

# How much does EU citizenship cost?

## The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the union?

**Sergio Carrera**

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### Abstract

How much does European citizenship cost in the EU? This was the question that has raised so much controversy over the Maltese citizenship-for-sale programme. The outright selling of Maltese nationality to rich foreigners led to unprecedented responses by the European Parliament and European Commission. This paper examines the affair and its relevance for current and future configurations of citizenship of the EU. It studies the extent to which member states are still free to lay down the grounds for the acquisition and loss of nationality without any EU supervision and accountability. It provides a comparative overview of member state schemes and the exact price for buying citizenship and a residency permit in the EU. It is argued that the EU's intervention on the Maltese citizenship-for-sale affair constitutes a legal precedent for assessing the lawfulness of passport-for-sale or golden migration programmes in other EU member states. The affair has also revealed the increasing relevance of a set of European and international legal principles limiting member states' discretion over citizenship matters and providing a supranational constellation of accountability venues scrutinising the impact of their decisions over citizenship of the Union. The Maltese citizenship-for-sale affair has placed at the forefront the EU general principle of sincere cooperation in nationality matters. Member states' actions in the citizenship domain cannot negatively affect *in substance* the concept and freedoms of European citizenship. That notwithstanding, the EU institutions' insistence on the need for Maltese nationality law to require a 'genuine link' in the form of an effective residence criteria for any rich applicants to benefit from the fast-track naturalisation poses a fundamental dilemma from the angle of Union citizenship: What is this genuine link really about? And what is precisely 'habitual', 'effective' or 'functional' residence? It is argued that by supporting the 'real connections' as the most relevant standard, the European institutions may paradoxically fuel nationalistic misuses by member states of the 'genuine link' as a way to justify restrictive integration policies on the acquisition of nationality.



This paper was prepared in the context of the ILEC project (Involuntary Loss of European Citizenship: Exchanging Knowledge and Identifying Guidelines for Europe), which aims to establish a framework for debate on international norms on involuntary loss of nationality. For more information visit: [www.ilecproject.eu](http://www.ilecproject.eu)

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Sergio Carrera\*

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### 1. Introduction

The Maltese citizenship-for-sale affair has attracted wide attention since its inception at the end of 2013. The announcement by Prime Minister Joseph Muscat's government of an amendment to the Maltese Citizenship Act introducing an investor citizenship programme selling Maltese nationality to any foreigner making a donation to the State or investing a substantial amount of euros in the country without any other requirement led to controversy both in domestic and European circles. The case presented an evident European dimension. What Malta was actually planning to put on sale was not only its own nationality, but also the supranational status enshrined in citizenship of the Union. Any person holding the nationality of a member state is a European citizen and enjoys the rights attached to it, such as the freedom to move and reside within the territory of the Union. At the heart of the debates surrounding the adequacy of the Maltese initiative has been the extent to which the European institutions, and in particular the European Commission, could legally intervene and prevent the Maltese government from introducing the scheme.

From an EU legal viewpoint the case was a difficult one to argue. Questions related to the acquisition and loss of nationality have remained engrained in the exclusive competence of member states since the kick-off of citizenship of the Union in 1993, with the entry into force of the Maastricht Treaty. One of the most sacred of cows in the division of competences between the member states and the EU is the entitlement to control citizenship laws. No one can become an EU citizen without first passing through the hands of a member state. Since the introduction of EU citizenship, a number of member states have been exceedingly anxious to keep the EU out of their citizenship laws and policies.<sup>1</sup> Since then, citizenship has been something of a 'hands-off' area as regards EU law. The extent to which member states are fully autonomous in the regulation of nationality has, however, become increasingly contested.

Nevertheless, something fundamental has changed over the last 20 years. The classic boundaries delimiting member states' discretion over nationality laws have been reshaped as a consequence of the emergence of a set of international principles and legal and judicial accountability venues overseeing their domestic actions. The degree of exclusivity traditionally enjoyed by EU member states has been progressively re-modelled, sometimes in unexpected ways. Moreover, while formally keeping their autonomy in the regulation of nationality issues, the Court of Justice of the European Union in Luxembourg has on several occasions held

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<sup>1</sup> Refer to Declaration No. 2 annexed to the Treaty of Maastricht on nationality of a member state, Treaty on European Union, OJ C191, 29 July 1992. Those with longer memories may recall that the Danish people rejected the Maastricht Treaty in a referendum there, an act that the pundits interpreted as at least in part based on concerns about loss of autonomy over citizenship. In any event, after a declaration confirming national control over citizenship (in Edinburgh in 1992), the Danish people were again asked what they thought of the proposed treaty changes and approved them.

that national policy and legislative actions need to have ‘due regard to’ European law and their impact on citizenship of the Union. Can therefore member states’ sovereign powers to lay down the grounds for the acquisition and loss of nationality still be freely exercised without EU supervision and accountability?<sup>2</sup> If not, what EU principles should apply to the grant of citizenship of any member state? These are the key research questions explored in this essay.

The Maltese Individual Investor Programme (IIP), and the ways in which it has developed since the end of 2013, provide us with an excellent case to test these questions. Discussions on the Programme took on a European dimension almost immediately, with strong criticism from the European Commission and the European Parliament. The Commission Directorate General for Justice, Fundamental Rights and Citizenship (DG Justice) reportedly was considering the feasibility of launching infringement proceedings against Malta,<sup>3</sup> which followed the adoption of a European Parliament Resolution on 16 January 2014 where an overwhelming majority of MEPs voted against the Maltese scheme and the outright sale of citizenship of the Union. Amongst the key components of the IIP that attracted criticism was that anyone wanting Maltese citizenship would not be required to reside in the country. The heft of the applicant’s wallet was the main and sole condition for any foreigner to cross the bridge towards Maltese citizenry and that of the Union. By donating money to the State and/or investing in the country, any applicant would be able to naturalise and acquire citizenship. Contrary to preliminary expectations, the European Commission succeeded in persuading the Maltese authorities to enact amendments to the IIP to include a residence requirement as one of the naturalisation criteria for the fast-track acquisition of Maltese nationality. How did this happen and which were the grounds were cited for EU intervention from a European law viewpoint?

This essay examines the Maltese citizenship-for-sale affair and its relevance for current and future contours of citizenship of the Union. It aims to better understand the relevant legal arguments driving the EU’s reactions to the Maltese IIP and their implications for the evolving competences on grounds of acquisition and loss of nationality at European levels. We start by providing a background of the citizenship-for-sale programme and the origins of the controversy in section 2. Section 3 sketches the critical reactions that the case provoked among the European institutions and outlines the most relevant legislative amendments introduced into the Maltese IIP as a consequence of these calls. As shown in section 4, Malta is not an exception in selling nationality and residence to rich third-country nationals. Other EU member states have investor and/or donor citizenship programmes similar to that in Malta. A number of European countries have developed simplified migration schemes – immigrant investor programmes – aimed at attracting wealthy foreign investors by facilitating an accelerated access to long-term residence status and even nationality and Union citizenship. The following questions will be examined in a comparative perspective in a selection of EU member states: What are the components of these schemes? And how much does citizenship and security of residence cost in the EU?

Section 5 then studies the legal arguments that led to the modification of the Malta IIP programme as a consequence of the intervention of some of the EU institutions. Special attention is paid to the role played by judicially-established international and European legal standards, as well as the general principles of EU law, in particular the principle of sincere or loyal cooperation enshrined in Article 4.3 of the Treaty on the European Union (TEU), which constituted one of the battlegrounds in the affair. This principle requires member states to refrain from adopting any regulatory measure that could jeopardise the attainment of the Union’s objectives. The application of the sincere cooperation principle to the Malta IIP is not exempted from a number of questions calling for further exploration, such as what were the EU objectives or facets of Union interests at risk in the Malta citizenship-for-sale affair. Furthermore, European institutions argued that the Maltese IIP should include a ‘genuine link’ criterion between the applicant and Malta, consisting of effective residence in the country. Yet, what is this ‘genuine link’ really about? Also, the quantitative effects of the Maltese IIP would be marginal in terms of the actual number of beneficiaries who would acquire nationality and benefit from EU citizenship freedoms. So what other aspects of the scheme have been found

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<sup>2</sup> Opinion Advocate General Poiares Maduro, 30 September 2009, Case C-135-08, *Janko Rottmann v Freistaat Bayern*.

<sup>3</sup> “IIP / Brussels contemplating infringement proceedings against Malta”, *Malta Today*, 18 January 2014 ([www.maltatoday.com.mt/en/newsdetails/news/national/IIP-European-Commission-contemplating-infringement-proceedings-against-Malta-20140118](http://www.maltatoday.com.mt/en/newsdetails/news/national/IIP-European-Commission-contemplating-infringement-proceedings-against-Malta-20140118)).

to be more problematic from the perspective of Malta's obligations in the scope of citizenship of the Union? The essay argues that the ways in which the Malta citizenship-for-sale case has developed can be seen as a step forward in the Union's role in the changing relationship between citizenship of the Union and nationality. The affair has shown a first inroad by the EU institutions into the formerly exclusive competence of the member states regarding the granting of citizenship. It has confirmed the relevance of a framework of European and international standards providing a set of legal principles and accountability transcending the national realms of competence and affecting nation-states' discretionary power over the field of citizenship.

