

EU Competence and Investor Migration

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1 Introduction

States around the world increasingly tailor their migration regimes with the purpose of attracting ‘the best and brightest’, including highly talented athletes, scientists, and artists. Also, European Union (EU) Member States participate in the scramble for human capital and most offer sought-after individuals fast-track access to residence.¹ Increasingly, however, national immigration policies are adapted in order to attract capital in addition to human capital.² Two EU Member States have adopted investor citizenship programmes and many investor residence programmes.³ Investor migration has come under strict scrutiny and heavy criticism in recent years. Some find investor citizenship programmes inherently problematic because they violate the notion that only individuals with ‘genuine

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¹ See further: Kristin Surak, ‘Global Citizenship 2.0 the Growth of Citizenship by Investment Programs’ [2016] IMC Research Paper 2016/02; Ayelet Shachar, ‘Picking Winners: Olympic Citizenship and the Global Race for Talent’ (2010) 120 *Yale Law Journal* 2088; Jelena Džankić, *The Global Market for Investor Citizenship* (Springer 2019) Chapter 6; Ayelet Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes’ (2006) 81 *NYU Law Review* 148; Stephen Castles, ‘Guestworkers in Europe: A Resurrection?’ (2006) 40 *International Migration Review* 741; Petra Zaletel, ‘Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration’ (2006) 12 *European Law Journal* 613; Jeroen Doomernik, Rey Koslowski, Dietrich Tränhardt, ‘The Battle for the Brains: Why Immigration Policy Is Not Enough to Attract the Highly Skilled’ [2009] *GMF Paper Series*.

² Ayelet Shachar and Ran Hirschl, ‘On Citizenship, States and Markets’ (2014) 22 *The Journal of Political Philosophy* 231.

³ For information about these schemes, Commission, ‘Staff Working Document accompanying the report on Investor Citizenship and Residence Schemes in the European Union’ SWD (2019) 5 final.

links', as evidenced by a certain period of residence, perhaps coupled with some understanding of the national language, should enjoy membership.⁴ Another set of objections focuses on the possible negative side effects of these programmes, such as money laundering, corruption, and tax evasion.⁵ The European Commission and Parliament have expressed such concerns too and have said they will monitor 'issues of compliance with EU law raised by the schemes and [...] take necessary action, as appropriate'.⁶ In this chapter, we will examine the options for the EU to intervene if it desires to do so. In particular, we will examine whether such action would be compatible with the EU's division of competences and the principle of conferral, according to which all powers of the EU are the result of an explicit and unequivocal transfer enacted by its Member States and enshrined in the Treaties.

We will draw a distinction between three different areas – nationality, residence, and money laundering and corruption – and demonstrate that EU competences to intervene vary, depending on the area that the EU seeks to address. In line with existing studies,⁷ we argue that it lacks the competence to intervene in the domain of national citizenship. Whether or not a requirement of genuine links is desirable,⁸ the EU is not in the position to enforce that on the Member States. This study, however, will move beyond existing studies and also examine whether the EU enjoys

⁴ Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (HUP Press 2009); Rainer Bauböck, 'Democratic Inclusion: A Pluralist Theory of Citizenship' in David Owen (ed), *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester University Press 2018) 3.

⁵ For example, Transparency International and Global Witness, 'European Getaway: Inside the Murky World of Golden Visas' (*Global Witness*, 10 October 2018) www.globalwitness.org/ru/campaigns/corruption-and-money-laundering/european-getaway/, accessed 6 February 2019.

⁶ Commission, 'Investor Citizenship and Residence Schemes in the European Union (report)' COM (2019) 12 final, 24. See also Amandine Scherrer and Elodie Thirion, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) Schemes in the EU: State of Play, Issues, and Impacts' (Report, European Parliamentary Research Service October 2018) 49; European Parliament resolution 2013/2995(RSP) of 16 January 2014 on EU citizenship for sale [2016] OJ C482/117.

⁷ Jo Shaw, 'Citizenship for Sale: Could and Should the EU Intervene?' in Rainer Bauböck (eds), *Debating Transformations of National Citizenship* (Springer 2018); Willem Maas, 'European Governance of Citizenship and Nationality' (2016) 12 *Journal of Contemporary European Research* 433; Hans Ulrich Jessurun d'Oliveira, 'Union Citizenship and Beyond' in Dimitry Kochenov, Nathan Cambien and Elise Muir (eds), *European Citizenship Under Stress: Social Justice, Brexit and Other Challenges* (Brill–Nijhoff 2020); Matjaž Tratnik and Petra Weingerl, 'Investment Migration and State Autonomy: A Quest for the Relevant Link' [2019] IMC Research Paper 2019/4.

⁸ See the chapter by Peter J Spiro in this volume.

the power to take action against investor residence programmes and some of the negative side-effects of these programmes mentioned above. By contrast to investor citizenship, the EU is in a better position to intervene in these situations. As we will show, the EU already restricts the range of options Member States can offer to investor residents in terms of freedom of movement and residence. It also possesses the competences to act against issues such as money laundering and corruption. After a brief excursion into EU principles on the division of competences (Section 2), this chapter will turn to investor citizenship (Section 3), investor residence (Section 4), and a set of miscellaneous competences to address some of the alleged shortcomings of national investor migration schemes (Section 5).

2 The Principle of Conferral and the Distribution of Powers between the EU and Its Member States

The principle of conferral of powers is currently enshrined in the Treaties, but for many years, it acted as an implicit but unanimously recognized limit on the powers of the European Communities.⁹ In the late eighties, a consensus emerged as to the need to codify the principle, as it actually occurred in 1992 when the Maastricht Treaty introduced a provision defining the principle, a text that is currently enshrined in Article 5(1) of the Treaty on the European Union (TEU), according to which ‘the limits of Union competences are governed by the principle of conferral’. Paragraph two of the same Article adds that ‘under [the principle of conferral], the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein’ and, on the other, that ‘competences not conferred on the Union in the Treaties remain with the Member States’.¹⁰

The principle of conferral is subject to limitations, but such limitations are usually interpreted restrictively. Good proof of this is Article 352 of the Functioning of the European Union (TFEU), which empowers the EU to

⁹ Gil Carlos Rodríguez Iglesias, ‘Reflections on the General Principles of Community Law’ (1998) 1 *Cambridge Yearbook of European Legal Studies* 1, 13–14.

