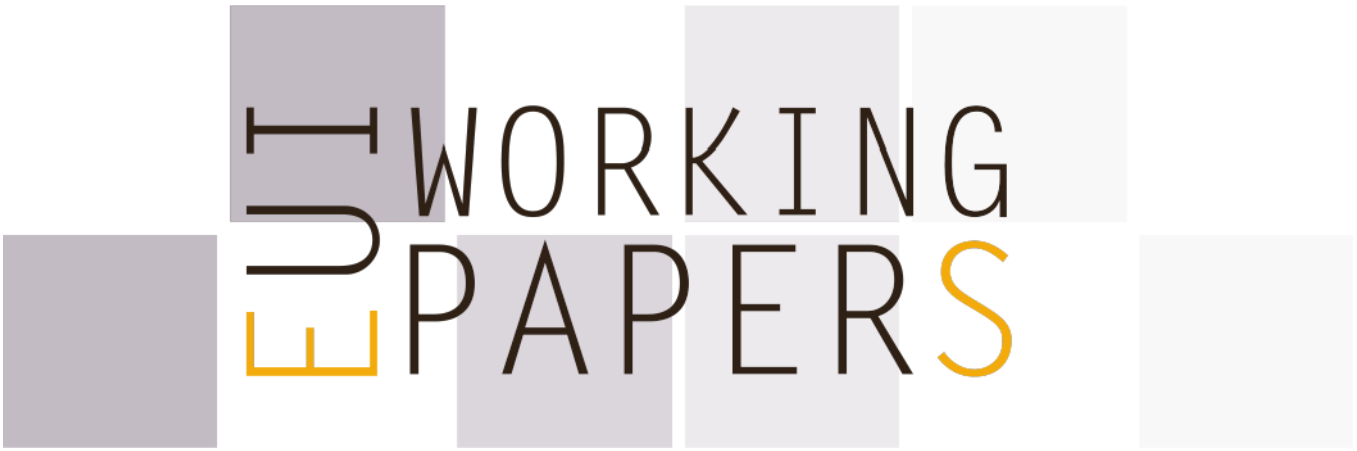

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Martijn van den Brink

European University Institute

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Abstract

EU institutions have argued on several occasions that national and EU citizenship should not be awarded without any genuine link with the Member State concerned. Various political theorists have adopted the same position as these institutions and have justified their arguments by referring to the genuine link requirement established by the International Court of Justice in Nottebohm. This has prompted criticism from legal scholars, who point out that Nottebohm was wrong as a matter of international law and moral principle. This paper shows that supporters and critics have often failed to recognise that they have been talking with different conceptions of the genuine link requirement in mind. The question of whether to apply a genuine link requirement for the recognition of nationality is altogether different from the question of whether to apply a genuine link requirement for the acquisition of nationality. Nottebohm concerns the first; the arguments of political theorists and EU institutions the second. Their arguments cannot therefore be dismissed by dismissing Nottebohm. I subsequently explore the normative arguments for predicating the boundaries of national membership on a genuine link requirement. There are weighty moral reasons for member states to condition the acquisition of national and EU citizenship on the presence of a genuine link. Finally, moving from the normative to the practical, I argue that such a requirement would have far-reaching consequences (targeting not just investor citizenship schemes) and cannot be enforced as a requirement under EU law.

Keywords

EU citizenship, genuine links, investor citizenship, Nottebohm

A. Introduction

Two opposing trends have been identified regarding the evolution of rules on the acquisition of citizenship. On the one hand, the possibility of acquiring citizenship through naturalisation has been restricted for most immigrants by many states in recent years. Linguistic and civic integration tests were introduced, residence requirements extended, and the financial requirements made more stringent, all with the purpose of reinforcing the boundaries of national membership. However, at the same time as states were fortifying the boundaries of citizenship, they lowered the drawbridge for a lucky few, especially for those with financial resources large enough to acquire citizenship by investment or for those with special ancestral ties to the state.[1] Critics of these developments highlight the growing inequalities in respect of the possibility of acquiring national citizenship. In order to tackle these inequalities, they have proposed conditioning the acquisition of citizenship on a *genuine link requirement*, with the idea that the conferral of citizenship should be reserved for those with social membership of the conferring state.[2]

This idea has been taken up in recent years by those European Union institutions keen on tackling investor citizenship schemes within the EU. Several EU member states allow for the acquisition of their nationality in exchange of capital transfers or the purchase of property or government bonds.[3] The main reason that EU institutions have criticised these practices relates to the fact that the EU has its own citizenship that is derived from the nationalities of the member states. According to Article 20 on the Treaty on the Functioning of the European Union, 'every person holding the nationality of a Member State shall be a citizen of the Union'. Already in 2014, the European Parliament adopted a resolution which stated that the possibility of acquiring national and thereby EU citizenship by investment 'undermines the very concept of European citizenship'.[4] The European Commission followed up on this resolution in 2019 by adopting a report on investor citizenship and residence schemes within the EU, in which it argued that Member States must ensure 'that nationality is not awarded absent any genuine link to the country or its citizens'.[5] And on 20 October 2020, it launched legal proceedings against Cyprus and Malta regarding their investor citizenship schemes. It considers that 'the granting of EU citizenship

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1 For a discussion of these contradictions, Ayelet Shachar, 'The Marketization of Citizenship in an Age of Restrictionism' (2018) 32 Ethics & International Affairs 3; Liav Orgad, 'Naturalization' in Ayelet Shachar and others (eds), *The Oxford handbook of citizenship* (First edition, Oxford University Press 2017).

2 Joseph H Carens, *The Ethics of Immigration* (OUP 2013) chapter 8; Ayelet Shachar, *The Birthright Lottery: Citizenship and Global* Inequality (Harvard University Press 2009) 166–170; Rainer Bauböck, 'Democratic Inclusion: A Pluralist Theory of Citizenship' in Rainer Bauböck (ed), *Democratic inclusion: Rainer Bauböck in dialogue* (Manchester University Press 2018) 44.

3 For an overview, Kristin Surak, 'Global Citizenship 2.0 The Growth of Citizenship by Investment Programs' [2016] IMC Research paper 2016/02; Jelena Džankić, *The Global Market for Investor Citizenship* (2019) chapter 6. Commission Staff Working Document accompanying the report on Investor Citizenship and Residence Schemes in the European Union, Brussels, 23 January 2019 (SWD(2019) 5 final).

4 European Parliament, 'Joint Motion for a Resolution on EU Citizenship for Sale' (14 January 2014) available at: <https://www.europarl.europa.eu/sides/getDoc.do?reference=P7-RC-2014-0015&type=MOTION&language=EN&redirect>. See also, European Parliamentary Research Service, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU: State of Play, Issues, and Impacts' (October 2018) 49; European Parliament Resolution on EU citizenship for Sale <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P7-RC-2014-0015+0+DOC+XML+V0//EN>.

5 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', Brussels 23 January 2019 (COM(2019) 12 final) 6.

for pre-determined payments or investments without any *genuine link* with the Member States concerned, undermines the essence of EU citizenship'.[6]

However, there is growing resistance to the idea of making the acquisition and loss of citizenship subject to a genuine link requirement. As we shall see, not only the practical aspects of introducing such a requirement but also its normative foundations have been called into question. Proponents of a genuine link requirement often appeal to the *Nottebohm* case of the International Court of Justice (ICJ, where it was decided that states were not required to recognise the grant of nationality made by another state where the individual did not enjoy a genuine link with the conferring state.[7] Critics have cast doubt on both the legal effects of the *Nottebohm* judgment and the normative justifications for the genuine link requirement adopted therein, and I will argue that they have done so for good reasons. On this basis, they also contest the legal proceedings brought by the EU against national investor citizenship schemes. They argue that the EU should not and cannot demand from Member States that they use a genuine link requirement in order to determine who to grant their nationality and thereby EU citizenship. This prompts the question which this paper answers: is introducing a genuine link requirement as a condition for the acquisition of EU citizenship the way forward?