## 2. Background to the controversy: EU passports for sale!

The Maltese government announced in the beginning of October 2013<sup>4</sup> a new legislative initiative to sell Maltese nationality to foreign donors in the framework of an Individual Investor Programme (IIP), amending the Maltese Citizenship Act.<sup>5</sup> The official framing of the investor citizenship programme was that it would allow the granting of citizenship by a certificate of naturalisation to foreign individuals and their families "contributing to the economic development of Malta". In an interview with Bloomberg in October 2013 covering Malta's relations with China, when asked whether he would be interested in encouraging Chinese to seek residency in Malta, Prime Minister Muscat stated:

We are interested in bringing in all those who are reputable people, who are willing to take up residence in Malta. We, however, don't do the hard selling. An address in Malta, residence in Malta, comes at a premium. So we are not into selling this right cheap. We have limited space in our country so we have to choose people carefully, no matter what nation they come from. In the next few months we will be issuing what I believe will be new exciting programs on residency and even citizenship. Again, due diligence and choosing the right type of person will be paramount.<sup>6</sup>

The IIP would make Maltese nationality available to successful applicants when they donate to the State €650,000, in addition to €25,000 for spouses and children below 18, and €50,000 for dependent parents aged 55 or over, and unmarried children between 18 and 25. Prime Minister Muscat's government declared that the IIP would bring in €30 million a year for the financial development of the country. In its preliminary form, the IIP was reported by media as allowing a large discretion to the Minister of Home Affairs to award Maltese citizenship (including to those of dubious character at least according to their home countries). Further, it lacked any transparency or accountability because the list of names of the people granted nationality would not be published in the official government Gazette.<sup>7</sup> The IIP as originally presented did not apply an annual cap on the number of people who could buy citizenship in Malta.<sup>8</sup>

It did not take long for critics to express concerns about the Government's plans. Times of Malta identified fears "that the scheme will attract unsavoury characters looking to buy a foothold in the EU", and reported

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<sup>4</sup> "Investors may buy Maltese citizenship", *Times of Malta*, 8 October 2013 ([www.timesofmalta.com/articles/view/20131008/local/individual-investor-programme-enables-foreigners-to-buy-maltese-citizenship.489537#.UJZ42xa8KWd](http://www.timesofmalta.com/articles/view/20131008/local/individual-investor-programme-enables-foreigners-to-buy-maltese-citizenship.489537#.UJZ42xa8KWd)).

<sup>5</sup> For an overview of relevant legislation, news and bibliography on Maltese nationality law, refer to the country profile contained in EUDO Citizenship Observatory (<http://eudo-citizenship.eu/country-profiles/?country=Malta>) See in particular, E. Buttigieg (2013), *Country Report: Malta*, EUDO Citizenship Observatory, European University Institute, Robert Schuman Centre for Advanced Studies, Florence; D. DeBono (2013), *Naturalization Procedures for Immigrants Malta*, EUDO Citizenship Observatory, European University Institute, Robert Schuman Centre for Advanced Studies, Florence.

<sup>6</sup> "Tiny Malta turns to China, says Prime Minister", *Bloomberg Business Week*, 4 October 2013 ([www.businessweek.com/articles/2013-10-04/tiny-malta-turns-to-china-says-prime-minister#p2](http://www.businessweek.com/articles/2013-10-04/tiny-malta-turns-to-china-says-prime-minister#p2)).

<sup>7</sup> "Names of those who buy Maltese citizenship will not be published", *Malta Today*, 14 October 2013. ([www.maltatoday.com.mt/en/newsdetails/news/national/Names-of-those-who-buy-Maltese-citizenship-will-not-be-published-20131014](http://www.maltatoday.com.mt/en/newsdetails/news/national/Names-of-those-who-buy-Maltese-citizenship-will-not-be-published-20131014)).

<sup>8</sup> "No cap on the number of people who can buy Maltese citizenship – Henley", *Times of Malta*, 7 November 2013 ([www.timesofmalta.com/articles/view/20131107/local/no-cap-on-the-number-who-can-buy-citizenship-henley.493749#.Unvu55FjHbR](http://www.timesofmalta.com/articles/view/20131107/local/no-cap-on-the-number-who-can-buy-citizenship-henley.493749#.Unvu55FjHbR)).

that a spokesperson for the Maltese Prime Minister had said that “while the government does not anticipate any action to be taken by the European Commission or other institution, any attempt to diminish Malta’s sovereignty right to grant citizenship would be met with a robust defence based on principles which have been established and agreed in international law”.<sup>9</sup> By the time the bill amending the Citizenship Act reached the Maltese Parliament on 9 November 2013, the controversy reached new heights. The opposition party led by former MEP and the Nationalist Party (PN), leader Simon Busuttil proposed a series of amendments, including a five-year residency requirement, during which at least 30 days a year must be spent in Malta, publication of the names of those acquiring citizenship and an investment of at least €5 million in the Maltese economy.<sup>10</sup> According to the opposition, the programme should be named “individual donor programme” and if the government would like to keep the current name, “there should be clear investment and not a mere contribution or donation”. Busuttil expressed the view that “these amendments change the concept of selling citizenship to one which commits a foreigner to the country”,<sup>11</sup> and that if not introduced, the PN, if elected to government, would revoke applicants’ citizenships under the scheme.

The debate continued when the journal *Malta Today* published a survey asking the question: “Do you agree with the scheme through which Maltese citizenship will be granted to foreigners who pay €650,000?”. Some 53% of the respondents were against it and 10% only if the applicants would make a significant investment in the country.<sup>12</sup> The PM continued to defend the new citizenship scheme and its original name,<sup>13</sup> yet following vocal concerns by the opposition party and from abroad, the government presented an amended version of the initiative. The amended initiative increased the total financial contribution by applicants to at least €1.15 million comprising the original donation of €650,000 (in accordance to the contribution requirements and schedule of fees provided in Annex 1 of this paper) as well as a new ‘investment’ dimension, composed of:<sup>14</sup>

- investing €150,000 in bonds, stocks, debentures, special purpose vehicles or other investment vehicles which shall be retained for at least a five-year period<sup>15</sup> and
- a property investment in Malta of a minimum value of €350,000, or taking a residential property lease for a minimum annual rent of €16,000.<sup>16</sup>

The government also included other changes such as applying a cap of 1,800 applications,<sup>17</sup> the creation of a National Development and Social Fund into which 70% of the contributions received would be paid and

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<sup>9</sup> “PM defends Citizenship-on-sale scheme”, *Times of Malta*, 9 October 2013 ([www.timesofmalta.com/articles/view/20131009/local/Citizenship-on-sale-in-scheme-to-net-30m.489548](http://www.timesofmalta.com/articles/view/20131009/local/Citizenship-on-sale-in-scheme-to-net-30m.489548)).

<sup>10</sup> “Opposition will not support prostitution of Malta’s identity, citizenship”, *Malta Today*, 9 November 2013 ([www.maltatoday.com.mt/en/newsdetails/news/national/Opposition-proposes-change-of-name-to-individual-donor-programme-20131109](http://www.maltatoday.com.mt/en/newsdetails/news/national/Opposition-proposes-change-of-name-to-individual-donor-programme-20131109)).

<sup>11</sup> Ibid.

<sup>12</sup> The survey included a total of 450 respondents in Malta. See “Survey/Malta says yes to Budget, no to sale of citizenship”, *Malta Today* ([www.maltatoday.com.mt/en/newsdetails/news/data/MaltaToday-survey-Budget-Citizenship-20131111](http://www.maltatoday.com.mt/en/newsdetails/news/data/MaltaToday-survey-Budget-Citizenship-20131111)).

<sup>13</sup> “PM again defends citizenship programme”, *Times of Malta*, 26 November 2013 ([www.timesofmalta.com/articles/view/20131126/local/pm-again-defends-citizenship-programme.496375](http://www.timesofmalta.com/articles/view/20131126/local/pm-again-defends-citizenship-programme.496375)).

<sup>14</sup> Individual Investor Programme of the Republic of Malta Regulations, 2013, L.N. 450, B 5308, Maltese Citizenship Act (CAP. 188); see also the Press Release issued by the Maltese Government on 23 December 2013 ([www.gov.mt/en/Government/Press%20Releases/Pages/2013/December/23/pr2881.aspx](http://www.gov.mt/en/Government/Press%20Releases/Pages/2013/December/23/pr2881.aspx)).

<sup>15</sup> See Paragraph 6.6 of the amendment act L.N. 450.

<sup>16</sup> Paragraph 6.5 of the amendment act L.N. 450.

<sup>17</sup> “At present, some 1,000 people were granted citizenship annually for one reason or another”, Muscat was reported to say. *Times of Malta*, “New citizenship programme creates bond with Malta – Muscat”, 23 December 2013 ([www.timesofmalta.com/articles/view/20131223/local/new-individual-investor-programme-creates-bond-with-malta-pm.500217#.UrltW9JDtGZ](http://www.timesofmalta.com/articles/view/20131223/local/new-individual-investor-programme-creates-bond-with-malta-pm.500217#.UrltW9JDtGZ)).

used “in the public interest inter alia for the advancement of education, research, innovation, social purposes, justice and rule of law, employment initiatives, the environment and public health”.<sup>18</sup>

An interesting feature of the new version is that it left the operational implementation of the scheme to a private company or ‘concessionaire’ (Henley & Partners),<sup>19</sup> under the supervision of the government agency Identity Malta.<sup>20</sup> If one examines the way in which the sale of Maltese citizenship has been promoted by the company, one finds that Henley & Partners advertises an “International Residence and Citizenship Practice Group has been advising private clients, their close advisors such as lawyers and private bankers, as well as governments, on citizenship law, immigration law, and visa policy issues”.<sup>21</sup> The names of the persons granted Maltese citizenship would be published in order to address concerns that the IIP would be convenient for persons evading justice.<sup>22</sup> Prime Minister Joseph Muscat stated in a press conference presenting these modifications: “This total of €1.15 million will create a bond with the country in a tangible manner.”<sup>23</sup> Among the advantages advertised by Henley & Partners on the programme include “EU citizenship gives right of establishment in all EU 28 member states and Switzerland” and “visa-free travel to more than 160 countries in the world, including the USA”.<sup>24</sup>

This economic rationale of the IIP is one of the main points attracting wider contention, mainly from a normative perspective, in scholarly reactions to the scheme, such as the one launched by the EUDO Citizenship Observatory in the European University Institute in Florence.<sup>25</sup> Shachar alluded to the “logic of capital and markets infiltrating the classic statist expression of sovereignty”, which in her view was putting up for sale not just the membership but its substantive content as well.<sup>26</sup> Bauböck also argued that initiatives such as the IIP link citizenship with social class and, by selecting future citizens on grounds of investment or income, depart from “the egalitarian thrust that underlines rules of birthright citizenship as well as residence-based naturalization”.<sup>27</sup>

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<sup>18</sup> See Paragraph 13 of the amendment act L.N. 450.