¹⁰ See, inter alia, Koen Lenaerts, *Le juge et la constitution aux États-Unis d’Amérique et dans l’ordre juridique européen* (Bruylant 1988) 346; Rene Barents, ‘The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation’ (1993) 30 *Common Market Law Review* 85; Kieran Bradley, ‘The European Court and the Legal Basis of Community Legislation’ (1988) 13 *European Law Review* 379.

enact measures that ‘should prove necessary’, but for which the Treaties have not provided the necessary powers. This provision allows the EU to act beyond the principle of conferral, but it must be noted that such action must take place ‘within the framework of the policies defined in the Treaties’, and it must serve ‘to attain one of the objectives set out in the Treaties’. In addition, as the Court decided in the landmark Opinion 2/94, this provision ‘cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty’,¹¹ although many view that it allows for flexible adjustments of EU competences and has been used to that end.¹²

Another example is Article 114 of the TFEU, which empowers the EU to enact measures for the approximation of laws, with the goal of ensuring ‘the establishment and functioning of the internal market’. It is confined to measure with a direct link with the functioning of the internal market, and it provides Member states with additional powers to introduce more protective measures on specific grounds, as is the case of health, safety, environmental protection, and consumer protection.¹³ The Court of Justice has reviewed the EU’s use of this legal base and it has used a pragmatic approach, empowering the EU in areas with loose links with the internal market, but with relevant indirect consequences in its functioning (financial stability and securities markets; tobacco commercialisation).¹⁴ In fields with no direct link with an economic activity in the internal market, Article 114 of the TFEU is not a viable option to surmount the limits of the principle of conferral.¹⁵

Overall, the principle of conferral is the EU’s main source *and* limit of policy action. It can be interpreted in pragmatic ways in order to fulfil the EU’s goals in areas of policy in which a competence has already been conferred and restrictions to EU competences are interpreted narrowly. For

¹¹ Opinion 2/94 *Accession of the Community to the European Human Rights Convention* [1996] ECLI:EU:C:1996:140, para 30.

¹² For discussion, Robert Schütze, ‘EU Competences: Existence and Exercise’ in Anthony Arnall and Damien Chalmers (eds), *The Oxford Handbook of EU Law* (Oxford University Press 2015) 79–80.

¹³ See judgments in, Case C-376/98 *Germany v. Parliament and Council* [2000] EU:C:2000:544, paras 84 and 95; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] EU:C:2002:741, paras 59–60; C-434/02 *Arnold André* [2004] EU:C:2004:800, para 30; Case C-210/03 *Swedish Match* [2004] EU:C:2004:802, para 29; Case C-380/03 *Germany v. Parliament and Council* [2006] EU:C:2006:772, para 37; Case C-58/08 *Vodafone and Others* [2010] EU:C:2010:321, para 32.

¹⁴ Opinion 2/94 (n 11).

¹⁵ Koen Lenaerts and Piet Van Nuffel, *European Union Law* (Sweet and Maxwell 2011) 111–114.

example, limitations to the EU's competence in the area of social policy were 'interpreted strictly so as not to unduly affect the scope of powers conferred to the EU in this domain'.¹⁶ However, when the principle is put under strain, the Treaties and case law introduce significant provisions to preclude any unjustified limitations on the Member State's prerogatives. These considerations also apply to investor migration policies.

3 Competence in the Domain of Nationality

There has always existed a fraught relationship between the nationalities of the EU Member States and EU citizenship.¹⁷ Because the possession of EU citizenship is conditional upon the possession of national citizenship and the Member States' powers to lay down the conditions of acquisition and loss of national citizenship remain almost unconstrained, national citizenship regimes condition EU citizenship. Yet, while the Treaty provisions stipulate that 'every person holding the nationality of a Member State shall be a citizen of the Union [which] shall be additional to and not replace national citizenship',¹⁸ disputes have arisen over whether the derivative nature of EU citizenship is defensible and whether or not the EU must restrict Member States' discretion in the domain of citizenship and national law. Most of these disputes have concerned the loss of EU citizenship, which has occurred in individual cases upon the deprivation of Member State nationality¹⁹ and will befall the majority of UK nationals the day the UK withdraws from the EU.²⁰ However, attention increasingly shifts to Member State naturalisation practices, including the very

¹⁶ Case C-307/05 *Del Cerro Alonso* [2007] EU:C:2007:509, para 39; Case C-268/06 *Impact* [2008] EU:C:2008:223, para 122.

¹⁷ For discussion, Gerard-René de Groot, 'Towards a European Nationality Law' (2004) 8 *Electronic Journal of Comparative Law* 1; Karolina Rostek and Gareth Davies, 'The Impact of Union Citizenship on National Citizenship Policies' (2006) 10 *European Integration Online Papers* 1; Dimitry Kochenov, 'Rounding Up the Circle: The Mutation of Member States' Nationalities Under Pressure from EU Citizenship' [2012] EUI RSCAS Working Paper.

¹⁸ Article 20(1) of the TFEU.

¹⁹ The two most important cases in that regard are, Case C-135/08 *Rottmann* [2010] EU:C:2010:104 and Case C-221/17 *Tjebbes and others* [2019] EU:C:2019:189.

²⁰ For a critical discussion of different proposals that seek to secure EU citizenship for UK nationals without a second Member State nationality following Brexit, Martijn van den Brink and Dimitry Kochenov, 'Against Associate EU Citizenship' (2019) 57(6) *Journal of Common Market Studies* 1366. For the contrary position, Dora Kostakopoulou, 'Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) 56(4) *Journal of Common Market Studies* 854.

liberal practices of allowing large groups of descendants with tenuous ties to a Member State to acquire that state's national citizenship,²¹ but also national provisions that provide the opportunity to naturalise solely to a small group of privileged individuals.²² Of these, investor citizenship regimes have been a particular cause of concern.