I will first attempt to clarify the terms of the debate on genuine links. Supporters and critics of this principle have often failed to recognise that they have been talking at cross-purposes, and with different conceptions of the genuine link requirement in mind. Supporters want to condition the *granting* of citizenship on the existence of a genuine link, but in support of this view, draw on international case law that conditions the *recognition* of citizenship on the existence of a genuine link.[8] Critics rightly criticise the idea of conditioning the *recognition* of citizenship on a genuine link requirement. However, they wrongly assume that their criticism also undermines the arguments for conditioning the *granting* of citizenship on such a requirement (section B). I subsequently explore the normative arguments for predicating the boundaries of national membership on a genuine link requirement and argue that there are strong moral reasons for allowing migrants with genuine links to naturalise (section C). Finally, moving from the theoretical to the practical, I shall argue that although it may be desirable for member states to condition the acquisition of national and EU citizenship on the presence of a genuine link, it appears difficult for the EU to enforce such a requirement (section D).

B. Genuine links: recognising and allocating nationality

Citizenship and migration theorists have debated at length what states owe to persons who are not their nationals but who reside within their territory. Many share the view that what matters morally is social membership; they agree with Joseph Carens, 'that living within the territorial boundaries of a state makes one a member of society, that this social membership gives rise to moral claims in relation to the political community, and that these claims deepen over time'.[9] Over time, residents acquire a moral claim to be included in the national citizenry. Some scholars have found support for this idea 'from an unexpected source: the jurisprudence of international law'.[10] They support their theories of social membership by reference to the doctrine of genuine links established by the ICJ in the *Nottebohm* decision, believing that the ICJ decided that the conferral of citizenship should depend on the existence of a genuine link

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6 European Commission Press Release, 'Investor Citizenship Schemes: European Commission opens infringements against Cyprus and Malta for "selling" EU citizenship' (20 October 2020) available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925> (italics mine).

7 *Nottebohm* (Liechtenstein v Guatemala), 1955 ICJ Rep 4 (6 April).

8 I have drawn attention to this before in Martijn van den Brink, 'A Qualified Defence of the Primacy of Nationality over European Union Citizenship' (2020) 69 International and Comparative Law Quarterly 177.

9 Carens (n 2) 158.

10 Shachar, *The Birthright Lottery* (n 2) 166.

with the conferring state.[11] This judgment is also invoked by the European Commission in support of its argument that Member States must ensure that nationality is not granted absent any genuine link.[12] As Viviane Reading, the former Vice-President of the Commission, said in her speech to the European Parliament: 'In compliance with the criterion used under public international law, member states should only award citizenship to persons where there is a "genuine link" or "genuine connection" to the country in question'.[13]

However, it is precisely because theories of social membership, and increasingly the policies of EU institutions, build on *Nottebohm* that they have been criticised. As Audrey Macklin observes, '[a]mong legal scholars who take *Nottebohm* seriously as jurisprudence, there is strong consensus that *Nottebohm* was wrong then, and may be even more wrong now'.[14] The judgment was critically received from the outset, said to be deficient in its reasoning and to be lacking a basis in international law.[15] One of the main problems was ambiguity regarding its scope of application. Although the decision was framed broadly, it was directed only at very specific cases of recognition of nationalities lawfully granted under national law. In fact, even on this point the scope and meaning of the decision is unclear. There has been debate about whether the chief concern of the judges was dual nationality in the context of diplomatic protection or abuses of rights.[16] What is clear, however, is that it was not the intention to establish general criteria of international law relating to nationality. Yet more importantly, although *Nottebohm* has exceptionally been relied upon by some international tribunals, it was largely confined to its facts in the years following the decision. And since then, it has been largely relegated to the annals of international law history.[17] The criterion of genuine link has been expressly rejected on different occasions by different international tribunals, including by the EU's own Court of Justice.[18] It is, in the words of Peter Spiro, little more than a 'jurisprudential illusion'.[19]

However, more problematic than the fact that the genuine link requirement is a dead letter, is that an application of this requirement would prove morally damaging. The facts in *Nottebohm* show how harmful the enforcement of a genuine link requirement can be. Mr Nottebohm was a German national but a long-term resident in Guatemala, where he had significant business interests. In order to protect these interests, he acquired the nationality of Liechtenstein at the outbreak of World War II, which resulted in the automatic loss of his German nationality. By reading a principle of genuine links into international law and by allowing Guatemala to refuse to recognise his newly acquired nationality, the

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11 Bauböck, 'Democratic Inclusion: A Pluralist Theory of Citizenship' (n 2) 44; Shachar, *The Birthright Lottery* (n 2) 166–170; Samantha Besson, 'Investment Citizenship and Democracy in a Global Age. Towards a Democratic Interpretation of International Nationality Law' (2019) 29 Swiss Review of International and European Law 525. See also, Džankić (n 3) 73–76; Diane F Orentlicher, 'Citizenship and National Identity' in David Wippman (ed), *International Law and Ethnic Conflict* (Cornell University Press 1998); Odile Ammann, 'Passports for Sale: How (Un)Meritocratic Are Citizenship by Investment Programmes?' (2020) 22 European Journal of Migration and Law 309, 327–328.

12 Report from the Commission (n 5)5-6.

13 Speech by Viviane Reading, 'Citizenship must not be up for sale' (15 January 2014). See further, Sergio Carrera, 'The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters' (2014) 21 Maastricht Journal of European and Comparative Law 406, 417–419.

14 Audrey Macklin, 'Is It Time to Retire *Nottebohm*' (2017) 111 American Journal of International Law 492.

15 See, for example, Joseph L Kunz, 'The *Nottebohm* Judgment' (1960) 54 American Journal of International Law 536.

16 See further, Robert Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal; Peter Spiro, '*Nottebohm* and "Genuine Link": Anatomy of a Jurisprudential Illusion' [2019] IMC Research paper 2019/01; Dimitry Kochenov and Justin Lindeboom, 'Pluralism through Its Denial: The Success of EU Citizenship' in GT Davies and Matej Avbelj (eds), *Research handbook on legal pluralism and EU law* (Edward Elgar Publishing 2018) 181–182.

17 For in-depth discussion of the relevant jurisprudence, Sloane (n 16); Spiro (n 16).

18 Case C-369/90 *Micheletti*, ECLI: EU:C:1992:295.

19 Spiro (n 16). See also, Rayner Thwaites, 'The Life and Times of the Genuine Link' (2018) 49 Victoria University of Wellington Law Review 645.

ICJ rendered Mr Nottebohm stateless for the purpose of diplomatic protection.[20] In his Dissenting Opinion, Judge Read observed that that the same fate could befall hundreds of thousands, if not millions of citizens resident abroad.[21] As is easy to see, the negative consequences of *Nottebohm* would be many times worse in today's globalised world. Dual nationality is now much more widespread and accepted than it was then, and individuals have become far more mobile, often maintaining social ties with different countries.[22] A genuine link requirement in the sense of *Nottebohm* would leave many mobile persons vulnerable and could have far-reaching consequences for the right to diplomatic protection. As the International Law Commission has pointed out, it would

> exclude literally millions of persons from the benefit of diplomatic protection. In today's world of economic globalisation and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire. Moreover, there are countless others who have acquired nationality by birth, descent or operation of law of States with which they have the most tenuous connection.[23]

This alone gives sufficient reason to assume that it is a good thing that *Nottebohm* is no longer good law.

