify their implementation of the Directive 2003/109/EC, and ensure that they do not undermine the citizenship of the Union.

Finally, where such schemes are nevertheless given clearance. In addition to the incorporation of the genuine link requirement. The EU shall have sight over those schemes to ensure that the procedures on acquiring EU citizenship are made through a legitimate procedure. That being said, the Report of January 2019 highlights, on various parts, that the Commission will closely monitor those schemes to ensure due diligence and that the residence requirement is applied.[158]

[157] i. Policies on the establishment of Investor Citizenship Schemes, and, ii. the failure transpose Directive 2003/109/EC in accordance with the requirements.
[158] European Commission, Directorate-General for Justice and Consumers. (2019)., *supra nota* 134.

In line with the requirements of transparency, it is also in the interest of the Member States to have meaningful information about the functions of ICS's.

Before going to the final chapter where the Author discusses the way forward and lays some proposals. The following sub-chapter shall lead the way through remarks, whilst also shedding light on the hypothesis and the secondary research question.

4.2. Remarks

The irony; interesting how some of the smallest EU countries are engaged in extremely large-scale practices — *gateway to EU*. The EU can no longer afford the sale of EU citizenship — the era of *citizenship for sale* in the EU should come to an end soon. As discussed above, the prohibition of such schemes is primarily for the sake of ensuring; i. The credibility and the integrity of EU citizenship, ii. Coherency of the internal market and the smooth functioning of citizenship matters, and thirdly, iii. To safeguard the application of EU values and principles that form the standard of EU polity. The list is by no means exhaustive,[159] but for the purpose of this research, it seems that these are the most salient things to highlight.

The above-mentioned points would seem to hint upon the hypothesis. They hint the affirmative. Truly, it would be burdensome to prohibit the EU from participating in the field of nationality in an ever integrating Union. In taking a partial stand, it is mainly for the sake of establishing common standards — to ease up the co-ordination related difficulties. On the same token, to mitigate the smooth functioning of citizenship matters, the genuine link requirement seems to be of great relevance. The secondary research question; *Are genuine links necessary for the smooth functioning of citizenship matters in the European Union?* It would seem that where the EU is to be seen as an actor — a co-ordinator to say the least. That the genuine link requirement would allow further coherency in dealing with the various nationality regimes as well as in ensuring common standards. Hence, the disparities between the citizenship laws of the Member States lead to multiplication of pathways to obtain the same status of EU citizenship.[160] In the Author's

[159] A number of studies has been done in considering the criminal side of Investor Citizenship Schemes. Frankly, the schemes are surrounded by blurry hedges. It has been observed that the investors may come through the schemes while bearing a phoney background. In addition, the question of fabrication of evidences has also raised tension.
[160] Kochenov, D., & Lindeboom, J. (2018)., *supra nota* 28, p 13.

view, EU citizenship, and the attribution of that, should be made through a procedure that in essence is not dependant on national policies but on EU-level requirements. In addition, having similar integration, and nationality attribution requirements in all of the Member States serves in fostering 'European identity', a topic that is increasingly subject to studies.

Finally, one must acknowledge that the development of EU citizenship is partly due to the CJEU's contribution. Member States should recognise the significance that the CJEU has had in the process of developing EU citizenship, and act faithfully — adopt policies that are in conformity with the EU law requirements. It follows, that it is of utmost importance that the Member States adapt to the demands of EU policies while refraining from introducing domestic policies that may hinder the smooth development of EU citizenship.[161]

EU citizenship remains a project, and of dynamic nature. While citizenship has always been extremely dependant on the time and place.[162] It would be naive to assume that EU citizenship is 'settled' and, hence, static. As a matter of fact, even the smallest changes in the domestic regimes may influence the smooth development of EU citizenship. Member States should embrace the development of EU citizenship and while it remains a fruitful source of rights, there is a likelihood that EU citizenship may yet surprise, and evolve to dimensions that could have not been foreseen initially. On that account, it would seem that there is a need to shed further transparency on the functions of EU citizenship and promote its significance.

[161] EU citizenships development is largely dependant on the Member States., *See* p 10, 12.
[162] Besson, S., & Utzinger, A. (2008)., *supra nota* 100, p 186.

5. A VIEW FOR THE FUTURE

Flexibility may be the *key* in allowing EU policies to flourish.[163] On the same token, the notion of uniformity calls for 'minimum rules' — that reach a sufficient level. While diversity is inherent in EU laws implementation.[164] Minimum standards bear the risk of resulting in a loosely developed inter-state collaboration.[165] Member States should, therefore, not be in a position to define the extent to which they implement EU policies, but a fair determination of the scope of Member States responsibility should be clarified — a balance needs to be stroked.