<sup>19</sup> See Paragraph 3 of the amendment act L.N. 450, “Revamped citizenship scheme will require €1.15 million investment per applicant”, *Malta Today*, 23 December 2013 ([maltatoday.com/en/newsdetails/news/national/Revamped-citizenship-scheme-will-require-1-15-million-investment-20131223](http://maltatoday.com/en/newsdetails/news/national/Revamped-citizenship-scheme-will-require-1-15-million-investment-20131223)). In a press conference presenting the new changes, Muscat announced that “the programme would be run by Identity Malta, a new government agency, but Henley and Partners would remain agents, as would other financial operators such as PWC and Deloitte. There would be no monopoly.” Reported in “New citizenship programme creates bond with Malta – Muscat”, *Times of Malta*, 23 December 2013.

<sup>20</sup> Identity Malta Agency (Establishment), Order 2013, Public Administration Act, CAP (497), L.N. 269 of 2013. According to this act, Identity Malta aims at assisting the Home Affairs Minister in his functions and duties related to matters related to nationality, passports and land registration.

<sup>21</sup> For more information about the group, refer to ([www.henleyglobal.com/the-practice-group](http://www.henleyglobal.com/the-practice-group)). The website states: “Furthermore, the Group advises Governments on strategy, design and implementation of investor immigration programs, generally on immigration and citizenship policies, laws and regulations, and on visa policy issues and the negotiation of bilateral and multilateral treaties in these areas.”

<sup>22</sup> “Let’s solve citizenship controversy”, *Times of Malta*, 22 November 2013 ([www.timesofmalta.com/articles/view/20131122/letters/Let-s-solve-citizenship-controversy.495761](http://www.timesofmalta.com/articles/view/20131122/letters/Let-s-solve-citizenship-controversy.495761)).

<sup>23</sup> “New citizenship programme creates bond with Malta – Muscat”, *Times of Malta*, 23 December 2013.

<sup>24</sup> ([www.henleyglobal.com/citizenship-malta-citizenship](http://www.henleyglobal.com/citizenship-malta-citizenship)) and (<http://daphnecaruanagalizia.com/wp-content/uploads/2013/11/Malta-Individual-Investor-Program-1310-copy.pdf>).

<sup>25</sup> A. Shachar and R. Bauböck (eds) (2014), “Should Citizenship be for Sale?”, EUI Working Papers, RSCAS 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, Florence.

<sup>26</sup> A. Shachar (2014), “Dangerous Liaisons: Money and Citizenship”, in A. Shachar and R. Bauböck (eds) (2014), *Should Citizenship be for Sale?*, EUI Working Papers, RSCAS 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, Florence, p. 5.

<sup>27</sup> R. Bauböck (2014), “What is wrong with selling citizenship? It corrupts democracy!”, in A. Shachar and R. Bauböck (eds) (2014), *Should Citizenship be for Sale?*, EUI Working Papers, RSCAS 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, Florence, Italy, p 5 and pp 20 and 21.

The UK Immigration Minister David Hanson expressed concerns about the risks to national security that in his view the Maltese scheme would prompt, and the perceived threat to the UK's own investor visa programme (also aimed at the Chinese and Middle Eastern investors), observing to the *Financial Times*: "This risks being a backdoor route to reside anywhere in the EU which is not a tight or appropriate immigration policy."<sup>28</sup> This reflects two main concerns – the national security question and the unfair competition issue. Representatives from European institutions also raised concerns as regards the risks that the measure would pose to other member states' security. As reported in the *Financial Times*, for example, Manfred Weber, MEP, stated: "Schengen is a European project that is based on mutual trust and should not be undermined by steps like this", and a representative from the European Commission remarked: "It is legally not possible for the Commission to intervene in this matter: the Brits would be the first to cry foul if we even tried to get involved in a matter of national competency."<sup>29</sup>

### 3. Reactions from the European institutions: Citizenship must not be up for sale!

The European Parliament Strasbourg Plenary Session of 15 January 2014 dedicated a debate to 'citizenship for sale'. On that occasion, Viviane Reding, Vice-President of the European Commission, emphasised in a strongly worded speech entitled "Citizenship must not be up for sale"<sup>30</sup> that naturalisation decisions adopted by one member state "are not neutral" with regard to others and the EU as a whole, and one should not put a price tag on citizenship of the Union:

It is a fact that the principle of sincere cooperation, which is inscribed in the EU Treaties (Article 4.3 of the Treaty on the European Union), should lead member states to take account of the impact of a decision in the field of nationality on other member states and the Union as a whole. That is why the Commission follows any developments concerning this matter in the Member States.

The Commissioner continued:

That is why member states should use their prerogatives to award citizenship in a spirit of sincere cooperation with the other Member States, as stipulated by the EU Treaties. 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.

On 16 January 2014, the European Parliament adopted a Resolution on EU Citizenship for Sale condemning member states' citizenship for sale programmes, with specific reference to the Maltese IIP.<sup>31</sup> Some 89% of the MEPs voted against the selling of Maltese nationality and European citizenship. As the EUobserver reported, "In a sign of the Maltese government's isolation on the European stage, its own political group, the centre-left S&D, co-sponsored the motion, along with the centre-right EPP and the Liberal and Green Groups".<sup>32</sup> The EP declared that the scheme of outright sale of Maltese citizenship undermined citizenship of the Union. The Resolution concluded that "this way of obtaining citizenship in Malta, as well as any other national scheme that may involve the direct or indirect outright sale of EU citizenship, undermines the very concept of European citizenship".<sup>33</sup> It called upon the European Commission to provide an analysis of the legality of such schemes (whether these schemes respect the letter and spirit of the Treaties and the Schengen

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<sup>28</sup> Malta Passport sale puts UK under pressure", *Financial Times*, 9 December 2013 ([www.ft.com/intl/cms/s/0/7de0a9fe-60fe-11e3-b7f1-00144feabdc0.html](http://www.ft.com/intl/cms/s/0/7de0a9fe-60fe-11e3-b7f1-00144feabdc0.html)).

<sup>29</sup> "Malta Passport sale puts UK under pressure", *Financial Times*, 9 December 2013 ([www.ft.com/intl/cms/s/0/7de0a9fe-60fe-11e3-b7f1-00144feabdc0.html](http://www.ft.com/intl/cms/s/0/7de0a9fe-60fe-11e3-b7f1-00144feabdc0.html)). See also "'Passport for sale' plan raises concern among EU members", *Financial Times*, 9 December 2014 ([www.ft.com/intl/cms/s/2/b8a2adfa-6106-11e3-b7f1-00144feabdc0.html#axzz2uWEKEVNH](http://www.ft.com/intl/cms/s/2/b8a2adfa-6106-11e3-b7f1-00144feabdc0.html#axzz2uWEKEVNH)).

<sup>30</sup> V. Reding, "Citizenship must not be up for sale", European Commission, Speech/14/18, 15 January 2014.

<sup>31</sup> European Parliament resolution on *EU citizenship for sale*, 2013/2995(RSP), 16 January 2014.

<sup>32</sup> "EU institutions attach Malta passport scheme", *EUobserver*, 16 January 2014 ([euobserver.com/justice/122744](http://euobserver.com/justice/122744)).

<sup>33</sup> Point 1 of the Resolution.



Borders Code<sup>34</sup> as well as EU rules on non-discrimination) and guidelines on granting EU citizenship via national schemes and recommendations to prevent such schemes to undermine EU values.