As far as the EU is concerned, there are even better reasons for rejecting the reasoning supporting the conclusions reached by the ICJ in the *Nottebohm* case. EU citizenship is the derivative status of nationals of EU Member States. It mediates the relationship of nationals of EU Member States with those Member States of which they are not nationals. The acquisition and loss of the status of EU citizenship, and thereby also the rights attached to this status, depend on the acquisition and loss of a member state nationality. These rights include the right to move and reside freely within the territory of the EU and the political rights to vote for and stand as candidate in municipal elections and elections to the European Parliament.[24] For many EU citizens, the enjoyment of these rights could be jeopardised if Member States were allowed to refuse to recognise the nationality – and with that EU citizenship – of persons who, in their view, have no genuine link with the Member State of which they are nationals. To prevent this, the EU Court of Justice ruled against national rules that impose additional conditions for the recognition of nationality as long ago as 1992, in the *Micheletti* case. It stated that is impermissible for Member States 'to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality'.[25] More recently, in the *Lounes* case, it affirmed that 'member states cannot restrict the effects that follow from holding the nationality of another Member State, in particular the rights which are attendant thereon under EU law and which are triggered by a citizen exercising his freedom of movement'.[26]

Is the argument of making the acquisition of citizenship conditional on a genuine link therefore a misleading one? Perhaps surprisingly, in the light of the above conclusions, the answer should be, *no it is not*. After all, and this is where the crux of the matter begins I believe, the question of whether to apply a genuine link requirement for the *recognition* of nationality is altogether different from the question of whether to apply a genuine link requirement for the *acquisition* of nationality. These two questions are confounded by almost everyone, both supporters and opponents of genuine links. The argumentation of the ICJ may have been confusing, but the *Nottebohm* case concerned the recognition, and not the acquisition, of nationality. In fact, as regards acquisition, the ICJ confirmed that it is for each

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20 Kunz (n 15) 566; Macklin (n 14) 494; Sloane (n 16) 16.

21 Dissenting Opinion Judge Read, *Nottebohm* (Liechtenstein v Guatemala), 1955 ICJ Rep 4 (6 April), 44.

22 Spiro (n 16) 17–18.

23 International Law Commission 'First Report on Diplomatic Protection' (2000) DOCUMENT A/CN.4/506, para 117.

24 Articles 20-24 on the Treaty on the Functioning of the European Union.

25 *Micheletti* (n 18) para 10. See also, Case C-148/02 *Garcia Avello*, ECLI:EU:C:2003:539, para 28.

26 Case C-165/16 *Lounes*, ECLI:EU:C:2017:862, para 55.

'sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality'.[27] Therefore, contrary to what the EU institutions and several political theorists have come to suppose, the jurisprudence of international law offers *no* support for the position that the acquisition of nationality must depend on the existence of a genuine link. Critics have been correct to point this out, and to emphasise the errors made by the ICJ in the *Nottebohm* case. However, contrary to what they assume, from the fact that the judgment was problematic as a matter of international law and normative principle, it does not follow that the argument for conditioning the acquisition of national citizenship – and thereby EU citizenship – on a genuine link is morally flawed as well. It is impossible to justify the conclusion that the granting of citizenship should not depend on a genuine link by finding that *Nottebohm* is flawed, simply because this ruling is unrelated to the acquisition of nationality. Therefore, the case for conditioning the conferral of national membership on a genuine link – as proposed by some political theorists and EU institutions – must be assessed on its own merits, not on the basis of international law.

C. Genuine links as a condition for the acquisition of citizenship?

In this section, I show that there are significant moral reasons for ascribing weight to the social ties of individuals in determining the boundaries of citizenship. People with genuine links to a society have a moral claim to membership of this society. However, before discussing the moral salience of genuine links, I wish to dispense of the objection that the ideal of a genuine link requirement is practically unattainable.

1. Genuine links: proxies and practice

While each person develops social ties with his or her place of residence, people identify differently with the society where they live and develop different sorts of social and political relations with its political institutions and their fellow residents. In other words, genuine links are subjective; they differ from person to person and are not objectively measurable. This has led to two closely related objections to conditioning the boundaries of membership on the principle of genuine links. On the one hand, because social ties are subjective, Spiro has argued that it 'does not translate into a practical standard for the allocation of nationality'.[28] In my view, this is a weak objection, not because the social ties individuals have in relation to particular societies are clearly and objectively measurable, but because it is possible to devise practical standards that serve as proxies for genuine links. However, this has led to a second objection, namely that such practical standards will be both over- and under-inclusive and will not be able to adequately measure immigrants' social ties.[29] While this is partly true, the fact that such practical standards are over- and under-inclusive is not in itself seem sufficient to reject the principle of genuine links.

The following example illustrates this point. In order to determine who is entitled to cast a vote in elections, democratic societies around the world apply a minimum age which citizens must have attained by the day of the election. The reason for applying a minimum age is not that age itself is morally relevant. Rather, societies use voting age as a practical device – a proxy – for political competence. The use of a minimum age as a proxy is justified on both principled and practical grounds.[30] It ensures that the allocation of political rights does not depend on morally problematic characteristics such as gender or ethnicity. Moreover, it is justified in the absence of objective instruments to measure political

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[27] *Nottebohm*, page 20. See further, Spiro (n 16) 7–8.

[28] ibid 22.

[29] For such an argument, Kieran Oberman, 'Immigration, Citizenship, and Consent: What Is Wrong with Permanent Alienage?: Immigration, Citizenship & Consent' (2017) 25 Journal of Political Philosophy 91, 94.

[30] See also, Timothy Endicott, 'The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 22–23.

competence. And even if a representative test could be designed to test political competence, such as a questionnaire to be completed by citizens before each election, carrying out such a test would not only be massively complex and costly, but it could also create democratically problematic obstacles to the exercise of the right to vote. Therefore, like genuine links, political competence is not an ideal that provides practical standards for its realisation. Yet we do not object on this ground to the idea that the allocation of political rights must depend on political competence. Of course, we can recognise that a voting age is an imperfect, and perhaps even arbitrary, practical yardstick. It is both over- and under-inclusive, excluding young but politically competent citizens from the ballot, while granting political rights to those who have reached the minimum age but do not have the necessary competence. However, as has been amply demonstrated by others, the fact that proxies can be over- and under-inclusive does not mean that there is anything inherently wrong with the use of such standards. Rather, the relevant question to ask is, what degree of over- and/or under-inclusion is acceptable in the relevant situation.[31]

As I believe Joseph Carens has clearly shown, the use of proxies is also the best way of measuring immigrants' social ties to their country of residence. According to his theory of social membership, the social ties of immigrants with their country of residence determine their moral claims to legal rights and to citizenship. However, instead of suggesting that the legal rights and status of these persons should depend on their particular individual relationships and the degree of identification with their country of residence, his theory of social membership depends on two criteria only: 'residence and the passage of time'.[32] He argues the following:

> If we want to institutionalize a principle that gives weight to the degree to which a person has become a member of society and if we expect to have to deal with a large number of cases, we will want to use indicators of social membership that are relevant, objective, and easy to measure. Residence and time clearly meet these requirements. Other ways of assessing social membership do not.[33]

Some will say that language or civic integration tests are a better way of measuring the social integration of immigrants and should complement residence requirements,[34] but this does not detract from the point made by Carens that certain proxies provide practical standards for the allocation of legal rights and legal status. In many cases, the EU also uses the criteria of residence and time as proxies for social integration, with the aim of determining the status and rights of citizens and third-country nationals. For example, the right of permanent residence for both EU citizens and third-country nationals is subject to a continuous period of residence of five years.[35] There thus is sufficient reason to believe that the principle of genuine links can be translated into practical standards that are not morally arbitrary.