The Treaties do not attribute to the EU the competence to define who can be a citizen of the Union. Conferring European citizenship to the nationals of the Member States was originally conceived as a symbolic act of empowerment on the grounds of new EU rights, but it did not weaken, nor was it intended to weaken, the rights or status of Member State nationality. Article 20 of the TFEU clarifies that European citizenship does not entail the suppression or alteration of Member State nationality, as a reminder of the EU's limited powers in the field of nationality. In fact, the absence of any reference to EU competence in this sensitive field came hand in hand with three Declarations to reinforce the powers of Member States.²³ The Declarations concerned were the result of three individual situations of three Member States, but they all signal the intention to clarify that the attribution of nationality is a competence of the Member States. First, Declaration No 2 on nationality of a Member State, annexed by the Member States to the final act of the TEU, was the result of the European Council of Edinburgh of December 1992, which intended to provide guarantees to Denmark in order to convince it to ratify the TEU.²⁴ According to the Declaration,

The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The

²¹ For discussion, de Groot (n 15); Opinion of AG Maduro in Case C-135/08 *Rottmann* [2009] EU:C:2009:588, para 30; Dimitry Kochenov, 'Tus Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15 *The Columbia Journal of European Law* 169.

²² Hans Ulrich Jessurun d'Oliveira has drawn attention to the Spanish and Portuguese provisions for Sephardic Jews. Jessurun d'Oliveira, 'Iberian Nationality Legislation and Sephardic Jews: "With Due Regard to EU Law?"' (2015) 11 *European Constitutional Law Review* 13.

²³ Which makes these declarations controversial. See, among others, Andrew C 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; de Groot (n 17); Kochenov (n 21). More generally, Akos G Toth, 'The Legal Status of the Declarations Attached to the Single European Act' (1986) 23 *Common Market Law Review* 803.

²⁴ Protocol No 22 to the Treaty on the Functioning of the European Union on the position of Denmark recalls the Edinburgh declaration.

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.

By contrast to Declaration No 2, which simply explains the Treaties, the other two seek to affect the interpretation of EU law by reference to national law.²⁵ The UK's Declaration on the definition of the term 'nationals', currently included among the unilateral Declarations by Member States, demands a strict interpretation of the term 'nationals' in EU law, in order to adjust it to the array of statuses of nationality under UK law. It states that,

In respect of the Treaties and the Treaty establishing the European Atomic Energy Community, and in any of the acts deriving from those Treaties or continued in force by those Treaties, the United Kingdom reiterates the Declaration it made on 31 December 1982 on the definition of the term 'nationals' with the exception that the reference to 'British Dependent Territories Citizens' shall be read as meaning 'British overseas territories citizens'.

Third and finally, the Federal Republic of Germany issued a Declaration in 1957, according to which the German Government stated that '[a]ll Germans as defined in the Basic Law for the Federal Republic of Germany shall be considered nationals'. According to Article 116(1) of the Basic Law, not only persons holding Germany 'nationality' but also those who held that status on 31 December 1937 are to be considered 'Germans'. This not only concerned citizens of the Democratic Republic of Germany but also so-called Volga Germans, ethnic Germans living in communist countries. Because anyone defined as a German national in accordance with Article 116(1) of the Basic Law acquires German nationality these days, this declaration no longer has practical significance.²⁶

The Court of Justice has correctly understood these declarations to mean that defining who is a Member State national is a matter of national law. In its judgment in *Rottmann*, the Court acknowledged, referring to Declaration No 2, that matters of nationality fall within the competence of national law.²⁷ Similarly, in the *Kaur* case, the Court held

²⁵ The usage of declarations was controversial. See, among others, Evans (n 23); de Groot (n 17); Kochenov (n 21). More generally, Toth (n 23).

²⁶ De Groot (n 17); Albert Bleckmann, 'German Nationality within the Meaning of the EEC Treaty' (1978) 15 *Common Market Law Review* 435; Kay Hailbronner, 'Germany', in Rainer Bauböck et al. (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries*. Volume 2: Country Analyses (Amsterdam University Press 2006).

²⁷ *Rottmann* (n 19), paras 40–41

that the UK declaration ‘must be taken into consideration as an instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty *ratione personae*’.²⁸ Therefore, ‘in order to determine whether a person is a national of the United Kingdom of Great Britain and Northern Ireland for the purposes of Community law, it is necessary to refer to the 1982 Declaration’.²⁹ Finally, while the German declaration has been less prominent in the case law, A. G. Tesauero in his Opinion in the *Micheletti* case reminded the Court ‘of the Declarations made by the German Government and the United Kingdom, which [...] relate to the definition of persons who are to be regarded as their nationals for Community purposes, that is to say persons who are subject to Community law inasmuch as they are regarded by those two Governments as German and British nationals respectively’.³⁰ These Declarations have driven the case law to confirm that Member State law is the sole relevant criterion in establishing the conditions of attribution and loss of nationality, thus confirming the competence of Member States in this field.³¹ The Treaties confer no competence to the EU to legislate and condition the terms of acquisition of nationality of the Member States.

That the EU lacks the competence to act does not mean that EU law cannot place certain limits on the powers retained at national level. Rather, according to established case law, Member States must still exercise their national competences in accordance with EU law.³² In the domain of EU citizenship, the result of the case law is one in which Member States retain the core of their competence in the field of nationality, subject to provisos that intend to ensure the exercise of EU rights. One important example is *Micheletti*,³³ a landmark case dealing with the refusal of the Spanish authorities to recognize the Italian nationality of a person who also was an Argentinian national, who intended to establish himself in Spain as an Italian national. The Court decided that ‘it is for each Member State [...]

²⁸ Case C-192/99 *Kaur* [2001] EU:C:2001:106, para 24.

²⁹ *Ibid*, para 27.

³⁰ Opinion of A. G. Tesauero in Case C-369/90 *Micheletti* [1992] EU:C:1992:47, para 7.

³¹ KR Simmonds, ‘The British Nationality Act 1981 and the Definition of the Term “National” for Community Purposes’ (1984) 21 *Common Market Law Review* 675.