The Parliament criticised the Maltese programme on a number of grounds: first, citizenship should not be a tradable commodity (as opposed to an inheritance commodity as is currently the case) and “cannot have a price tag attached to it”; secondly, citizenship should depend on people having ties with the EU or ties with an EU citizen; and thirdly, the programme privileges rich people over the poor, and therefore raises issues of non-discrimination because it allows only the richest third-country nationals to obtain EU citizenship, “without any other criteria being considered”.<sup>35</sup> The EP Resolution put special emphasis on the need for member states to be careful when exercising their national competences on matters of residency and citizenship and “to take possible side-effects into account”.<sup>36</sup> It underlined that “a number of member states have introduced schemes which directly or indirectly result in the sale of EU citizenship to third country nationals”, yet no specific names were given in the Resolution.<sup>37</sup>

Muscat’s government reportedly did not show any preliminary signs of ceding to EU pressure,<sup>38</sup> referring to the investor citizenship programmes in Austria and Cyprus, and voiced several concerns of the opposition Nationalist Party (PN) “of tarnishing the country’s name overseas, by taking political infighting into the European area”.<sup>39</sup> The Maltese authorities, according to whom nationality matters remained under the sole competence of EU member states, were largely comforted by the position of the EU Greek Presidency which in the same above-mentioned Strasbourg debate declared that the Council did not have any position on the matter, that the Council was not aware of any such a case of infringement and had not discussed the issue. The Greek Presidency representative also said:

It is important to remind ourselves that EU citizenship is additional to and clearly does not replace national citizenship...there is no harmonisation of national legislation in this field. The conditions for acquiring and losing EU citizenship depend directly on the conditions for acquiring/losing nationality of individual member states...It also has an autonomous character stemming from the EU legal order, so member states need to exercise their powers in accordance to the Treaties...Member states must have mutual trust to recognise different national provisions governing naturalisation.

That notwithstanding, the press reported on 17 January that the European Commission had begun laying the groundwork for a legal challenge and potential infringement proceedings against Malta on the IIP.<sup>40</sup> It appears that Reding’s speech of 15 January and the favourable position of the Commission’s legal service on the matter, encouraged the Commission’s DG Justice services to proceed with the case against Malta. A meeting took place in Brussels on January 29<sup>th</sup> between the Maltese authorities and representatives of the DG Justice of the European Commission where the IIP and its compatibility with EU law were discussed in detail. According to a joint press statement by the European Commission and the Maltese Authorities on the

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<sup>34</sup> The EP stated in point 10 of the Resolution: “Note that ongoing competition for more attractive investment conditions of financial resources may lead to a lowering of the standards and requirements for obtaining Schengen Area residence permits and EU citizenship.”

<sup>35</sup> Point K. of the Resolution.

<sup>36</sup> Point 6 of the Resolution.

<sup>37</sup> Points 12 and 13 of the Resolution.

<sup>38</sup> “Citizenship / Muscat confident ‘way forward’ can be found with Commission”, *Malta Today*, 24 January 2014 ([www.maltatoday.com.mt/en/newsdetails/news/national/Citizenship-scheme-Muscat-remains-confident-way-forward-can-be-found-with-EC-20140124](http://www.maltatoday.com.mt/en/newsdetails/news/national/Citizenship-scheme-Muscat-remains-confident-way-forward-can-be-found-with-EC-20140124)).

<sup>39</sup> “Can European Commission take Malta to court over citizenship scheme?”, *Malta Today*, 19 January 2014 ([www.maltatoday.com.mt/en/newsdetails/news/national/Can-European-Commission-take-Malta-to-court-over-citizenship-scheme-20140119](http://www.maltatoday.com.mt/en/newsdetails/news/national/Can-European-Commission-take-Malta-to-court-over-citizenship-scheme-20140119)).

<sup>40</sup> “IIP / Brussels contemplating infringement proceedings against Malta”, *Malta Today*, 18 January 2014 ([www.maltatoday.com.mt/en/newsdetails/news/national/IIP-European-Commission-contemplating-infringement-proceedings-against-Malta-20140118](http://www.maltatoday.com.mt/en/newsdetails/news/national/IIP-European-Commission-contemplating-infringement-proceedings-against-Malta-20140118)).

IIP,<sup>41</sup> both parties reached a common understanding on the issues at question and the announcement closed with the following statement:

The Commission's services welcomed the announced amendments concerning the residence requirement done in good faith and in a spirit of sincere cooperation and both parties expressed satisfaction about the understanding reached on this issue.

The Maltese representatives presented their intentions regarding further amendments of the IIP “with a view to clarifying that this Programme will confer full rights, responsibilities and a full citizenship status”. The amendments would aim at establishing a “genuine link” to Malta through the introduction of “an effective residence status in the country” before acquiring Maltese nationality. The joint press statement stated that no naturalisation certificate would be issued unless the applicant could show evidence of having resided in Malta for a period of at least 12 months immediately prior to the date of issuance. A particular issue of discussion was how this residency requirement would be implemented in practice, with the Commission insisting on a concept of residence similar to the one applied in Maltese naturalisation procedures in the Maltese Citizenship Act.

Muscat announced in a press conference held January 29<sup>th</sup> in Malta<sup>42</sup> that the European Commission had endorsed the IIP after the government accepted to introduce a residency requirement, which was described as a ‘minor’ change by Muscat during the press event.<sup>43</sup> He also insisted before the press that the residency criterion would not mean that an applicant would be required to spend 365 days in the country before Maltese nationality would be granted. Reding tweeted: “Glad that thanks to support from European Parliament, constructive cooperation with the Maltese, we found a solution on the Maltese citizenship issue”.<sup>44</sup> Similar declarations were issued by EU Vice President Marcos Sefcovic which declared the IIP case settled. While these high-level political announcements seemed to conclude that the case had been closed, it was reported that the Commission services would be still “closely monitoring Malta’s implementation of the newly amended scheme and it will be keeping in touch”, in particular as regards the way in which the residency requirement would be applied into practice.

On 4 February 2014, the government issued an amended version of the IIP,<sup>45</sup> which included a new paragraph 7.12 according to which “No certificate of naturalisation under these regulations shall be issued unless the main applicant provides proof that he has been a resident of Malta for a period of at least twelve months preceding the day of the issuing of the certificate of naturalisation”. The Malta Independent reported that “the Commission was actually still analysing the text to confirm that it ensures that its ‘effective residence’ requirement is met”.<sup>46</sup> In the meantime, the Maltese government published yet another new amended version of the IIP on February 14<sup>th</sup> further specifying questions related to the residency criterion, in particular the so-called ‘Form N’ on the application for naturalisation as a citizen of Malta, which in its final version included two new elements in the ‘I Declare’ section: First, that the applicant undertakes to provide proof of residence in Malta prior to being granted a certificate of naturalisation as a citizen of Malta, and second, that they will take an oath of allegiance to Malta and “to do all things necessary to evidence my new allegiance”.

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<sup>41</sup> European Commission, Press Release, Joint Press Statement by the European Commission and the Maltese Authorities on Malta’s Individual Investor Programme (IIP), European Commission – MEMO/14/70, 29.01.2014.

<sup>42</sup> “Malta, EC reach agreement on citizenship, Reding welcomes breakthrough”, *Malta Today*, 29 January 2014 ([www.maltatoday.com.mt/en/newsdetails/news/national/Malta-EU-reach-agreement-on-Individual-Investor-Programme-20140129](http://www.maltatoday.com.mt/en/newsdetails/news/national/Malta-EU-reach-agreement-on-Individual-Investor-Programme-20140129)).

<sup>43</sup> *Ibid.*, Muscat insisted that “the positions of the government and the Commission were actually very close at the outset, and that ultimately, it took only a few hours to reach an agreement”.

<sup>44</sup> [http://ec.europa.eu/commission\\_2010-2014/reding](http://ec.europa.eu/commission_2010-2014/reding)

<sup>45</sup> Individual Investor Programme of the Republic of Malta Regulations, 2014, L.N. 47 of 2014, Maltese Citizenship Act (CAP. 188), B 341. See also Citizenship (Amendment) Regulations, 2014, L.N. 17 of 2014, Maltese Citizenship Act, CAP. 188.

<sup>46</sup> “Government amends Citizenship Act again, but residency still remains undefined”, *Malta Independent*, 16 February 2014 ([www.independent.com.mt/articles/2014-02-16/news/government-amends-citizenship-act-again-but-residency-still-remains-undefined-3968991233](http://www.independent.com.mt/articles/2014-02-16/news/government-amends-citizenship-act-again-but-residency-still-remains-undefined-3968991233)).

While these new amendments position the IIP more in line with the European Commission's demands, it still remains unclear the way in which the 'effective residency requirement' will be implemented and consistently assessed in practice.<sup>47</sup> During the negotiations between the Commission and the Maltese authorities, which preceded the change in the law, the Commission's position regarding the meaning of 'effective residence' was to apply a similar residency requirement as in ordinary naturalisation procedures. However, the Maltese government has declared on several occasions that the 12-month criteria will not mean that applicants necessarily have to live in the country to apply, nor that they would need to set foot in Malta.<sup>48</sup> According to an interview held with the Maltese authorities for the purposes of this essay,<sup>49</sup> the calculation of time will be still different from the one applicable to other naturalisation procedures. It appears that if the applicant has been residing in Malta during the last six months before the submission of the application, this period of residence will be counted in the 12-month period.<sup>50</sup> Although a number of potential applicants have already expressed interest in the Maltese citizenship scheme,<sup>51</sup> doubts remain as to whether the concept of residency that will be finally applied by the Maltese authorities will fulfil the Commission's expectations.<sup>52</sup>

#### 4. Investor citizenship and residency programmes in the EU: A comparative outlook

The Maltese citizenship-for-sale programme has been in the eye of the storm in EU debates over the last months of 2013 and the beginning of 2014. Yet, the Maltese scheme is not so unique across the Union. Similar programmes have been introduced in few other member states during 2013 which grant fast-track naturalisation to rich foreign investors and donors (section 4.1 below). An even-larger number of European countries have recently introduced (between 2012 and 2013) residency for foreign investor programmes, which offer facilitated access to long-term residency status, and in some cases even facilitated or indirect access to nationality (section 4.2).

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<sup>47</sup> Ibid.