2. Should genuine links matter for the acquisition of citizenship?

It may be practicable, but is conditioning the status of citizenship on a genuine link also desirable? In this section, I argue that critics have been too quick to dismiss the principle of genuine links. To see why this is so, it is first of all necessary to understand that the principle of genuine links serves both as a mechanism for inclusion and exclusion. In the context of the debate on the boundaries of EU citizenship, the principle of genuine links is mostly invoked to argue that certain individuals are not entitled to the

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31 Sophia Moreau, 'Equality Rights and Stereotypes' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 291. More generally, Frederick Schauer, *Profiles, Probabilities and Stereotypes* (HUP 2006).

32 Carens (n 2) 164.

33 ibid 165.

34 For a general discussion, Rainer Bauböck and Christian Joppke (eds), 'How Liberal are Citizenship Tests?' (2010) RSCAS Working Paper 2010/41.

35 As regards EU citizens, see Article 16(1) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. As regards third-country nationals, see Article 4 of Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents'.

status and rights of EU citizenship. I suppose that this focus on the exclusionary side of the principle of genuine links is one of the reasons why this principle has not been well received by everyone. More often, however, theories of social membership purport to determine which persons who are currently excluded from national citizenship should be included. I will first focus on migrants with genuine links to their country of residence and argue that they have a moral claim to membership of this society. With regard to migrants without genuine links, I will argue that they do not have such a moral claim. However, whether it is morally impermissible to grant them citizenship depends on specific moral and empirical assumptions which require further research.

The typical point of departure of theories of social membership is that citizenship is a morally arbitrary concept for the allocation of rights and duties among persons. As Shachar has argued, 'criteria for attributing membership at birth are arbitrary: one is based on the accident of birth within particular geographical borders while the other is based on the sheer luck of descent'.[36] Although states may have good reasons to grant membership at birth,[37] migrants often have the same social connections to a particular state as its citizens. They may have grown up there or have built up a relationship with their state of residence over an extended period of time. And as residents, they cooperate and participate with fellow residents in the production of collective societal goods. Theories of social membership claim that such social connections are relevant and give migrants moral claims to legal rights and ultimately to citizenship.[38]

Few theorists disagree with the basic moral assumptions behind such claims. Moreover, despite the escalating immigration rhetoric and harsher migration policies of the last two decades, democratic states around the world have steadily incorporated considerations of social membership into their domestic laws over the past decades. They have decoupled legal rights from the status of citizenship. This trend has not been linear and uniform, but as a result of the international human rights regime and the social and political pressure generated by labour migration, most civil and social rights, and sometimes even political rights, are now derived from residence rather than citizenship.[39] The EU has also felt compelled to adopt legislation recognising the social membership of persons without EU citizenship status. In 1999, the European Council committed itself to approximating as far as possible the legal status of third-country nationals to that of EU citizens.[40] Since then, the EU has adopted an extensive legislative framework granting specific legal rights to different groups of third-country nationals.[41] I do not suggest that these measures have dealt satisfactorily with the position of third-country nationals. However, it seems to me that most would agree that it was desirable for the EU to legislate in this domain in order to give legal recognition to the social reality that third-country nationals are social members of national societies as well as the EU as a whole. It also seems to me that, in so far as these measures are considered inadequate, this view stems in large part from the assumption that the EU has not done enough to recognise the genuine links third-country nationals establish during their periods of residence in Europe.

Although migrants enjoy most of the legal rights of citizenship, due to the strict naturalisation requirements applied by many states, obtaining the legal status of citizenship is difficult for many

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36 Shachar, *The Birthright Lottery* (n 2) 7.

37 For a defence of birthright citizenship, Bauböck, 'Democratic Inclusion: A Pluralist Theory of Citizenship' (n 2) section 4.2.

38 Carens (n 2) chapter 8.

39 David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Johns Hopkins Univ Press 1997); Feldblum, 'Reconfiguring Citizenship in Western Europe' in Christian Joppke (ed), *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford University Press 1998); David Owen, 'Citizenship and Human Rights' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017).

40 Presidency Conclusions, Tampere European Council (15- 16 October 1999).

41 Martijn van den Brink, 'EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems' (2019) 25 European Law Journal 21, 28.

immigrants.[42] Is this morally problematic from a social membership perspective? Should naturalisation requirements also be conditioned on specific principles of social membership such as genuine links? Of course, the requirements imposed by states typically guarantee that genuine links exist by the time of naturalisation. Practically everyone must obtain permanent residence under national law, and often a language or civic integration test must be passed before a person can qualify for naturalisation. It may be that in an era of growing mobility and acceptance of dual nationality, the social relationship of an increasing number of people with their country of citizenship is shallow,[43] but as Sloane rightly observed—and social science research has affirmed[44]— the majority of citizens still 'do self-identify, to a greater or lesser degree, by their nationality in the robust sociopolitical sense described by the genuine link theory'.[45] However, the relevant question is not whether citizens do have genuine social ties to their country of nationality, but whether the conditions for naturalisation should be linked to criteria of genuine links.

Naturalisation conditions can fail to observe the principle of genuine links in two respects. On the one hand, the conditions for naturalisation are often under-inclusive. States with strict naturalisation rules may deny the possibility of naturalisation to large groups of migrants whose social membership cannot be in doubt. On the other hand, the conditions for naturalisation can be over-inclusive. As the investor migration schemes show, some states allow a select group of individuals without any meaningful social ties to acquire citizenship. As we have seen above, the fact that the practical standards used to determine the existence of genuine links are over- or under-inclusive is not sufficient to conclude that their use is impermissible. The question is what degree of over- and under-inclusion is permissible in specific contexts. To determine this, we should first of all know whether naturalisation conditions must be defined in accordance with the principle of genuine links. I will consider over- and under-inclusive naturalisation rules in turn.

With regard to under-inclusive naturalisation rules, migrants who have been resident for an extended period of time and have become social members are not just entitled to the legal rights of citizenship but to the legal status of citizenship as well. As the class of rights still closely tied to citizenship is that of political rights, the moral wrong in denying migrants with genuine links the right to obtain citizenship is in large part a democratic wrong. Migrants not only participate in and contribute to the social and political life of their country of residence. Their lives in turn are also determined by the political decisions taken by this country. They are coercively subjected to its laws, while they lack important political rights that allow them to participate in the formation of these laws on an equal basis with the citizens of this country. This is so despite the fact that they may have an equally strong stake as citizens in being a member of this country.[46] This should be recognised by giving them the opportunity to acquire citizenship and the political rights that come with this status.

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[42] It must be recognised that both naturalisation requirements and naturalisation rates vary considerably from one Member State to another. See further, Samuel Schmid, 'Stagnated Liberalization, Long-Term Convergence, and Index Methodology: Three Lessons from the CITRIX Citizenship Policy Dataset' [2021] Global Policy (forthcoming); Jeremias Stadlmair, 'Which Policies Matter? Explaining Naturalisation Rates Using Disaggregated Policy Data' (2017) 46 Österreichische Zeitschrift für Politikwissenschaft.

[43] Spiro (n 16) 22.

[44] See, for example, Andrea Schlenker, 'Divided Loyalty? Identification and Political Participation of Dual Citizens in Switzerland' (2016) 8 European Political Science Review 517; Carlos Mendez and John Bachtler, 'European Identity and Citizen Attitudes to Cohesion Policy: What Do We Know?' [2015] COHESIFY Research Paper 1 10. Measuring identity faces methodological difficulties: R Sinnott, 'An Evaluation of the Measurement of National, Subnational and Supranational Identity in Crossnational Surveys' (2006) 18 International Journal of Public Opinion Research 211. But as only 3-4% of the world's population are migrants, there seems to be no reason to doubt the statement by Sloane.