³² Case C-274/96 *Bickel and Franz* [1998] EU:C:1998:563, para 17; Case C-148/02 *Garcia Avello* [2003] EU:C:2003:539, para 25; Case C-403/03 *Schempp* [2005] EU:C:2005:446, para 19; Case C-145/04 *Spain v. United Kingdom* [2006] EU:C:2006:543, para 78; *Rottmann* (n 19), para 41.

³³ Case C-369/90 *Micheletti* [1992] EU:C:1992:295.

to lay down the conditions for the acquisition and loss of nationality', but that they must do so 'having due regard to [EU] law'.³⁴ Regarding the recognition of the grant of the nationality of another Member State, the Court decided it is not permissible to restrict the effects of such a grant 'by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty'.³⁵ This line of reasoning was further expanded in the cases of *García Avello*³⁶ and *Chen*.³⁷ In *García Avello*, Belgium had to recognise the Spanish nationality of the children involved, even though they also had the Belgian nationality and had always resided in the territory of Belgium.³⁸ In *Chen*, a Member State questioned the means of acquisition of the nationality of another Member State (extraterritorial *ius soli* rules, as was the case of Irish law for those born in Northern Ireland), with the purpose of refusing derived residence rights to the parents of the child. The Court of Justice once again struck out the attempt to limit EU rights, recognizing the autonomy of each Member State to develop the terms and conditions of acquisition of nationality.³⁹

Despite talk about conditions of loss and acquisition, these cases merely concerned decisions on the recognition of conferral of nationality. However, the doctrine established in these decisions was expanded subsequently to cases dealing with the loss of national citizenship.

³⁴ Ibid, para 10.

³⁵ Ibid.

³⁶ *García Avello* C-148/02 EU:C:2003:539. See comments by, Marta Requejo Isidro, 'Estrategias para la "comunitarización": descubriendo el potencial de la ciudadanía europea' [2003] *Diario La ley* no 5903; Gerard-René de Groot, 'Towards European Conflict Rules in Matters of Personal Status' (2004) 11 *Maastricht Journal of European and Comparative Law* 114; Thomas Ackermann, 'Case C-148/02, Carlos García Avello v. État Belge' (2007) 44 *Common Market Law Review* 141.

³⁷ Case C-200/02 *Zhu and Chen* [2004] EU:C:2004:639.

³⁸ Hence, EU law does not consider which is the dominant nationality, as international law does in some situations. For discussion, Alice Sironi, 'Nationality of Individuals in Public International Law: A Functional Approach' in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 58.

³⁹ Ibid, paras 37–41. See Dimitry Kochenov and Justin Lindeboom, 'Breaking Chinese Law – Making European One' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 201; Catherine Barnard, 'Of Students and Babies' (2005) 64(3) *The Cambridge Law Journal* 560; Bjørn Kunoy, 'A Union of National Citizens: The Origins of the Court's Lack of Avant-Gardisme in the Chen Case' (2006) 43 *Common Market Law Review* 179; Alina Tryfonidou, 'Further Cracks in the "Great Wall" of the European Union?' (2005) 11 *European Public Law* 527; Bernhard Hofstötter, 'A Cascade of Rights, or Who Shall Care for Little Catherine? Some Reflections on the Chen Case' (2005) 30 *European Law Review* 548.

In *Rottmann*,⁴⁰ the Court reiterated that ‘it is for each Member State, having due regard to [EU] law, to lay down the conditions for the acquisition and loss of nationality’.⁴¹ It could be, the Court continued, that by depriving an EU citizen of his nationality and putting the person ‘in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching thereto’,⁴² the Member State failed to have due regard to EU law. The provision to have due regard to EU law enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of EU law.⁴³

It is particularly important in that regard 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’.⁴⁴ 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’.⁴⁵

Despite being ground-breaking, the legal principles established in *Rottmann* did not protect the applicant, who became stateless on the ground of having acquired the Member State nationality fraudulently.⁴⁶ Yet, these principles can have very concrete practical implications, as *Tjebbes* demonstrates.⁴⁷ By contrast to Dr Rottmann, the applicants in *Tjebbes* were not rendered stateless by the respective decisions of the responsible authorities of the Netherlands to withdraw their Dutch citizenship. Yet, the decision may require an important revision of the rules on the loss of the nationality of the Netherlands. Article 15(1)(c) of

⁴⁰ For a more detailed analysis, 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; Nathan Cambien, ‘Case C-135/08, Janko Rottmann v. Freistaat Bayern’ (2011) 17 *Columbia Journal of European law* 375.

⁴¹ *Rottmann* (n 19), para 39.

⁴² *Ibid*, para 42.

⁴³ *Ibid*, para 48.

⁴⁴ *Ibid*, para 55.

⁴⁵ *Ibid*, para 56.

⁴⁶ Cambien (n 40).

⁴⁷ *Tjebbes* (n 19).

the Netherlands Nationality Act allows adults to lose their Netherlands nationality if they have their principal residence outside the EU for an uninterrupted period of ten years. The Court deemed the habitual residence requirement to be legitimate in principle, but held that the rules on the loss of nationality must have 'due regard to the principle of proportionality' and allow for an individual examination of the consequences of that loss.⁴⁸ The Court suggested that the Dutch legislation already contains a requirement to carry out 'a full assessment based on the principle of proportionality enshrined in EU law',⁴⁹ but this rested upon a profound misunderstanding of the Netherlands Nationality Act. There is no such requirement under Dutch law. While it remains to be seen how the *Raad van State* (Council of State of the Netherlands) will interpret the rather opaque reasoning of the Court, it seems difficult to maintain that the current nationality legislation is fully compatible with the Treaty provisions on EU citizenship as understood by the Court.⁵⁰

The Court of Justice has thus 'challenged Member State sovereignty in nationality law',⁵¹ but what this entails for investor citizenship schemes is as of yet unclear. On the one hand, the case law to date deals merely with the loss of nationality and is silent as regards questions of acquisition.⁵² On the other hand, there is no guarantee that the Court will not expand on its current case law to also scrutinise Member State rules on the acquisition of nationality, if, for example, the Commission can plausibly argue that investor citizenship indeed undermines the integrity of EU citizenship. Yet, by contrast to those who argue that the Court's case law on the relationship between EU and national citizenship offers a proper basis for challenging investor citizenship practices,⁵³ we take the position that such legal action is incompatible with the Treaty provisions on EU citizenship. Shaw was right in concluding that '[t]he case for a legal obligation

⁴⁸ Ibid, paras 40–41.