Failure to meet such expectation, or more harshly, 'non-compliance' should be made further costly. Appropriate deterrents could be a solution. Hence, it has been observed, that in certain circumstances, non-compliance tends to be less costly than compliance.[166] It was also highlighted above, that if financial penalties will be forwarded — such penalties will not do much for the sake of ensuring stability in EU's citizenship affairs. As called, rectifying the suspicious violations is the minimum, but it seems as if the prohibition of ICS's is the preferable way forward. Hence, The citizenship of the Union should not be a marketable commodity. In addition, there seems to be a need to re-think the price of non-compliance.

Member States should promote naturalisation at the national-level, but some criteria should flow from the EU in a 'top-down' manner. Truly EU citizenship and the attribution of thereof should not be a black-and-white issue. If we adapt to such top-down method — it would seem to ensure conformity with European standards and facilitate the consequent ways of acquiring EU citizenship. However, Member States are likely to challenge EU's sight over nationality policy,

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[163] Walker, N. (1999). Flexibility within a Metaconstitutional Frame: *Reflections on the Future of Legal Authority in Europe.* In *Constitutional change in the EU: From uniformity to flexibility.* (pp. 9-30). Bloomsbury Publishing., p 10.

[164] Thomann, E., & Sager, F. (2017). Toward a better understanding of implementation performance in the EU multilevel system. *Journal of European Public Policy*, *24*(9), 1385-1407., p 1390.

[165] Weatherill, S. (2004). Competence creep and competence control. In *Yearbook of European Law*, *23*(1), (pp. 1-55). Oxford Publishing Limited (England)., p 6.

[166] Duina, F. (1997)., *supra nota* 141, p 175-176.

but as it was elaborated, it seems that the EU is becoming further involved in matters of nationality policy and, hence, there is a great need for a co-ordinator in matters of nationality policy in the European Union. Furthermore, the kind of movement that is been witnessed should not be classified as an arbitrary take-over by the EU, but it seems as if such movement would be also in the interests of some of the Member States.[167] Finally, it would be contrary to the very logic of gradual integration to oppose the EU from facilitating ever so significant matters, especially when those matters have EU-wide impact. It follows, that sovereignty arguments need to be reasonable and Member States may not establish rules of nationality attribution in total discretion.

Stressing that the Member States need to co-operate and exchange good practices on matters relating to citizenship and integration. A meaningful discussion should take place often, if not annually. Such practices could be established through workshops for example.[168] In addition, implementing guidances from the EU could flow more regularly, hence, guidance documents correlate with effective implementation in the EU.[169]

EU citizenship and the approximation of nationality policies has grown to such an important matter that it cannot be exposed to whatever sort of attribution — the attribution of EU citizenship should, henceforth, be dependant on some common rules. Highlighting, that as a minimum requirement, the Principle of Genuine Links needs to be applied at the national-level. The following would not mean that EU citizenship opposes a modern, forward-looking status[170] — by requiring a residence requirement,[171] — but of ensuring conformity with European standards, and values, while fostering the ever emerging European identity.

In light of reducing the possibilities to manoeuvre the residence criteria. The Directive 2003/109/EC could be amended to include explicitly 'genuine links'. Article 4(1) on the duration of

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[167] A number of Member States have expressed their concerns on ICS's. In line with this, such schemes are not in the interest of the destination Member States.
[168] Van Dam, C. (2017). Guidance documents of the European Commission: a typology to trace the effects in the national legal order. *Review of European Administrative Law*, *10*(2), 75-91., p 88-89.
[169] *ibid*., p 77.
[170] As claimed by some academics and Residence: Kochenov, D. (2019). Investor Citizenship and Residence: The EU Commission's Incompetent Case for Blood and Soil. *Verfassungsblog: On Matters Constitutional*., Retrieved from: https://verfassungsblog.de/investor-citizenship-and-residence-the-eu-commissions-incompetent-case-for-blood-and-soil/ as of 5th of March 2021
[171] In its report of January 2019 concerning ICS. The EU-institutions pronounced themselves in a general mode, addressing all of the Member States to follow the genuine link requirement.

residence, could be extended as follows "… within its territory for five years immediately prior to the submission of the relevant application, *in line with the Principle of Genuine Links*". By incorporating the Principle into the positive framework of the EU's legal order — it leaves no ambiguities as to the application of the Principle, and further, it highlights the necessity of genuine links in the EU.

CONCLUSION

The EU project is facing a serious threat. It is of utmost importance that the Member States adapt to the growth of EU citizenship and embrace its development. Over the past years, observers have witnessed the EU's footprint becoming further visible in the sphere of nationality policy. EU's role could be seen as becoming increasingly desired — given the deceptive arrangement in which the Member States may undermine EU citizenship, and to reflect the co-ordinative difficulties that have come to exist through the simultaneously existing nationality policy regimes.

The thesis provided an extensive overview on the compatibility of ICS's with European values and policies, while also shedding light on the evolving competences of the European Union in the field of nationality policy. Hence, the aim of the thesis was two-folded; to investigate the compatibility of ICS's with the EU's legal order, whilst shedding light on the evolving competences. In addition, the Author had great emphasis on the necessity of the Principle of Genuine Links. What appears to be clear, that in fostering European identity, the following principle serves a unique role.