[45] Sloane (n 16) 30.

[46] The previous sentences possibly use different criteria for democratic inclusion. For present purposes, I am not interested in the question of which of the possible criteria is most plausible. In the present context, they seem to point in the same direction, namely in favour of the democratic inclusion of migrants who are social members. For a helpful discussion of

Within the EU, the exclusion of migrants from third countries with strong social ties from citizenship constitutes not only a democratic wrong at national level.[47] The failure of democratic inclusion affects the EU's own legitimacy as well, first of all because national representative processes are key to the legitimisation of EU policies, but also because national citizenship goes hand in hand with EU citizenship and the right to vote for and stand in elections to the European Parliament. A European Union committed to democratic fairness has an interest in ensuring that migrants are not excluded permanently, or for an excessively long period, from national and EU citizenship. In other words, it has an interest in ensuring that the boundaries of national membership are predicated on standards that trace the genuine links of migrants.[48] How then should those boundaries be drawn? Views may differ as to how exactly to determine the existence of genuine links. It seems to me that after three to five years of residence, migrants will have established genuine social links. A naturalisation requirement along these lines therefore does not appear to be too under-inclusive. In any case, the above suggests that it is morally desirable for migrants with genuine links to have the right to obtain citizenship.

If being a social member of a society creates a moral right to the legal rights and status of citizenship, it follows that individuals without social membership – without genuine links – do not have a moral claim to the citizenship of this society and the rights that come with this status (at least not on these grounds). However, it does not follow from the fact that it is morally permissible to deny persons without genuine links citizenship that it is morally impermissible to grant them citizenship (for investment or for another reason).[49] It seems to me that, all things being equal, naturalisation rules that are under-inclusive and deny citizenship to persons *with* genuine links are morally more problematic than naturalisation rules that are over-inclusive and grant citizenship to persons *without* genuine links. As long as over-inclusive naturalisation rules do not violate the rights of others, they do not seem morally impermissible. In the light of this, it is at least noteworthy that in recent years, the debate on the boundaries of EU citizenship has been more preoccupied with denying access to those without genuine links than ensuring access for those with such ties.[50] What is needed is a more holistic debate on the relationship between national and EU citizenship, which does not focus on specific cases and problems, but tries to provide a consistent normative vision of citizenship within the European Union.[51]

That being said, it may be that over-inclusive naturalisation schemes, such as investor citizenship programmes, are problematic for other reasons. One concern regarding naturalisation requirements not predicated on the principle of genuine links is that they have potential negative consequences for other Member States. The benefits granted to EU citizens include the right to travel throughout the EU, to reside in a Member State of which the citizen is not a national and to enjoy - with limitations - the benefits of national citizenship. Decisions on the acquisition and loss of nationality are indeed not neutral with regard to other Member States. As I will stress in the last part, this cannot in itself be an argument

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the different principles of democratic inclusion, Bauböck, 'Democratic Inclusion: A Pluralist Theory of Citizenship' (n 2) section 3.

47 I do not speak of second-country national migrants here, EU citizens moving from the Member State of which they are nationals to another Member State. As this paper is about the acquisition of EU and national citizenship, it ignores those who already enjoy national and EU citizenship. Yet, it should be observed that second-country nationals can also suffer a moral wrong by being denied voting rights in the state where they reside. See further, Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75 Fordham Law Review 2393.

48 This draws on, van den Brink (n 8) 197–198.

49 For a similar argument, Javier Hidalgo, 'Selling Citizenship: A Defence' (2016) 33 Journal of Applied Philosophy 223.

50 The exception, perhaps, is the discussion about the loss of EU citizenship of British nationals after Brexit. But this debate had its own shortcomings, I explain here: Martijn van den Brink and Dimitry Kochenov, 'Against Associate EU Citizenship' (2019) 57 Journal of Common Market Studies 1366.

51 For my attempt, van den Brink (n 8). See further, Rainer Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 Theoretical Inquiries in Law 453; Oliver Garner, 'The Existential Crisis of Citizenship of the European Union: *The Argument for an Autonomous Status*' (2018) 20 Cambridge Yearbook of European Legal Studies 116.

for limiting the competences of the Member States with regard to nationality, since any decision to grant nationality may have repercussions for other Member States. The question is whether naturalisation rules which provide for the acquisition of nationality without a genuine link aggravate the risk of negative spill-over effects. Advocate General Maduro suggested in his Opinion in the *Rottmann* case that the EU might have reasons to intervene 'if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalisation of nationals of non-member States'.[52] One frequently mentioned example in this respect is the Italian policy of granting citizenship to large numbers of people with Italian ancestry but without genuine links to Italy.[53] If the ability to naturalise without having genuine links does indeed undermine the legitimate interests of other Member States, such schemes would be morally problematic and there would be reasons to make the acquisition of national and EU citizenship subject to a genuine link requirement.

One legitimate concern regarding investor citizenship programmes in particular is that they facilitate money-laundering, corruption, and other forms of crime.[54] Such possible negative side-effects certainly need to be addressed, but the question is whether these effects are intrinsically linked to investor migration programmes. More evidence is needed to establish this. If not, these consequences can in large part be tackled by means other than a genuine link requirement, such as through better enforcement or updating of existing EU anti-money laundering or immigration law policies.[55] If, on the other hand, these consequences are inherent in the way investor migration regimes are designed and administered, then there are good reasons to question the desirability of these regimes as a whole.

These EU-related criticisms of over-inclusive naturalisation schemes focus on the possible negative side-effects that citizenship acquisition policies that are not based on the principle of genuine links may have on other Member States. In addition, normative theorists have offered two more general criticisms of investor citizenship programmes, which seem applicable to all naturalisation rules that are not premised on the principle of genuine links, namely: that such rules exacerbate inequalities between different categories of migrants and that they undermine the civic bonds between citizens that enable states to flourish.[56] Both arguments strike me as possibly plausible, though I believe that further normative and empirical research is needed in order to settle the question of whether it is morally problematic to grant citizenship in the absence of genuine links.

According to the argument from equality, it is unfair that naturalisation has been facilitated for the privileged few, while citizenship has become more difficult to obtain for most migrants. While I agree, this is not so much an argument against naturalisation in the absence of genuine links as it is an argument for treating the majority of migrants fairly. The question, which I believe is still open to discussion, is whether it would also be morally problematic to allow migrants without genuine links to naturalise if states were to recognise the moral claims of migrants with genuine links by allowing them to obtain citizenship. Would it still be problematic to award citizenship in exchange for investment if other migrants would be treated fairly? The answer, it seems to me, depends on whether inequality is

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52 Case C-135/08 *Rottmann*, Opinion of AG Maduro, ECLI:EU:C:2009:588, para 30.

53 Costica Dumbrava, 'External Citizenship in EU Countries' (2014) 37 Ethnic and Racial Studies 2340; Jo Shaw, 'Citizenship for Sale: Could and Should the EU Intervene?' in Ayelet Shachar and Rainer Bauböck (eds), *Should Citizenship be for Sale?* (EUI RSCAS Working Paper 2014).

54 Report of the Commission (n 5); European Parliamentary Research Service (n 4); Transparency International and Global Witness, 'European Getaway: Inside the Murky World of Golden Visas' (2018) available at <https://www.globalwitness.org/ru/campaigns/corruption-and-money-laundering/european-getaway/>.

55 For a discussion of these measures, Daniel Sarmiento and Martijn van den Brink, 'EU Competence and Investor Migration' in Dimitry Kochenov and Kristin Surak (eds), *The Law of Citizenship and Money* (Cambridge University Press (forthcoming)) section 5. Also available here, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715773>.