⁴⁹ Ibid, para 43.

⁵⁰ Martijn van den Brink, 'Bold but without Justification? Tjebbes' (2019) 4 *European Papers* 409. Approaching *Tjebbes* from a different angle, Dimitry Kochenov, 'The *Tjebbes* Fail' (2019) 4 *European Papers* 319. See also, Gerard-René de Groot, 'Beschouwingen over *Tjebbes*' (2019) 9 *Asiel en Migrantenrecht* 196.

⁵¹ Jo Shaw (ed), 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?' [2011] RSCAS Working paper 2011/62.

⁵² In *Rottmann* (n 19), para 42 and *Tjebbes* (n 19), para 32, the Court stated that only cases of loss of nationality, when that results in the loss of EU citizenship, fall within the ambit of EU law.

⁵³ 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.

under the Treaties to moderate this type of national citizenship policy seems rather weak. It may be a mercantilist practice, but it is not arbitrary according to the norms of EU law'.⁵⁴ The different declarations on nationality, in accordance with which the rules on the possession of national citizenship are for national law to determine, support this view. The Court may believe that EU citizenship is 'destined to become the fundamental status of nationals of the Member States',⁵⁵ but there is little in the Treaties that support the view that this destiny currently includes imposing significant restrictions on Member States competence in the area of nationality, such as imposing a genuine link requirement. Whether such a requirement is normatively desirable is something about which opinions continue to converge,⁵⁶ but what seems evident is that it cannot be regarded as a requirement of EU law, as it currently stands.

4 Competence in the Domain of Residence

Unlike in the case of citizenship, the EU enjoys the competence to adopt legislation that restricts Member States' powers to enact investor residence schemes.⁵⁷ In the EU, investor residence exists in many forms, and a brief overview of important criteria that distinguish different schemes will help understand to what degree the current legal framework already limits what Member States can offer their investor residents in terms of freedom of movement and residence in the EU. After the turn of the millennium, many EU Member States reformed their immigration laws with the purpose of attracting highly skilled immigrants. In 2002, the UK adopted its Highly Skilled Migrants Programme (repealed in 2008), which introduced a point system for the selection of highly skilled individuals.⁵⁸ Other states introduced similar policy changes. Germany

⁵⁴ Shaw (n 7), 33.

⁵⁵ Case C-184/99, *Grzelczyk* [2001] EU:C:2001:458; Case C-34/09 *Ruiz Zambrano* [2011] EU:C:2011:124.

⁵⁶ Supporting the introduction of this condition in national citizenship laws, Shachar (n 4); Bauböck (n 4). Opposing it, Peter J Spiro, 'Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion' [2019] IMC Research Paper 2019/1, 16. See also the chapter by Peter J Spiro in this volume.

⁵⁷ This part draws on Martijn van den Brink 'Investment Residence and the Concept of Residence in EU Law: Interactions, Tensions, and Opportunities' [2017] IMC Research Paper 2017/1.

⁵⁸ Replaced by the Tier 1 visa scheme. For a detailed overview see Gina Clayton, *Textbook on Immigration and Asylum Law* (Oxford University Press 2014), Chapter 9.

overhauled its highly restrictive immigration regime so as to facilitate the admission and residence of highly skilled individuals,⁵⁹ Italy has created a start-up visa regime to attract innovative entrepreneurs, providing those who qualify with priority access to the country,⁶⁰ and the Netherlands has sought to attract entrepreneurs by offering them residence permits if their 'business activities serve an essential Dutch interest'.⁶¹ EU Member States have clearly become involved in a scramble for human capital.

Investor residence schemes differ from these schemes in two ways, roughly speaking, which explains some of the controversy that surrounds them. First, they are interested primarily in attracting economic capital rather than human capital. The main purpose is not to attract entrepreneurs or business owners, but investment in the private sector (mainly in local businesses or the housing market) or in government bonds.⁶² Second, a few (though by no means all)⁶³ investor residence schemes allow those who have acquired residence through investment to acquire permanent residence without actually being physically present within the country.⁶⁴ That is, by contrast to more traditional schemes that focus on attracting human capital, which facilitate admission, but require permit holders to satisfy criteria, often as substantive

⁵⁹ For an apt summary of the introduced changes, Veysel Oezcan, 'Germany: Immigration in Transition' (2004) Migration Information Source www.migrationpolicy.org/article/germany-immigration-transition, accessed 21 October 2019. See also Shachar (n 2), 188–190; Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992).

⁶⁰ For information on this programme, see <http://italiastartupvisa.mise.gov.it/#landing-section> accessed, 21 October 2019.

⁶¹ For further information, see 'Working in the Netherlands – Self Employed Person' (Website, IND) https://ind.nl/en/work/working_in_the_Netherlands/Pages/Self-employed-person.aspx, accessed 21 October 2019.

⁶² For overviews, Madeleine Sumption and Kate Hooper, 'Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration' [October 2014] Migration Policy Institute 17; van den Brink (n 57); Džankić (n 1).

⁶³ Indefinite leave to remain (permanent residence) in the UK is available after either five years (with a GBP 2 million investment in government bonds), three years (with a GBP 5 million investment), or two years (with GBP 10 million investment), but applicants do not qualify if they are absent from the UK for more than 180 days in any calendar year during the qualification period. For detailed guidelines: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/834448/Tier_1_Investor_guidance_10_2019_v0.1_.pdf, accessed 21 October 2019.

⁶⁴ 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) 12.

as those ordinary migrants must satisfy, before they can acquire permanent residence or citizenship, investor resident schemes permit for the acquisition of permanent residence (and sometimes also citizenship) without the satisfaction of these criteria. For example, a EUR 250,000 investment in property, one will get a visa in Greece valid for five years. The visa is renewable for as long as the property is retained.⁶⁵ Those who participate 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.⁶⁶ 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.⁶⁷ As we will demonstrate, this second element defines the rights investor residents enjoy under EU law in important ways.