To begin with — the primary research question.[172] Overall, it was established that ICS's pose a threat to the uniform application of EU law as well as the very credibility of EU citizenship. To be further exact, ICS's contradict various EU policies, but primarily, the general principles of EU law which form the standard of EU's legal polity. As it was mapped above, the most significant violation, under the principles, seems to occur under the Principle of Sincere Co-operation as well as in general, the Principle of Due Regards. In addition, in the strict sense, it would strongly seem as if the Member States practicing ICS's have failed to transpose the Directive 2003/109/

[172] *To what extent Investor Citizenship Schemes are in contrary to European Union law and what should be the relevant steps — in line of making them in conformity with European Union law?*

EC by deriving from its goals — ensuring that the residence criteria is met.[173] Besides, the measures adopted under ICS's do not correspond to the spirit of EU law.

Facilitating the attribution of EU citizenship serves in fostering European identity as well as in ensuring equality and common standards. Where the EU has adopted policies in ensuring that the attribution of EU citizenship should be subjected to at least some common rules, the residence criteria cannot be applied as flexibly as some Member States would assume as it may reduce the trust amongst the Member States, whilst making the attribution of EU citizenship subject to national criteria which may result in an incoherent system of citizenship in the EU.

This leads to the secondary research question.[174] It was highlighted above, that the Principle of Genuine Links derived from the hearings of the ICJ — and not the CJEU. Nevertheless, the CJEU has stressed upon that requirement, and that is not it. The European institutions, namely, the European Commission as well as the European Parliament has recently also stressed upon that requirement when addressing the very practices of ICS's. The Author strongly believes that the Principle stands in a hybrid position, wherein it is evolving to become a general principle of EU law. The Directive 2003/109/EC also stresses upon the residence criteria, and although it does not explicitly mention 'genuine links', it seems to quietly imply upon that requirement. Perhaps, the Directive could be amended to include explicitly 'genuine links' to reduce any uncertainties as to its application.

The extensive research carried concludes the affirmative from the secondary research question. In the context of the European Union, genuine links would ensure that third-country nationals are integrated before becoming European citizens. In addition, EU citizenship has evolved to a level of dimension that its attribution calls for a common approach amongst the Member States. As the Author stressed above, the attribution of EU citizenship calls for a top-down approach, wherein, EU shall be eligible to set down the pivotal criteria that must be complied at the national-level. The following would ensure that the Member States do not practice policies that may undermine the credibility of EU citizenship, while also ensuring coherency in citizenship affairs in the European Union.

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[173] Hence, the genuine link requirement has been dismissed by the Member States in question.
[174] *Are genuine links necessary for the smooth functioning of citizenship matters in the European Union?*

Rectifying the suspicious violations will call for the Member States to integrate the genuine link requirement whilst engaging in further co-operation amongst the Member States. It, nevertheless, seems as if the era of citizenship for sale in the European Union shall come to an end. At the end of the day, it makes no real difference whether the genuine link requirement is incorporated if the EU citizenship remains regardless a marketable commodity — that goes against the integrity of EU citizenship; the fundamental rights attached to EU citizenship are of relational value, and such values should not simply flow in exchange for a monetary fee.

Wherein EU is becoming further concerned about the ways in which some of the Member States may abuse their exclusivity in nationality matters.[175] It has prompted the EU to lay down general rules which, regardless of the exclusivity, need to be complied by the Member States. Even though nationality policy in the traditional sense falls under the competence reserved for the Member States, what is clear, is that the EU has not been quiet at all — but its footprints are becoming further visible in the sphere of nationality law. As to the hypothesis,[176] the contemporary affairs have seemed to prompt the EU to take the role of a co-ordinator while simultaneously retaining the position of the guardian of the Treaties. It should not come as a surprise that the EU is eager to mitigate matters within the sphere — given the EU-wide implications. The genuine link requirement would, therefore, allow the EU to ensure coherency in dealing with the 27 systems of nationality policy regimes, and in ensuring that there are no fast-tracks to gain EU citizenship.

To this end, functional needs may overtime place limits on the sovereignty rights of the Member States. EU citizenship needs to be 'protected' from deceptive arrangements and its attribution calls for a common approach. The European Commission’s role as the guardian of the Treaties is on a test, and the Author strongly believes that approving EU’s co-ordinative role in nationality matters will be later championed as a milestone — that may have saved the EU from fragmentation.

The citizenship of the Union is increasingly becoming an indicator of Europeanness, and of a united community. There is a great need to shed transparency as to the meaning of EU citizenship — in light of embracing its significance and the opportunities thereof.

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[175] Since the bundling of national and EU citizenship, EU has been keen to mitigate matters within the sphere.
[176] *The European Union should have competences to participate in the field of nationality policy as the practice of Investor Citizenship Schemes illustrate the extent upon which the Member States may act in an abusive manner.*

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