56 Ayelet Shachar, 'Citizenship for Sale?' in Ayelet Shachar and others (eds), *The Oxford handbook of citizenship* (Oxford University Press 2017).

intrinsically objectionable or only when it produces further injustices.[57] This is not the place to discuss this question. Suffice it to say that in the case inequality is not intrinsically wrong, the argument from equality cannot be aimed at over-inclusive naturalisation rules.

With respect to the second argument, that naturalisation conditions not predicated on a genuine link would undermine valuable civic relations between citizens, it should be observed that this is first of all an empirical claim. In respect of investor citizenship schemes, Hidalgo has argued that we lack the empirical evidence to validate this claim.[58] Indeed, it seems difficult to proof that granting citizenship to a select few without substantial social ties will have a significant detrimental impact on civic relationships. At the same time, it is not just a question of the consequences of a limited number of citizenship acquisitions, but also of what would be the consequences of citizenship schemes that would allow larger numbers of people to obtain citizenship without genuine links. If it is correct that the trust necessary to promote and maintain collective goods arises mainly among citizens with sufficiently strong reciprocal social and political ties,[59] awarding citizenship in the absence of genuine links may well be morally undesirable. Further empirical research is needed in order to settle this question.

D. Genuine links in EU law

The previous two sections allow us to evaluate the arguments of both the Commission and the European Parliament in favour of introducing a genuine link requirement as a condition for access to national and thereby EU citizenship. We saw that this is a plausible moral requirement, especially with regard to under-inclusive naturalisation conditions which exclude migrants with genuine links from the right to naturalise. In this section, I will zoom in on the debate on investor citizenship in the EU, and in particular on the legal proceedings launched by the Commission against the investor citizenship schemes of Malta and Cyprus. In response to its arguments, I will make three points. Firstly, based on the distinction offered in the first section, between the application of a genuine link in the context of *recognition* and *acquisition* of nationality, it appears that the Commission cannot be criticised for ignoring established case law in launching proceedings against Cyprus and Malta. Secondly, on the basis of the accepted definition of genuine links provided in the previous section, it appears that the objections of the Commission against investor citizenship ought to target a much larger set of naturalisation rules than only investor citizenship schemes. Thirdly, and partly following from this second point, this raises the question of whether a requirement of genuine links can be enforced as a matter of EU law. As I will argue, existing naturalisation practices may be morally suspect but are not unlawful under EU law as it currently stands.

1. Genuine links and the recognition and allocation of EU citizenship

The first point concerns the decision of the Commission to push for a genuine link requirement by reference to the *Nottebohm* judgment. Critics of a genuine link requirement have been quick to point out the flaws of this argument. As Spiro and Kochenov rightly point out, this argument flies in the face of the common view that *Nottebohm* was bad law at the time and is a dead letter these days.[60] They are also right to remind us that in its *Micheletti* judgment, the EU Court of Justice (CJEU) rejected an

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57 Thomas Scanlon, *Why Does Inequality Matter?* (Oxford University Press 2018).

58 Hidalgo (n 49) 233–234.

59 See further, Mark Warren (ed), *Democracy and Trust* (Cambridge University Press 1999); Andrea Sangiovanni, 'Global Justice, Reciprocity, and the State' (2007) 35 Philosophy & public affairs 3, 32–33; Sarah Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State' (2012) 4 International Theory 39, 59.

60 Spiro (n 16); Dimitry Kochenov, 'Investor Citizenship and Residence: the EU Commission's Incompetent Case for Blood and Soil' (23 January 2019), available at <https://verfassungsblog.de/investor-citizenship-and-residence-the-eu-commissions-incompetent-case-for-blood-and-soil/>.

application of the principles laid down in *Nottebohm* within the framework of EU law.[61] And yet, contrary to what they assume, such criticism does not demonstrate that the Commission is wrong to emphasise the importance of a genuine link requirement. The reason is that *Nottebohm* concerned principles on the *recognition* of nationality, while the Commission is concerned with national rules on the *acquisition* of nationality. Those raise very different moral issues that should not be confused. As I explained above, there are moral reasons to reject the application of a genuine link requirement in relation to the recognition of nationality and to endorse such a principle in relation to the acquisition of nationality. The Commission should simply stop mentioning *Nottebohm* when it defends genuine links. Then it can no longer be criticised for misunderstanding international law and for suggesting that it wants to overturn established – and desirable – principles of EU citizenship law.

2. The consequences of a genuine link requirement

The second point concerns the consequences that should logically result from a decision to condition the acquisition of national and EU citizenship on a genuine link requirement. Before assessing whether a genuine link requirement can and should be enforced as a principle of EU citizenship law, I would like to explore these consequences. Since the Commission is only arguing against granting national and European citizenship without a genuine link, I will only examine the consequences of this argument and not go into the question of what would be the consequences of the opposite argument, that national and European citizenship should be granted to persons with a genuine link. As we will see, it will be a watershed moment for the relationship between national and EU citizenship for the CJEU to go along with the arguments put forward by the Commission in its legal proceedings against Malta and Cyprus (assuming the dispute reaches the CJEU). Not only will it herald the end of investor citizenship; it may also open the door to further legal challenges to national citizenship policies.

The Commission considers that 'the granting of EU citizenship for pre-determined payments or investments without any genuine link with the Member States concerned, undermines the essence of EU citizenship'.[62] The press release in which it sets out its legal arguments is brief and all we can go on so far. It does not clarify whether the Commission considers the absence of genuine links alone as problematic, or whether granting EU citizenship for investment combined with the absence of genuine links justifies its legal challenge. Previously, however, it has suggested that violating the principle of genuine links is problematic in itself:

> Since … a host Member State cannot limit the rights of naturalised Union citizens on grounds that they acquired the nationality of another Member State without any link with that awarding Member State, each Member State needs to ensure that nationality is not awarded absent any genuine link to the country or its citizens.[63]

For the sake of understanding the potential scope and consequences of the legal arguments put forward, let's assume that the Commission indeed intends to make the national rules on the acquisition of citizenship subject to a genuine link requirement.

In that case, the arguments of the Commission ought to target a much larger set of nationality rules than the two that are the subject of the legal infringement proceedings. At least three other practices which are enabled by domestic naturalisation rules are incompatible with the principle of genuine links. This concerns first of all some forms of discretionary naturalisation. States across the world have provisions allowing for discretionary nationalisation and the waiving of one or more of the naturalisation conditions for migrants who have made or are expected to make an exceptional economic, cultural,

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61 See Section B.

62 European Commission Press Release (n 6).

63 Report of the Commission (n 6) 6.

scientific or athletic contribution.[64] Among them are 22 EU Member States.[65] It is not the case that discretionary naturalisation always benefits individuals without genuine links, but as Džankić explains, discretionary naturalisation is part of a wider transformation, which 'has at its core, not a direct link between one individual and one state, but rather broader global dynamics in which states compete against each other for limited human and material resources'.[66] And Shachar observes that it 'represents the rise of a more calculated approach to citizenship in which a premium is placed on individuals with extraordinary ability or talent, detaching it from the conventional genuine-ties interpretations'.[67] Secondly, several Member States have adopted naturalisation policies that seek to remedy past injustices.[68] The example often given in this context is that of Spain and Portugal allowing the descendants of Sephardic Jews forced into exile in the 15th and 16th centuries to be naturalised.[69] It seems evident that descendants who have never lived in Spain or Portugal lack genuine connections with these societies. Thirdly, many Member States have adopted investor *residence* schemes.[70] Some such schemes allow beneficiaries to acquire citizenship without actually being physically present within the country.[71] For example, participants in Portugal's Golden Visa scheme need to be present only for seven days during the first year and for fourteen days during each subsequent period of two years.[72] If a Golden Visa is maintained for five years, the holder is entitled to permanent residence and, upon passing a basic language test, to Portuguese citizenship after six years.[73] Whether having a rudimentary understanding of Portuguese is sufficient to prove the existence of genuine links seems highly questionable.