By contrast to matters of nationality, the EU enjoys competence to create 'a common policy on asylum, immigration and external border control' as part of the Area of Freedom, Security, and Justice.⁶⁸ The legal bases in the areas of asylum, immigration, and border control are enshrined in Articles 77–80 of the TFEU and the result of a long process of evolution of EU competence that began in the 1990s, followed by a gradual integration of policy, first through intergovernmental decision-making and finally, as a result of the Lisbon Treaty, full inclusion in the common family of EU policies subject to the traditional community method.⁶⁹ The EU's powers in the field of immigration are defined in Article 79 of the TFEU. In accordance with this provision, 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 Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'. For that purpose, the EU can legislate in four areas: the conditions of entry and residence, and standards on the issue by Member States of long-term visas

⁶⁵ For a useful summary in English of the Greek legislation www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit_ependytes_en.pdf, accessed 21 October 2019.

⁶⁶ 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.

⁶⁷ Article 6 of the Portuguese Nationality Act.

⁶⁸ Article 67(2) of the TFEU.

⁶⁹ On the historical evolution of EU immigration policy, see, inter alia, Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016) 9 and following.

and residence permits; the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; illegal immigration and unauthorized residence; and combating trafficking in persons. Paragraph 5 of Article 79 of the TFEU limits these powers and specifies that these provisions 'shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory to seek work, whether employed or self-employed'.

When compared to the pre-Lisbon Treaty provisions, it is worth noting that the Treaties now speak of developing a 'common immigration policy', which arguably makes it 'easier to justify more intensive EU action [...] and harder to argue that any particular area of immigration law is outside EU competence'.⁷⁰ Article 79(5) of the TFEU provides the exception and protects the right of Member States to decide on admission of third-country nationals coming from third countries to seek work. However, as with other limitations to EU competences, this provision must be restrictively interpreted.⁷¹ Further, as this provision only speaks of the admission of third-country nationals seeking work, the provision 'does not reserve competence over the volumes of persons who immigrate for *any* purpose at all'.⁷² As individuals acquiring residence by investment do not do so for the purpose of work, the EU is in the position to intervene and take action against investor residence schemes.

Still, it is highly unlikely that the EU will be able to undertake effective action. If the EU's immigration legislation shows one thing, it is that Member States remain reluctant to relinquish their national immigration policies. Even in those areas in which the EU has acted, they have insisted on the right to design their individual immigration policies besides the common European one. The Long-Term Residents Directive entitles Member States to 'issue residence permits of permanent or unlimited validity on terms that are more favourable than those laid down by this Directive'.⁷³ The Blue Card Directive also recognises

⁷⁰ Steve Peers et al. (eds), *EU Immigration and Asylum Law: Text and Commentary* (Martinus Nijhoff Publishers 2012), 13. See also Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary* (Hart Publishing 2016) 277.

⁷¹ Peers and others (n 70), 15.

⁷² *Ibid.*, 17.

⁷³ Article 13 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2013] OJ L16/4.

Member States' prerogative to keep in place their own regimes.⁷⁴ The possibility of competing national schemes can significantly weaken the impact of the Directives. For example, most Member States still prefer conferring long-term residence status under national law over EU law, most likely because national residence permits often provide fewer rights and protections.⁷⁵ The four Member States without competing national schemes (Austria, Italy, Luxemburg, and Romania) issued 80 per cent of the total number of EU long-term residence permits issued in 2018.⁷⁶ All other Member States, with the exception of Estonia and Slovenia, still confer long-term resident status primarily under national law. Yet, the main reason for why changing the current situation will be near impossible is that most Member States see the benefits of investor residence programmes. With twenty Member States having investor residence programmes in place, often without physical presence requirements attached, there is no chance that the Council will approve of legislation that restricts their power to attract investment through residence. Clearly, the enjoyment of a competence to act is insufficient to realise legislative action.

Having said that, it is worth pointing out that investor residents enjoy only a fraction of the free movement and residence rights when compared to EU citizens. Investors who acquire national citizenship (and thus EU citizenship) acquire the full set of mobility rights enjoyed by all EU citizens. For EU law purposes, investor residents are treated like other residents without Member State nationality, who enjoy free movement and equality rights under a number of EU legislative acts, *if* they satisfy the required conditions. Despite efforts to reduce the gap between EU citizens and third-country nationals, the legislative regime in place has not succeeded in that goal.⁷⁷ More interesting than this gap, however, is the

⁷⁴ Article 4 of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17.

⁷⁵ Commission, 'On the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (report)' COM (2019) 161 final 7.

⁷⁶ This number was calculated based on the information provided by Eurostat https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_reslong&lang=en, accessed 13 November 2019.

⁷⁷ For analysis, Dimitry Kochenov and Martijn van den Brink, 'Pretending There Is No Union: Non-derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' in Daniel Thym and Margarite Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill-Nijhoff 2015) 63.

question of whether, and if so, when investor residents satisfy the conditions that allow them to benefit from the protections provided by EU immigration legislation. It is certain that individuals who have acquired residence permits through investment are entitled to free travel in the Schengen area for periods not exceeding ninety days within a six-month period.⁷⁸ However, not all of them will satisfy the conditions that allow for the enjoyment of the more substantial set of free movement and equal treatment rights, as EU long-term residents.

Third-country nationals must have legally resided for a continuous period of five years in one of the Member States to which the Directive applies to be entitled to long-term resident status⁷⁹ and fulfil the other conditions in the Directive: have stable and regular resources, health insurance, and not pose a threat to public policy and security.⁸⁰ However, the possession of a residence permit for a continuous period of five years alone is insufficient to claim EU long-term residence status and enjoy the mobility rights attached to this status. Third-country nationals must also have actually lived in a Member State to be eligible. Article 4(3) specifies that '[p]eriods of absence from the territory of the Member State concerned shall not interrupt the [five-year period of continuous and legal residence] where they are shorter than six consecutive months and do not exceed in total 10 months'. Recital 17 of the Preamble to the Directive supports the view that Member States are also required to deny the status of EU long-term residents to people who have not been physically present for sufficiently long periods. It states that

[h]armonisation of the terms for acquisition of long-term resident status promotes mutual confidence between Member States. Certain Member States issue permits with a permanent or unlimited validity on conditions that are more favourable than those provided for by this Directive. The possibility of applying more favourable national provisions is not excluded by the Treaty. However, for the purposes of this Directive, it should be provided that permits issued on more favourable terms do not confer the right to reside in other Member States.⁸¹

⁷⁸ Regulation (EC) No 810/2009 establishing a Community Code on Visas [2009] OJ L243/1.