<sup>48</sup> See Maltese Community Council of Victoria, Revised Malta Citizenship Legal Notice Published and Corrected ([www.mccv.org.au/new-malta-citizenship-investor-scheme-legal-notice-published-corrected](http://www.mccv.org.au/new-malta-citizenship-investor-scheme-legal-notice-published-corrected)). See also [www.independent.com.mt/articles/2014-02-04/news/residency-still-undefined-in-fresh-legal-notice-on-citizenship-scheme-3867148291](http://www.independent.com.mt/articles/2014-02-04/news/residency-still-undefined-in-fresh-legal-notice-on-citizenship-scheme-3867148291)

<sup>49</sup> Interview with Maltese authorities, 21 February 2014.

<sup>50</sup> According to a clarification kindly provided by the Permanent Representation of Malta to the European Union in Brussels, "the period of six months to two years from the filing of the application for the Minister to issue a certificate of naturalisation does not override the 12-month residency requirement. In practice, it would mean that the process cannot take less than six months or more than two years, subject to all eligibility requirements being satisfied."

<sup>51</sup> "First applicants for Maltese citizenship are approved", *Times of Malta* ([www.timesofmalta.com/articles/view/20140316/business-news/First-applicants-for-Maltese-citizenship-are-approved.510827](http://www.timesofmalta.com/articles/view/20140316/business-news/First-applicants-for-Maltese-citizenship-are-approved.510827)). Also Malta Today reported that by mid-February 2014, a total number of 277 requests for Maltese passports had been received. "Foreign Minister says 277 requests for Maltese passport received in Embassies", *Malta Today*, 17 February 2014 ([www.maltatoday.com.mt/news/national/35497/foreign-minister-says-277-requests-for-maltese-passport-received-in-embassies-20140217](http://www.maltatoday.com.mt/news/national/35497/foreign-minister-says-277-requests-for-maltese-passport-received-in-embassies-20140217)).

<sup>52</sup> The daily Malta Today has recently reported that the chief executive officer of Identity Malta has clarified that the assessment of the application criteria will be done on "a case-by-case basis". Also, the applicants "must make at the very least two visits to Malta" as well as "obtaining e-residence or enrolment in the Global Residence Programme, having a functional residence, as well as being the member of social clubs, philanthropic initiatives, engaging with professional bodies... So [according to Malta Today] for example, enrolling a family doctor, membership with a yacht club, or participating in philanthropic activities, will bolster candidates' portfolios at proving a genuine link with the island". See "Functional address and a yacht club membership makes good IIP resident", *Malta Today*, 7 April 2014 ([www.maltatoday.com.mt/news/national/37710/functional\\_address\\_and\\_a\\_yacht\\_club\\_membership\\_makes\\_good\\_iip\\_resident#.U0K6hqiSxHV](http://www.maltatoday.com.mt/news/national/37710/functional_address_and_a_yacht_club_membership_makes_good_iip_resident#.U0K6hqiSxHV)). See also [www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-013318&language=EN](http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-013318&language=EN)

## 4.1 Investor citizenship-for-sale programmes

**Cyprus** introduced in mid-2013 a new investor citizenship programme that is very similar to the Maltese IIP.<sup>53</sup> The Cypriot Scheme for Naturalisation of Investors, adopted by the Council of Ministers on 24 May 2013,<sup>54</sup> provides a fast-track acquisition of nationality.<sup>55</sup> The programme presents similar features to the Maltese IIP, such as the combination of investment and a donation to the State as criteria for naturalisation and no effective residency condition (See Annex 2 for a more detailed description). Fast-track investor naturalisation comes with the following price tags: €2 million purchase of shares/bonds with National Treasury, and €0.5 million donation to a Research and Technology Fund; or direct investments in Cyprus of €5 million; or personal fixed-term deposits for three years in Cypriot banks or deposits in privately owned companies or trusts of €5 million; or a combination of mixed investment and donation to a State Fund of €5 million; or ensure deposits in national banks amounting to a total of at least €3 million.

**Bulgaria** has an investor citizenship programme with some important distinguishing components. As also in the cases of Malta and Cyprus, the Bulgarian programme was adopted in early 2013. Under the scheme, foreign applicants who have been granted a permanent investor residency permit,<sup>56</sup> will acquire Bulgarian citizenship without demonstrating Bulgarian language proficiency or renouncing any other nationality.<sup>57</sup> Still, the applicant will be eligible for naturalisation without need to comply with the period of 5 years residency applicable to all the rest of applicants to be granted with long-term stay and naturalisation in Bulgaria.<sup>58</sup> Permanent residents under the investors' scheme will in this way have facilitated access to Bulgarian nationality, without the need to reside continuously in the country for five years prior to the submission of the naturalisation application.<sup>59</sup> Permanent residence will be given to non-Bulgarian nationals who have invested in the country over BGN 1,000,000 (+/- €500,000), in addition to other financial conditions, or have invested BGN 6,000,000 (+/-€3,000,000) in a Bulgarian company.<sup>60</sup>

The Maltese authorities had already referred in media and political discussions to the 'citizenship-by-investment programme' in **Austria** as a justification of their own initiative. This led Austrian authorities officially to deny the existence of such a programme. Austrian authorities declared that Austria has never sold citizenship and that Maltese media and public officials were misinterpreting Austrian law.<sup>61</sup> Austria

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<sup>53</sup> <http://eudo-citizenship.eu/news/citizenship-news/846-cyprus-to-grant-citizenship-to-biggest-bailout-losers> <http://rt.com/news/cyprus-investor-citizenship-requirements-848> <http://www.dw.de/european-citizenship-sold-to-the-super-wealthy/a-16756198>

<sup>54</sup> Scheme for Naturalisation of Investors in Cyprus by exception on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002-2013, Council of Ministers Decision dated 24.5.2013 ([www.moi.gov.cy](http://www.moi.gov.cy)).

<sup>55</sup> According to Section A6 of the law, "the applicant must hold a permanent privately-owned residence in the Republic of Cyprus, the market value of which must be at least €500,000, plus V.A.T".

<sup>56</sup> Foreigners in the Republic of Bulgaria Act (FRBA), as amended in February 2013.

<sup>57</sup> Bulgarian Citizenship Act (BCA), SG, 136, November 18, 1998., amended SG 41, April 26, 2001, amended SG 54, May 31, 2002, amended in February 2013, Section III, Acquiring Bulgarian citizenship by naturalisation. See D. Smilov and E. Jileva (2013), *Country Report: Bulgaria*, EUDO Citizenship Observatory, May 2013, European University Institute, Robert Schuman Centre for Advanced Studies, Florence, p. 12.

<sup>58</sup> Article 12.2 of the BCA.

<sup>59</sup> Article 25.5 of the FRBA (amend. – SG 29/07; revoked – SG 9/11; new – SG 23/13; amend. – SG 70/13) states that permanent residence will be granted to those "who have resided legally and continuously in the territory of the Republic of Bulgaria for the last 5 years prior to submission of the application for permanent residence and who have not been abroad for more than 30 months during this period, provided that in the cases referred to in Art. 24c only half of the periods of residence shall be taken into account".

<sup>60</sup> Refer to Article 25 FRBA (amend. SG 11/05; amend. - SG 36/09).

<sup>61</sup> "Austria denies it has ever sold citizenship – Council insists various factions are 'misinterpreting laws'", *Times of Malta*, 23 January 2014 ([www.timesofmalta.com/articles/view/20140123/local/Austria-denies-it-has-ever-sold-citizenship.503690](http://www.timesofmalta.com/articles/view/20140123/local/Austria-denies-it-has-ever-sold-citizenship.503690)). The journal included declarations by the consul of the Austrian Embassy in Malta who declared: "The Republic of Austria has never had such a programme and, consequently, we have never had to stop it." The article also included some interesting statistics concerning the number of applicants who had been granted Austrian citizenship via Article 10.6 of the Austrian Citizenship Act.

does have an unofficial investor citizenship programme which is negotiated with applicants on a case-by-case basis; Dzankic (2012), who has provided a comparative analysis of EU countries offering investor citizenship and golden passport programmes,<sup>62</sup> has indeed highlighted that the actual regulation of the ‘citizenship by investing’ in Article 10.6 of the Austrian Nationality Act is in fact an unofficially recognised investor citizenship programme,<sup>63</sup> where no residency requirement seems to apply as a criteria for naturalisation. In her analysis she points out that the programme is loosely regulated and largely dependent on a high degree of discretion on the part of the government and relevant ministry.<sup>64</sup>

That notwithstanding, it is important to highlight that there are clear differences when comparing the Austrian schemes to those identified in Malta, Cyprus and even Bulgaria. The provisions in Austrian law do not form, at least formally, the basis of an investor or donor citizenship programme. The donation and/or investment components are absent. It has neither been publicly presented nor advertised as such by the Austrian government. Furthermore, a fundamental difference between these programmes is one of the newest features characterising systems such as those described in Malta and Cyprus, namely the idea of a ‘donation’, according to which the State granting nationality requires wealthy foreigners to deliver a substantial financial donation which the applicant will never get back. In Malta, the IIP demands applicants to pay €650,000 (in addition to €25,000 for their spouse and each child) of which 70% will go to a National Development and Social Fund, which according to Maltese law, “shall be used in the public interest inter alia for the advancement of education, research, innovation, social purposes, justice and rule of law, employment activities, the environment and public health”.<sup>65</sup> Similarly, in Cyprus, the applicants can qualify for the scheme for naturalisation of investors through a combination of mixed investment and donation to a State fund of €5 million.<sup>66</sup>

**Ireland** constitutes a unique example of a member state that used to have an investment-based naturalisation scheme, started in 1989, and which for a number of reasons was abolished on 20 April 1998. As in the Maltese case, it attracted significant criticism from national politicians and media during its almost ten years of existence. The requirements of the programme were outlined in an unpublished Statement of Intent,<sup>67</sup>

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<sup>62</sup> J. Dzankic (2012), “The Pros and Cons of *Ius Pecuniae*: Investor citizenship in comparative perspective”, EUI RSCAS, 2012/14, European University Institute, Florence. Dzankic argues that the existence of a genuine link as one of the grounds of acquisition is in fact what differentiates so-called ‘investor citizenship programmes’ from ‘golden or premier residence’ based on investment or donation to the country programmes in the EU. In the former the main factor determining acquisition of the receiving state nationality is mainly financial in nature, donation and/or investment in the country. In the latter, residency for a period is still required as well as following the usual naturalisation procedure.