Some may suggest interpreting the principle of genuine links in such a way that it includes only those naturalisation practices that they find morally problematic. If it involves investment, it is not genuine; if it serves remedial justice, it is. Of course, if granting citizenship to individuals without genuine links is morally objectionable because it exacerbates inequalities or because it undermines valuable civic bonds between citizens, granting nationality to individuals whose ancestors were expelled centuries ago hardly seems less objectionable than granting nationality to individuals with deep pockets. More to the point, however, the concept of 'genuine links' cannot be plausibly interpreted in the way proposed above. As I have explained, the principle of genuine links gives expression to the ideal that the granting of citizenship should be reserved for those who have social membership of the granting State: those who

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64 Džankić (n 3) chapter 4; Ayelet Shachar, 'Picking Winners: Olympic Citizenship and the Global Race for Talent' (2010) 120 Yale Law Journal 2088.

65 Jelena Džankić, 'Investment-based citizenship and residence programmes in the EU' (2015) RSCAS Working Paper 2015/08, 5-6.

66 Džankić (n 3) 97.

67 Shachar, 'Picking Winners' (n 62) 2094.

68 Aleksandra Dr Maatsch, *Ethnic Citizenship Regimes: Europeanization, Post-War Migration and Redressing Past Wrongs.* (Palgrave Macmillan 2011).

69 Hans Ulrich Jessurun d'Oliveira, 'Iberian Nationality Legislation and Sephardic Jews' (2015) 11 European Constitutional Law Review 13.

70 See further, Martijn van den Brink 'Investment Residence and the Concept of Residence in EU Law: Interactions, Tensions, and Opportunities' [2017] IMC Research Paper 2017/1.

71 Manuela Boatcă, 'Commodification of Citizenship: Global Inequalities and the Modern Transmission of Property' in Immanuel Maurice Wallerstein, Christopher K Chase-Dunn and Christian Suter (eds), *Overcoming global inequalities* (Paradigm Publishers 2014).

72 For a detailed discussion of the developments of the Portuguese regime, Luuk van der Baaren and Hanwei Li, 'Wealth Influx, Wealth Exodus: Investment Migration from China to Portugal' (2018) *Investment Migration Working Papers* No 2018/1.

73 Article 6 of the Portuguese Nationality Act. Acquisition of Portuguese citizenship is even easier for their children, as explained here: Investment Migration Insider, 'Portugal to Allow Birthright Citizenship from Tomorrow: Major Win for Golden Visa', available at <https://www.imidaily.com/editors-picks/portugal-to-allow-birthright-citizenship-from-tomorrow-major-win-for-golden-visa/>.

have built up a relationship with their place of residence over a certain period of time. The Commission agrees with this interpretation, having said that a genuine link is 'established either by birth in the country or by effective prior residence in the country for a meaningful duration'.[74] The principle of genuine links does not distinguish between different naturalisation rules based on which objectives states pursue with their rules and how desirable they are. An application of this principle as a principle of EU citizenship law should thus have far-reaching consequences and target many other naturalisation practices besides investor citizenship.

3. Genuine links and EU law

This brings me to the third and final point: should the principle of genuine links be a principle of EU law, as the Commission alleges in the infringement proceedings it launched against Cyprus and Malta regarding their investor citizenship schemes? Even if naturalisation rules that violate the principle of genuine links are morally problematic, I doubt that they are unlawful under EU law. The Commission considers that the granting of EU citizenship for pre-determined payments or investments without any genuine link with the Member States concerned, violates the principle of sincere cooperation enshrined in Article 4(3) of the Treaty *and* undermines the essence of EU citizenship. The only argument the Commission offers in support of this position is that, because the acquisition of EU citizenship is linked to the award of nationality, 'the effects of investor citizenship schemes are neither limited to the Member States operating them, nor are they neutral with regard to other Member States and the EU as a whole'.[75] Surely this cannot be an argument for limiting the powers of the Member States to lay down the rules on the acquisition of nationality. Since any acquisition of nationality leads to the acquisition of EU citizenship, *no* decision to grant nationality is limited to the Member State making that decision or neutral with regard to other Member States. Are there other legal grounds on the basis of which naturalisation rules not predicated on a genuine link requirement could be outlawed?

As I believe everyone will accept, the Treaties do not attribute to the EU the competence to define who can be a citizen of the Union.[76] According to Article 20 TFEU, EU citizenship is derivative of Member State nationality – 'Every person holding the nationality of a Member State shall be a citizen of the Union'. In addition, this provision provides that European citizenship does not entail the suppression or alteration of Member State nationality – 'Citizenship of the Union shall be additional to and not replace national citizenship'. These provisions were joined by three Declarations that all emphasise that decisions on the attribution of nationality are for the Member States to take,[77] including Declaration Nº 2 on nationality of a Member State, which states expressly that 'the question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned'. In *Rottmann*, the CJEU recognised, referring to Declaration Nº 2, that 'the rules on the acquisition and loss of nationality fall within the competence of the Member States'.[78]

It is established case law, however, that 'Member States must exercise their powers in the sphere of nationality having due regard to European Union law'.[79] Still, there is no precedent for the argument that national rules on the acquisition and loss of nationality must be compatible with a genuine link

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74 Report of the Commission (n 6) 5.

75 European Commission Press Release (n 6).

76 The following paragraphs draw on, Sarmiento and van den Brink (n 54).

77 For critical discussion, AC Evans, 'Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981' (1982) 2 Yearbook of European Law 173, 177–178; Gerard-René de Groot, 'Towards a European Nationality Law' (2004) 8 Electronica Journal of Comparative Law; Dimitry Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2008) 15 Colum. J. Eur. L. 169.

78 Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, para 37; Case C-221/17 *Tjebbes and others* ECLI:EU:C:2019:189.

79 Ibid para 32. See also, *Micheletti* (n 18).

requirement. Existing case law imposes two restrictions on the powers of the Member States in the sphere of nationality.[80] The first concerns the *recognition* of nationality. As we saw above, the CJEU decided in *Micheletti* and *Garcia Avello* that it is impermissible for Member States 'to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality'.[81] The second concerns the *loss* of nationality. It established in *Rottmann* and affirmed in *Tjebbes* that a decision that places EU citizens 'in a position capable of causing him to lose the status [of EU citizenship] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law'.[82] None of these decisions concerns the *acquisition* of nationality, though the CJEU has been asked in *JY v Wiener Landesregierung* (pending) whether the situation of a person

> has renounced her only nationality of a Member State of the European Union, and thus her citizenship of the Union, in order to obtain the nationality of another Member State, having been given a guarantee by the other Member State of grant of the nationality applied for, and whose possibility of recovering citizenship of the Union is subsequently eliminated by revocation of that guarantee, fall, by reason of its nature and its consequences, within the scope of EU law.[83]

It is evident from the question asked how unusual the factual circumstances of this case are. From an affirmative answer of the CJEU that, in such circumstances, the rules on the acquisition of nationality also fall within the scope of EU law, we will therefore not be able to deduce much as to whether or not Member States must observe the principle of genuine links.