⁷⁹ It does not bind the United Kingdom, Ireland, and Denmark.

⁸⁰ Articles 4–6 of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44. For a detailed analysis of the Directive, see Diego Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Brill–Nijhoff 2011).

⁸¹ For a similar conclusion, Case C-469/13 *Tahir* ECLI:EU:C:2014:2094.

The ambition to promote the ‘mutual confidence between Member States’ would clearly be undermined if Member States could decide all alone whether third-country nationals must be physically present within the territory of a Member State during the five years preceding the request for a long-term resident status. As Carrera argues persuasively, the requirement of having resided ‘legally and continuously’ for a period of five years indicates that this requirement cannot be ‘manipulated so that wealthy third-country nationals do not have the inconvenience of having to actually live in the host Member State for five years’.⁸² Member States are permitted to define more favourable conditions of residence under national law, but individuals enjoying these favourable conditions cannot subsequently benefit from the rights under the long-term residence Directive. Of course, it will be difficult for the EU to monitor whether Member States do not extend long-term resident status to investor residents after a period of five years.⁸³

For the overwhelming majority of investor residents, visa-free access and thus the mobility rights provided by the Schengen regime will be sufficient. Individuals without an interest in residence within the EU will not be bothered by the limitations imposed by the Long-Term Residents Directive. However, it shows that there are important differences between investor citizenship and investor residence schemes. While the former lie outside of the scope of EU competences, EU law extends to the domain of residence. EU citizenship still is ‘additional to’ (Article 20 of the TFEU) Member State citizenship in terms of its acquisition and does not displace national competence in the domain of nationality. The restrictions the Court of Justice of the EU (ECJ) has imposed on Member State powers to define the conditions under which nationality can be withdrawn are almost negligible (though their symbolic importance is unquestionable) and do not extend, moreover, simply to the acquisition of national and EU citizenship. In the area of residence, by contrast, the EU enjoys competence to define the conditions third-country nationals must satisfy to enjoy residence and free movement rights, even though it often does not displace the national legislation in place. However, while competing national law may undermine the effectiveness of EU efforts to harmonise standards on residence, and while it does not regulate investor

⁸² Sergio Carrera, ‘How Much Does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union?’ (2014) *CEPS Liberty and Security in Europe* 18.

⁸³ Report from the Commission (n 6), 9.

residence directly, its legislative provisions bear on national investor residence schemes indirectly. They restrict the mobility rights investors can acquire. While establishing investor residence programmes is not itself incompatible with EU law, conferring long-term resident status on investor residents that have not satisfied the periods of physical presence under the Directive would be. Moreover, as the EU enjoys competence to harmonise the entry and residence conditions of investors in accordance with Article 79 of the TFEU, EU institutions that find aspects of investor citizenship undesirable could aim to adopt legislation in order to address those aspects, even if it is unlikely that the required support for adopting such acts exists.

5 Competence to Address Side-Effects of Investor Migration

There are legitimate reasons for the EU to intervene if national investor policies undermine existing EU objectives or mutual trust between the Member States. The question worth asking is thus whether the EU enjoys any other power that entitles it to take action. One possible legal base worth exploring is Article 352 of the TFEU, which allows for legislative action ‘if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers’. According to official ECJ doctrine, this provision, ‘being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of [EU] powers beyond the general framework created by the provisions of the Treaty as a whole’.⁸⁴ This interpretation would exclude legislative action on common standards on access to national and EU citizenship, given that the EU currently lacks these powers. However, the more common view is that this provision allows for flexible adjustments of EU competences and that it has been used to that end.⁸⁵ Still, even that interpretation would not easily justify legislative intervention, as action under Article 352 of the TFEU must still be necessary to attain one of the objectives set out in the Treaties. Given the Treaties’ insistence that EU citizenship is merely additional to national citizenship and that nationality

⁸⁴ Opinion 2/94 (n 11), para 30.

⁸⁵ For discussion, Robert Schütze, ‘EU Competences: Existence and Exercise’ in Anthony Arnall and Damien Chalmers (eds), *The Oxford Handbook of EU Law* (Oxford University Press 2015) 79–80.

determinations are for the Member States to make, it appears difficult to establish that the EU cannot attain the objectives of EU citizenship without legislative provisions on the attribution of Member State nationality. Lacking the competence to introduce common standards on the acquisition of nationality, the EU cannot address the concerns of those who find investor citizenship programmes inherently problematic. As we saw, objections against investor citizenship schemes are partially based on the theory of 'genuine links'. From this perspective, investor programmes are problematic by definition and must be abolished altogether. It is clear that under the current division of competences between the EU and the Member States, the former is incapable of imposing a genuine link requirement on the latter.

Another set of objections focuses not on the way investor programmes challenge established conceptions of citizenship, but on the negative side-effects of these schemes. Various EU institutions and non-governmental organisations have pointed out that these programmes risk facilitating tax evasion, money laundering, and other forms of crime. While the EU is not in the position currently to address the concerns of those with inherent objections against investor programmes, it can contribute to tackling these negative side-effects. The EU has long undertaken efforts to combat money laundering, by introducing preventive obligations for credit and financial institutions, and other professions that could help facilitate money laundering, and by setting up national institutions that can exchange information and should facilitate the effective enforcement of EU rules.⁸⁶ In addition, in the context of its immigration and asylum regime, the EU has adopted measures on visa and border controls, with the purpose of deciding who must be banned entry to the EU, which bear on investor migration too.⁸⁷ These measures are based on a number of legal bases, which can be used to adopt further measures to tackle some of the problems that investor regimes have created, including legal bases of EU immigration law, but also Article 114 of the TFEU, which enables

⁸⁶ For further analysis, Valsamis Mitsilegas and Bill Gilmore, 'The EU Legislative Framework against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards' (2007) 56 *International and Comparative Law Quarterly* 119; Valsamis Mitsilegas and Niovi Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 32 *Maastricht Journal of European and Comparative Law* 261.