<sup>63</sup> Article 10.6 of the Federal Law concerning the Austrian Nationality (Nationality Act, 30 July 1985, Federal Law Gazette of the Republic of Austria, FLG No. 311/1985) stipulates: “The requirements set out in subparagraphs 1 and 7 of paragraph (1) and in paragraph (3) above shall not apply if the Federal Government confirms that the granting of nationality is in the particular interests of the Republic by reason of the alien’s actual or expected outstanding achievements.”

<sup>64</sup> For more information on the Austrian system, see [www.henleyglobal.com/citizenship-by-investment](http://www.henleyglobal.com/citizenship-by-investment) and <https://www.henleyglobal.com/citizenship-austria-citizenship> According to Henley & Partners website “It is also possible to acquire Austrian citizenship if you invest substantially in the country. Although this is an established practice, there is no Citizenship-by-Investment program as such and only very few cases are approved each year. Nevertheless, Austria can be a very attractive option for a substantial investor” (accessed 28/2/2014) ([www.henleyglobal.com/citizenship-by-investment](http://www.henleyglobal.com/citizenship-by-investment)). This corresponds with the analysis carried out by Dzankic who stated that “Yet, from this author’s personal correspondence with the same source, there is no derived legislation regulating the exact amount or type of investment, and other criteria”, *Ibid.*, p. 12.

<sup>65</sup> Paragraph 13.2, Individual Investor Programme of the Republic of Malta Regulations, 2014, Maltese Citizenship Act (CAP. 188), L.N. 47 of 2014.

<sup>66</sup> Refer to Scheme for Naturalisation of Investors in Cyprus by exception on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002-2013, Council of Ministers Decision dated 24.5.2013.

<sup>67</sup> Statement of Intent, in relation to the exercise by the Minister for Justice of his discretion under section 16 of the Irish Nationality and Citizenship Act, 1956, as amended by the Irish Nationality and Citizenship Act 1986, to waive the provisions of section 15(c) of the Act in the case of persons establishing certain businesses in the State), which stated that the Minister would accept naturalisation when: “(a) the applicant acquired a residence in the State, had been resident in the State for two years and had spent a reasonable amount of time here over the two years; (b) the Minister

which simply referred to the need for applicants to ensure a “substantial investment” without mentioning any specific minimum figure for any applicant’s “manufacturing or international services or other acceptable wealth and job creation project” to qualify for the investor programme. Investments in the order of £500,000 appeared to have been the norm.<sup>68</sup> The applicant was still required to fulfil the condition to intend in good faith to continue to reside in the State after naturalisation. This was subject to change after 1994, which in addition to increasing the criteria for ensuring the investment and economic benefits for Ireland, it also eased the residency requirement by only demanding applicants to acquire residence in Ireland and spend a “reasonable amount of time” in the country corresponding to a minimum of 60 days over the previous two years since the granting of nationality (see Annex 2 for a more detailed overview of the scheme). The scheme was originally intended to attract inward investment in the manufacturing industry in the country. From 1989 to 1998, a total number of 169 persons, along with 24 spouses and children were naturalised, and investments of over £100 million were made.

The Irish scheme as criticised on several grounds: First, the scheme demeaned Irish citizenship which should be reserved to those presenting links or a genuine identification with the Irish nation; second, it left Ireland vulnerable to criticism from EU partners; third, the difficulties for the Minister to guarantee the character of the applicants; fourth, while significant benefits were provided to investors, it remained questionable the extent to which the scheme represented a bargain to the State “even after taking account of the economic benefits”; and fifth, the contrast between the openness and attractiveness approach towards wealthy persons and the restrictive approach to immigration of poor (penniless migrants) and not-so-rich foreigners. Perhaps most importantly, one of the main challenges faced by the Irish naturalisation by investment programme was that there was little evidence that the criteria for the granting of Irish nationality-by-investment were always met by the applicants and allegations of corruption, favouritism and bribes by the government.<sup>69</sup> Handoll (2013) pointed out the large degree of discretion held by the Minister in determining the two-year residency requirement and the condition of ‘substantial investment’.<sup>70</sup> Also, according to the findings of a Review Group which was set up by the Government to assess the programme,<sup>71</sup> “a significant number of cases in which the requirements of the Statement of Intent either were not adhered to or where evidence that they were adhered to is absent from the Department's files.”<sup>72</sup>

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was satisfied, on the advice of a Minister of the Government, that the applicant had established a manufacturing or international services or other acceptable wealth and job creating project here that was viable and involved a substantial investment by the applicant.”

<sup>68</sup> According to the Review Group Report, “Over the period 1988 to 1994, the range of investments made under the Scheme, which were usually £500,000 each, widened from industrial development (which appears to have been envisaged during the early days of the Scheme) to include, for example, some property and forestry development and the shipping sector. A key development in this context was a Government decision of March, 1992 that “Irish associations” should be interpreted liberally so as not to confine the requirement to investment in industry: tourism related projects, but not property, should also be included.” Paragraph 2.5 of the report.

<sup>69</sup> One case which proved to be more controversial was the one of Masri family from Palestine in 1992, which was even subject to an internal government inquiry in 1994 during the period when Albert Reynolds was Taoiseach of Ireland. One of Reynolds companies on pet food received +/- £1 million as donation which allowed then to benefit from Irish nationality. See N. Collins and Mary O’Shea (2000), *Understanding Corruption in Irish Politics*, Cork University Press, Ireland.

<sup>70</sup> J. Handoll (2010), “Country Report: Ireland”, EUI Working Papers, RSCAS 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, Florence, p. 5.

<sup>71</sup> Along with the decision to abolish the programme, the Government called for the setting up of a review of the Irish Nationality and Citizenship Act in order to assess ways in which investment in the country could be fostered. A Review Group was established comprising representatives from different Ministries and external experts. The Report of the Review Group on Investment Based Naturalisation was published in April 2000, and concluded that it was not necessary to introduce a new investment-based scheme under the economic circumstances which characterized the country in the early 2000s ([www.inis.gov.ie/en/INIS/invbankrev.pdf/Files/invbankrev.pdf](http://www.inis.gov.ie/en/INIS/invbankrev.pdf/Files/invbankrev.pdf)).

<sup>72</sup> Paragraph 2.5 of the report. There were also critics expressed in the media alluding to cases where no investment at all had taken place. For instance Magill magazine, in an article in its March, 1999 issue where it was stated that “In an article of 5 June, 1994, the Sunday Tribune alleges that investments were typically in the form of a loan of £1m at 5% over five years. This amount was lodged in a bank as security and the company got to keep the difference between the

The Irish case might therefore provide us with a number of lessons for other EU member states currently having or considering the introduction of investor/donor citizenship programmes; as Bauböck (2014) has rightly put it, by linking citizenship with investment and converting citizenship into a “*marketable commodity*” there is a real danger of corrupting democracy.<sup>73</sup>

## 4.2 Investor residency programmes

A number of EU countries have simplified immigration regimes for wealthy third-country nationals – immigrant investor or golden visa/residence programmes – aimed at attracting investments by rich third-country nationals and offering accelerated access to visas and residency permits. Being a wealthy foreigner is also here the key factor determining a privileged immigration status and security of residence in the receiving country. These programmes aim at providing ‘attractive’ schemes leading to the rapid acquisition of long-term residency status and even nationality after shorter periods of residency and with fewer requirements than those generally applied to other third-country nationals. As shown in Map 1 below, Bulgaria, Cyprus, Greece, Hungary, Ireland, Latvia, Portugal, Spain and the UK are illustrative examples of member states with investor/golden residency schemes in the EU. Annex 3 contains a detailed overview and description of these programmes. The concept of ‘investment’ varies widely from country to country. Among the common components of these schemes are: first, a minimum investment threshold in the country, a secured annual income and personal assets and/or an investment in state bonds and shares; second, acquisition of property in the country; third, depositing a minimum amount of capital in a national bank; and fourth, sometimes making a philanthropic donation.<sup>74</sup>