It should also be noted that, despite all their glamour and fame, the aforementioned decisions impose hardly any restrictions on national citizenship laws. *Micheletti* and *Garcia Avello* merely expect of Member States that they recognise each other's decisions as regards the acquisition of nationality. They do not challenge national rules on the loss and acquisition of national citizenship as such. *Rottmann* and *Tjebbes* were perhaps ground-breaking in terms of legal argumentation it is unclear how much they changed in practice. These decisions established that it is for 'the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law'.[84] This involves taking 'into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union'.[85] However, despite the proportionality requirement, the applicant in *Rottmann* became stateless on the ground of having acquired the Member State nationality fraudulently.[86] The decision in the *Tjebbes* case had more tangible consequences, requiring the Dutch authorities to complement the rules on the loss of nationality with an individual assessment,[87] but did not trigger an amendment of these rules.

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80 See also, Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (2020) RSCAS Working Paper 2020/33, 31-35.

81 *Micheletti* (n 18) para 10; *Garcia Avello* (n 25) para 28.

82 *Rottmann* (n 69) para 42; Case C-221/17 *Tjebbes and others* ECLI:EU:C:2019:189, para 32.

83 Case C-118/20 *JY v Wiener Landesregierung* (pending).

84 *Rottmann* (n 69) para 55.

85 Ibid para 56.

86 See also, Nathan Cambien, 'Case C-135/08, *Janko Rottmann v. Freistaat Bayern*' (2011) 17 Columbia Journal of European law 375; Dimitry Kochenov, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47 Common Market Law Review 1831.

87 Raad van State, Uitspraak 201504577/2/A3, 201507057/2/A3, 201508588/2/A3, 201601993/2/A3, 201604943/1/A3 en 201608752/1/A3 (12 February 2020) ECLI:NL:RVS:2020:423.

Therefore, while the CJEU has 'challenged Member State sovereignty in nationality law',[88] none of the developments in EU citizenship law over the last decade indicates that national rules not conditioned on a genuine link violate EU law. Nevertheless, the Commission considers that a genuine link requirement must be introduced, for the most part because national schemes violating this requirement violate the essence of EU citizenship. What to make of this argument? For a start, it is controversial what the essence of EU citizenship is (which is one reason why it is difficult to build a case on this argument). Perhaps the Commission objects to the instrumentalization of EU citizenship and the possible cross-border implications of citizenship by investment programmes. In this respect it is essential to remember that morally unjust naturalisation regimes are not by definition unlawful under EU law. After all, if one element defines the essence of EU citizenship, it is that it is a status derived from Member State nationality. The CJEU may believe that EU citizenship is 'destined to become the fundamental status of nationals of the Member States',[89] but as Weiler has reminded us, this understanding of EU citizenship has always been hard to square with the 'text, teleology and legislative history' of the Treaties.[90] In any case, the Treaties do not support the view that EU citizenship limits the competence of the Member States with regard to the acquisition of their nationality, as proposed by the Commission in its legal challenge to the investor citizenship schemes of Malta and Cyprus.[91] Both Article 20 TFEU and the Declarations on nationality attached to the Treaties support the view that nationality rules not predicated on a genuine link are compatible with the essence of EU citizenship.

In in its press release announcing the launch of infringement proceedings against Cyprus and Malta, the Commission also mentions the principle of sincere cooperation as a reason to outlaw naturalisation conditions not compatible with the principle of genuine links (or at least investor citizenship). It is not entirely clear from this statement whether it considers the principle to be a self-standing or secondary argument. In the past, the Commission has always used it as a secondary argument in support of genuine links,[92] in which case it adds little to the argument concerning the essence of EU citizenship. Others have suggested that the principle can work as an independent argument against domestic citizenship programmes that violate the principle of genuine links, or at least against investor citizenship programmes.[93] The principle of sincere cooperation has been interpreted in different ways, but generally includes an obligation to actively contribute to compliance with EU law and an obligation to abstain from conduct contrary to the objectives of the EU.[94] As we have just seen, nationality rules that are incompatible with the principle of genuine links do not appear to violate EU law. Could it be said, however, that such rules contravene any other EU objective? It could perhaps be argued that this is the case where naturalisation schemes encourage significant malpractices that undermine the interests of other Member States and the EU as a whole. For example, if investor citizenship schemes structurally facilitate money laundering and other criminal practices, there may be a moment where they indeed undermine the objectives the EU pursues and, with that, the principle of sincere cooperation. However, this argument would relate only to the side effects of such schemes and not to the practice as such. It is therefore unlikely (or at least unclear) that the introduction of the principle of genuine links into domestic nationality laws is necessary in order to comply with the principle of sincere cooperation.

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88 Jo Shaw (ed), Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law? (2011) RSCAS Working 2011/62.

89 Case C-184/99, Grzelczyk, ECLI:EU:C:2001:458; Case C-34/09 Ruiz Zambrano, ECLI:EU:C:2011:124.

90 For more general criticism of the 'destined to be the fundamental status' slogan, JHH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 248.

91 For more general criticism of the 'destined to be the fundamental status' slogan, ibid.

92 Report from the Commission (n 5) footnote 31; European Parliament, 'Answer given by Mrs Reding on behalf of the Commission' (28 March 2014).

93 Carrera (n 13).

94 Marcus Klamert, *The Principle of Loyalty in EU Law* (First edition, Oxford University Press 2014).

Elsewhere I have argued that it is time to reconsider the current relationship between EU and national citizenship. I offered a qualified defence of the primacy of nationality over EU citizenship, which supports certain EU minimum standards which rules on the acquisition and loss of national citizenship must satisfy.[95] Others disagree and hold a different conception of what this relationship ought to be.[96] However, I believe that we should all be able to agree that the decision as to whether and how to alter this relationship should not be left to the CJEU. The revision of this relationship requires, first and foremost, an amendment of the Treaties, followed, if necessary, by the adoption of European-wide standards that further determine this relationship. Therefore, it is unlikely that the relationship between EU and national citizenship will undergo any significant changes in the near future. Unless the CJEU is prepared to ignore the limits laid down in the Treaties, the acquisition of national and EU citizenship will not be made conditional on the presence of a genuine like. Supporters of a genuine link requirement may dislike this conclusion, but alas, not everything that is immoral is also illegal.

E. Conclusion

This paper has sought to distinguish a number of questions concerning the application of a genuine link requirement under EU citizenship law which are often confused both by supporters and critics of the principle of genuine links. I believe it is useful to distinguish four questions:

1. Should the principle of genuine links determine the *recognition* of nationality?
2. Should the principle of genuine links determine the *allocation* of nationality?
3. Should the principle of genuine links determine the *allocation* of EU citizenship?
4. Should the principle of genuine links be legally enforced as a principle of EU citizenship?

As EU citizenship is derived from the nationalities of the Member States, the second and third questions are closely related. With regard to the first question, I argued that it is morally unacceptable to make the recognition of nationality conditional on a genuine link. Such a condition would generate unacceptable uncertainty for mobile citizens. However, I explained that it does not follow that the allocation of nationality should not be made subject to a genuine link requirement. To the contrary, we saw that migrants with genuine links to a particular society have a moral claim to be included as full members of that society. Furthermore, I have suggested that in certain circumstances it may be morally justifiable to exclude people without genuine links. These considerations apply also to the acquisition of EU citizenship. The answer to questions 2 and 3 is thus positive. On the other hand, I have explained why the answer to question 4 should be negative. The application of a genuine link requirement may be desirable but is unenforceable as a principle of EU law.

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95 van den Brink (n 8).

96 Garner (n 51); Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 European Law Journal 623, 644.

Author contacts:

Martijn van den Brink
British Academy Postdoctoral Fellow
Department of Politics and International Relations, Oxford University
Manor Road
OX1 3UQ
Oxford
UK

Email: martijn.vandenbrink@politics.ox.ac.uk


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