⁸⁷ For extensive discussion of EU measures on visa and border controls, Steve Peers, Elspeth Guild and Jonathan Tomkin, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition – Volume 1: Visas and Border Controls* (Brill–Nijhoff 2016).

the approximation of legal measures which have as their object the establishment and functioning of the internal market.

The Anti-Money Laundering Directives were adopted within the scope of Article 114 of the TFEU, on the ground that '[f]lows of illicit money can damage the integrity, stability and reputation of the financial sector, and threaten the internal market of the Union as well as international development'.⁸⁸ The EU has already taken its first steps to deal with the problem of money laundering in the context of investor citizenship and residence. The 5th Anti-Money Laundering Directive, adopted in July 2018, defines as a potentially higher-risk situation, third-country nationals who apply 'for residence rights or citizenship in the Member State in exchange of capital transfers, purchase of property or government bonds, or investment in corporate entities in that Member State'.⁸⁹ In such potentially higher-risk situations, Member States are required to apply enhanced customer due diligence measures. The Directive must be transposed by January 2020, by which date the Member States must have better mechanisms in place to ensure that investor citizenship and residence programmes do not undermine European standards against money laundering. Besides updating existing legislation, the EU could also aim at more effectively enforcing existing standards, including existing due diligence standards that seek to prevent money laundering.⁹⁰

Measures to diminish the chances of investors with criminal backgrounds acquiring residence permits can be taken in the context of the Area of Freedom, Security and Justice, and in particular the area of EU immigration law. There already is a wide array of security measures in force that serve as a check on the immigration decisions taken by the Member States. However, there are still gaps in the EU's security arrangements in the field of migration, in particular as concerns those holding a long-term residence permit.⁹¹ To address these shortcomings, the

⁸⁸ Recital 1 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L141/73.

⁸⁹ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43.

⁹⁰ European Parliamentary Research Service, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU: State of Play, Issues, and Impact' (October 2018), 49.

⁹¹ Different security measures merely cover short-stay visas: Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay

Commission has proposed to update the Visa Information System alongside the Interoperability Regulation. The latter proposal seeks to connect and make interoperable the still fragmented information systems with data on different categories of immigrants (there will be six in the future),⁹² in order to facilitate data sharing and prevent that individuals with a criminal record in one system can enter and travel throughout the EU because Member States could not access the relevant information.⁹³ This proposal has encountered the objection that it violates important data protection principles.⁹⁴ If adopted and introduced, however, the Visa Information System which currently only contains information on short-stay visas will be extended to long-stay visas and residence permits.⁹⁵ Together, these changes will obligate the Member States to search all existing databases with respect to all visa and residence permit applicants, which the Commission hopes will go some way in combating some of the security risks of investor residence programmes.⁹⁶

Not all of these measures are in place as of yet, making an assessment of their effectiveness impossible. The point of the examples offered in this section though was to show that there are various ways in which the EU can intervene in order to try to counter some of the negative side-effects of investor policies within the Member States. In the short term, such measures seem to be far more realistic than any other form of EU

visas [2008] OJ L218/60; Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes [2017] OJ L 327/20.

⁹² The Schengen Information System, the Eurodac system, the Visa Information System, the Entry/Exit system, the European Travel Information and Authorisation System and the European Criminal Record Information System for third-country nationals.

⁹³ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 016/399 and Regulation (EU) 2017/2226 (proposal)' COM (2018) 793 final.

⁹⁴ Francesca Galli, 'Interoperable Law Enforcement Cooperation Challenges in the EU Area of Freedom, Security and Justice' [2019] RSCAS Working Paper 2019/15.

⁹⁵ Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JH COM/2018/302 final (proposal)' COM (2018) 302 final.

⁹⁶ Report from the Commission (n 6), 12.

intervention in the area of investor migration. If there will be opposition among Member States to the sale of citizenship and residence by others, it is likely not because they are principally opposed to such practices, but due to worries, this undermines their security. In addition, the countries with investor migration programmes will presumably have an interest in avoiding such programmes being used for the purpose of criminal activities if they are to retain their credibility. The first meetings of the Group of Member State experts on Investor Citizenship and Residence, set up by the Commission, after it published its report, show that also states with investor migration programmes react positively to many of the concerns raised by the Commission. Some Member States are currently reviewing their investor migration schemes; others have aligned their laws with the Money Laundering Directive since the publication of the report. All seem to agree on the need for additional security checks, even if disagreements on best solutions and the appropriate division of tasks between the Member States and the EU remain.⁹⁷ Considerable support for the different options explored in this section thus seems to exist among all the parties involved.

6 Conclusion

This study on EU competence in the area of investor migration offers a mixed picture. While it is indeed the case, as several colleagues have pointed out before us, that EU intervention in the domain of nationality law is not a possibility that is compatible with the Treaties, the EU certainly is not impotent in the face of the marketisation of national immigration practices. It enjoys competence to define the conditions of entry and residence as well as the rights of third-country nationals residing legally within the EU, which permit it to take action against investor residence practices and – as it currently already does – condition their right to free movement on certain further requirements such as physical presence. In addition, it has the power to reinforce existing security measures to prevent individuals with past or present involvement in criminal activities from acquiring residence or citizenship through investment. Of course,

⁹⁷ For useful information about the activities of the Group of Experts and the positions of the Member States: Minutes, First Meeting of the Group of Member State Experts on Investor Citizenship and Residence Schemes in the EU (Brussels, 5 April 2019); Minutes, Second Meeting of the Group of Member State Experts on Investor Citizenship and Residence Schemes in the EU (Brussels, 8 July 2019).

besides questions of competence, EU action in this domain, as well as the effective monitoring and enforcement of EU legislation, will in part be a matter of political will among the different national governments. That most Member States have adopted such programmes will be a bigger obstacle to the adoption and implementation of EU legislative measures than the EU's competences.