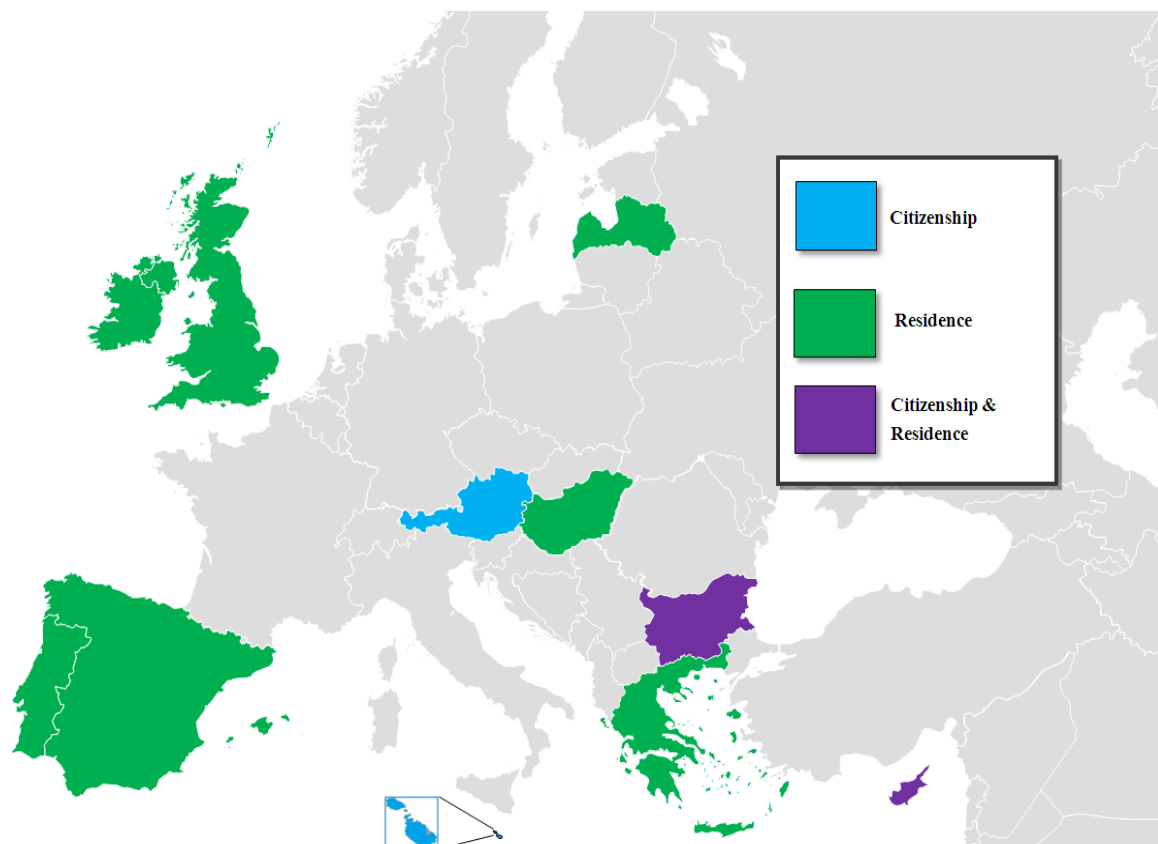
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interest rate that was earned on it and the 5% rate which they paid the investor. The companies thus got a benefit of between £150,000 and £170,000 over five years.” paragraph 4.6 of the Review Group Report.

<sup>73</sup> R. Bauböck (2014), “What is wrong with selling citizenship? It corrupts democracy!”, in A. Shachar and R. Bauböck (eds) (2014), *Should Citizenship be for Sale?*, EUI Working Papers, RSCAS 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, Florence, Italy, p. 5.

<sup>74</sup> An even larger number of EU member states offer investor residency schemes addressed mainly to the self-employed, persons with independent means and entrepreneur schemes (including those setting up or establishing a company), for the purposes of professional activities, or those directed to corporate bodies, managers and key personnel of the companies, yet they fall outside the scope of this essay.

Map 1. Overview of citizenship and residency investor schemes in the EU



Source: Author's own compilation.

**Spain** has a Residency Visa for Investors in the Law supporting Entrepreneurs and their internationalisation 14/2013,<sup>75</sup> which provides facilitated entry and residency conditions to applicants making a significant capital investment in the country, consisting of: an initial investment of at least €2 million in government bonds and public debt or at least €1 million in shares of Spanish firms or banks, or acquisition of property or property investment in Spain of at least €500,000. In a similar logic, in the **UK** Immigration Rules, the Points-Based Immigration System includes one tier covering ‘investors’ “for high net worth individuals making a substantial financial investment to the UK.”<sup>76</sup> Applicable conditions include owning at least £1,000,000 in a regulated financial institution in the UK, or showing proof of own personal assets exceeding £2,000,000 in value, and money held in a regulated financial institution and disposable in the UK of at least £1,000,000. An additional example exists in **Hungary**, where a residency permit is issued for a maximum of five years to foreign applicants who purchase bonds issued by the Hungarian Republic of at least € 250,000.<sup>77</sup>

The golden residency permit programme in **Portugal** has attracted attention.<sup>78</sup> A residency permit for investment activities (ARI) is offered to foreign nationals guaranteeing an investment in the country,

<sup>75</sup> Ley 14/2013 de apoyo a los emprendedores y su internacionalización, BOE 28/IX/2013, 19 Septiembre 2013, Chapter II: Investors (Articles 63-67).

<sup>76</sup> Refer to [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/279721/Immigration\\_Rules\\_-\\_Part\\_6A.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279721/Immigration_Rules_-_Part_6A.pdf)

<sup>77</sup> Refer to Act II of 2007, Art 28 (3)-(11), as amended by Act CCXX of 2012.

<sup>78</sup> See for instance “Les ‘Visas Dorés’ pour riches étrangers indignent les Portugais”, *Le Monde*, 26 March 2014 ([www.lemonde.fr/europe/article/2014/03/26/les-visas-dores-pour-riches-etrange-indignent-les-portugais\\_4390099\\_3214.html](http://www.lemonde.fr/europe/article/2014/03/26/les-visas-dores-pour-riches-etrange-indignent-les-portugais_4390099_3214.html)).



including the acquisition of real estate property with a minimum value of €500,000.<sup>79</sup> Some 734 golden visas have been issued so far by the Portuguese authorities, mainly to Chinese nationals.<sup>80</sup> **Cyprus** has also an immigrant permit programme for foreign nationals who intend to invest in the country. Amongst the requirements that need to be fulfilled by the applicants are: proof of a secured minimum annual income of €30,000, a title of ownership of property in Cyprus and a deposit in a Cypriot bank of a minimum capital of €30,000.<sup>81</sup> **Greece** offers a special entry (Schengen) visa and a residency permit for real estate property acquisition to third-country nationals purchasing a property with a minimum value of €250,000, which allow the beneficiary to travel to other EU member states for up to 90 days in any six-month period.<sup>82</sup> **Latvia** has a residency permit for investors and/or for the acquisition of immovable properties since 2010.<sup>83</sup> Applicants acquiring one or several immovable properties in Latvia with the total value of +/- €100,000 or making financial investments in a credit institution of at least +/- €200,000 will be granted a residency permit of five years.

As Sumption and Hooper (2013) have emphasised,<sup>84</sup> “the form of these programmes remains experimental, with some cases having lowered investment thresholds to attract more applicants”. This is the case in **Ireland**, for its Immigrant Investor Programme. As from July 2013, the scheme grants residence permission to applicants investing €1 million in bonds, or €500,000 in an Irish enterprise for three years, or an investment in a residential property of a minimum value of €450,000 and a direct investment of €500,000 in the immigrant investment bond, or a €500,000 philanthropic donation.<sup>85</sup> Before this period, however, the income thresholds were higher, requiring applicants to invest double the current figures (see Annex 3). The same situation occurred in **Bulgaria**, where according to Paskalev (2013),<sup>86</sup> there were several discussions on the size of investment which would qualify the applicant. The threshold was diminished from the original 4 million BGN (+/- €2 million), to the current +/- €1 million. Discussions to change the features of the residency permit scheme for investors and the acquisition of immovable properties in **Latvia** took place during 2013. They were mainly focused on introducing quotas, blocking investors from certain countries and

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<sup>79</sup> Refer to Order 1661-A/2013 (Amends Order 11820-A/2012) of the Ministry of Foreign Affairs and of the Ministry of Internal Affairs, published in the Portuguese Official Journal [DR 19 SÉRIE II] of 28 January 2013; see also Order 11820-A/2012 of the Ministry of Foreign Affairs and of the Ministry of Internal Affairs, published in the Portuguese Official Journal [DR 171 SÉRIE II, 1º SUPLEMENTO] of 4 September 2012. For more information see [www.sef.pt/portal/V10/EN/asp/apoiocliente/detalheApoio.aspx?fromIndex=0&id\\_Linha=6269](http://www.sef.pt/portal/V10/EN/asp/apoiocliente/detalheApoio.aspx?fromIndex=0&id_Linha=6269) and [www.sef.pt/documentos/56/ARIEN2.pdf](http://www.sef.pt/documentos/56/ARIEN2.pdf)

<sup>80</sup> BBC (2014), “The Winners and Losers of Portugal’s Golden Visa Scheme”, 19 March 2014 ([www.bbc.com/news/world-europe-26636829](http://www.bbc.com/news/world-europe-26636829)).

<sup>81</sup> Interestingly, and unlike the other programmes, the applicant must also have no intention to work or engage in any kind of business in Cyprus. See Regulation 6(2) of the Aliens and Immigration Regulations, 2013.

<sup>82</sup> Law 4146/2013, Establishment of a friendly investment environment for strategic and private investments, July 2013 ([www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit\\_ependytes\\_en.pdf](http://www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit_ependytes_en.pdf)).

<sup>83</sup> Immigration Law, after amendments in 20 January 2011 [shall come into force from 4 February 2011] and 26 May 2011 [shall come into force from 16 June 2011], and Law “Amendments to the Immigration Law”, Latvian Herald, No. 250, 20.12.2013 [came into force on 01.01.2014].

<sup>84</sup> M. Sumption and K. Hooper (2013), *The Golden Visa: “Selling Citizenship” to Investors*, Migration Policy Institute, 18 December, Washington, D.C. ([www.migrationpolicy.org/article/issue-no-3-golden-visa-selling-citizenship-investors](http://www.migrationpolicy.org/article/issue-no-3-golden-visa-selling-citizenship-investors)).

<sup>85</sup> Immigration Act 2014, Immigrant Investor Programme, S.I. No. 258 of 24 July 2012, Guidelines. The thresholds of these criteria were reduced as from 15 July 2013.

<sup>86</sup> V. Paskalev (2013), “Naturalisation Procedures for Immigrants Bulgaria”, EUDO Citizenship Observatory, May, European University Institute, Robert Schuman Centre for Advanced Studies, Florence. See also to [www.key2europe.com/en](http://www.key2europe.com/en). See also <http://bulgarianbusinesslawyer.com/blog/bulgarian-parliament-amended-changes-in-ipa>

increasing the amount of invested capital and the value of purchased property in the country, yet were not finally adopted. The debate continues in parliament.<sup>87</sup>

Most of these schemes aim at being ‘attractive’ to wealthy foreigners by offering permanent residence and/or a temporary residency permit, but are easily renewed and extended to settlement in the country. They tend to foresee fewer administrative burdens and shorter time-limits for the procedures, as well as a fairly flexible approach to absences from the country, by requiring only few visits. This is the case in the above-mentioned permanent residence permit scheme for investors in **Bulgaria**, where permanent residence holders are exempted from the general obligation applicable to other non-nationals of being physically present or residing in the country for a period of 12 consecutive months.<sup>88</sup> In other cases some criteria are waived. In the **UK** the beneficiaries of the investor points-based immigration system are exempted from English language proficiency and proof of means of subsistence conditions. The UK regime offers entry clearance in the country for a period of three years and four months and the possibility for applicants to acquire permanent residence (indefinite leave to remain) in the country to foreign investors subject to few requirements.<sup>89</sup> Successful applicants of the Irish immigrant investor programme get a two-year residence permit which may be renewable for another three years, after which they can apply for long-term residency in Ireland. These constitute multi-entry visas for the same duration.<sup>90</sup> In **the Netherlands** the residence permit for ‘wealthy foreign nationals’ is issued for a maximum of one year, yet it is possible to renew it and extend the residency in the country subject to a number of conditions.

Perhaps more importantly for the purposes of this essay, some investor immigrant programmes directly or indirectly facilitate access to nationality. This is the case for example under the residency visa for investors in **Spain**. Beneficiaries of this scheme have easier or facilitated access to Spanish nationality in comparison to other third-country nationals legally residing in Spain under the general migration legal system, because even if they don’t effectively reside in Spain their visa will be renewed with the only condition of having travelled to Spain at least once during the validity of the investor visa. Another example is **Bulgaria**, which provides linkages between the permanent residence permit for investors and access to Bulgarian nationality (see Section 4.1 above). On the basis of the previously discussed difficult experiences that **Ireland** encountered with its former investor-based naturalisation programme during the 1990s, the current immigrant investor programme expressly stipulates that it does not provide preferential access or confer Irish citizenship to applicants and that successful applicants for a residency permit under the scheme are free to apply for citizenship under the normal procedure foreseen in the Irish Nationality and Citizenship Act.

### 4.3 How much does citizenship and security of residency cost in the EU?

The answer to the question ‘how much does citizenship cost’ in the EU is therefore a fragmented one, depending upon the domestic nationality and migration legal systems in each member state of the Union. The picture that emerges from Map 2 below, is one presenting a heterogeneous set of regulations and programmes with various prices or financial values of Union citizenship and residency across the EU. There are at least three EU member states where EU citizenship has now a price tag: Malta: +/-€1.15 million; Cyprus: +/-€2 and €5 million; and Bulgaria: +/-€500,000. One of the key features of these schemes is the financial donation, going beyond actual investment in the country, which creates an even higher degree of dissonance. There is certainly a question of comparative price and value. Some member states are taking advantage of the margin of manoeuvre on questions of acquisition and loss of nationality, to design strategic nationality and attractive migration schemes for their own economic advantages and national interests.

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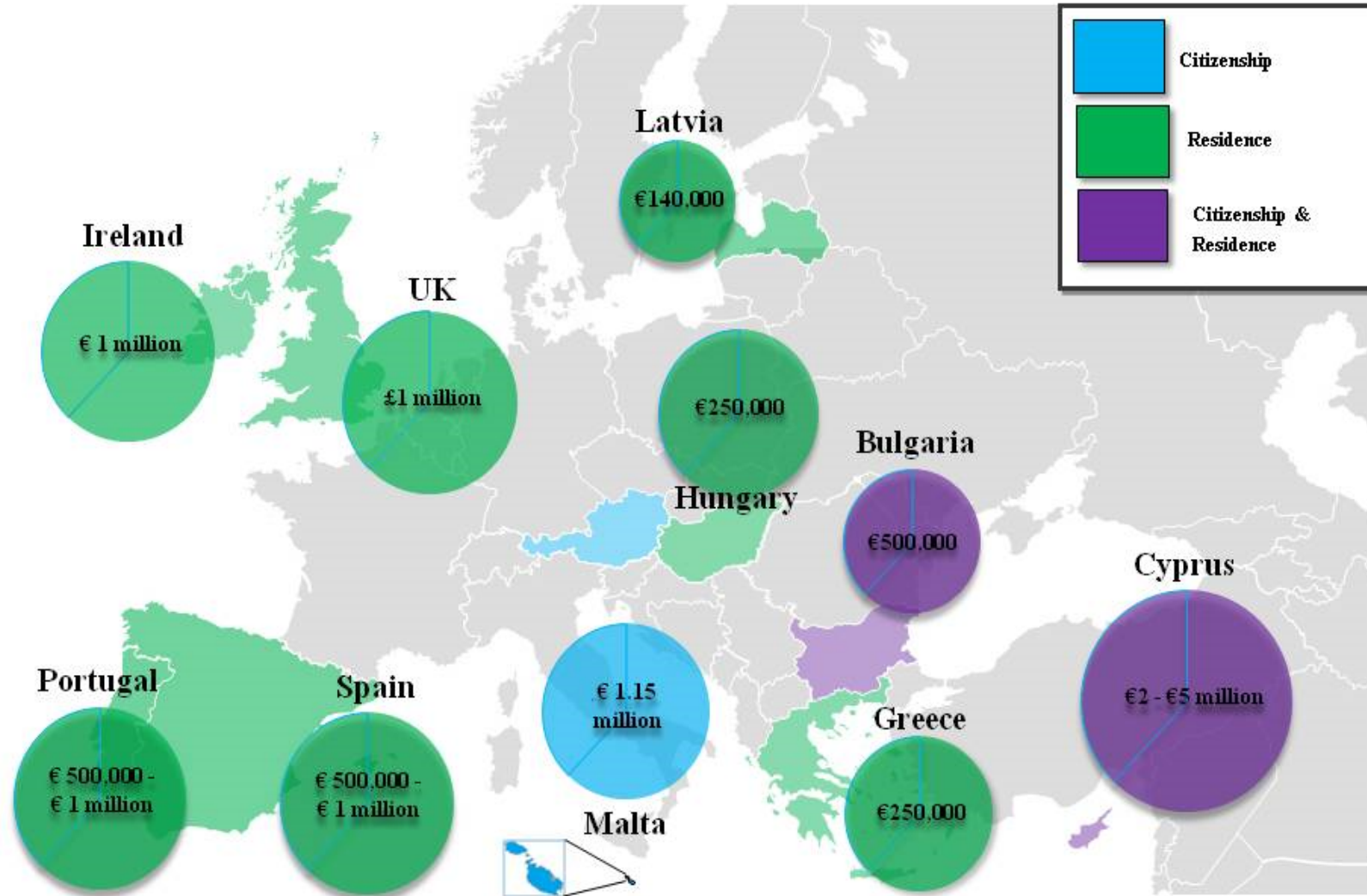
<sup>87</sup> According to Silina-Osmane (2014), “The draft amendments to the Immigration Law envisaged even more extensive changes in respect of granting of residence permits to investors, but they were not adopted” ([www.emn.lv/wp-content/uploads/APR-2013\\_Part\\_2\\_Latvia\\_EN.FINAL.pdf](http://www.emn.lv/wp-content/uploads/APR-2013_Part_2_Latvia_EN.FINAL.pdf)).

<sup>88</sup> Refer to Article 25 FRBA and Article 40.1.6 of the same law. Article 40 stipulates that a foreigner’s right to reside in Bulgaria will be revoked if s/he is found to be absent from the territory of the member states for a period of 12 consecutive months.

<sup>89</sup> See Annex 3.

<sup>90</sup> Immigration Act 2014, Immigrant Investor Programme, S.I. No. 258 of 24 July 2012, Guidelines.

Map 2. How much do European citizenship and residence cost in the EU?



Source: Author's own compilation.

The question is whether these programmes are also in the EU's interest when the actual interest of people in the programmes is to live elsewhere in the EU than in the state that has pocketed the money. If this is the case, then the member states offering the schemes may be classified as free riders, which unjustly benefit from the attractiveness of life in other member states that they have not paid for or participated in creating. By instrumentalising the granting of their citizenship, they are selling something they do not own (or pay for) – life in other member states.

How much does residency cost in the EU? Here, one also finds variations: Bulgaria: +/-€500,000; Cyprus: +/-€300,000; Greece: +/-€250,000; Hungary: +/-€250,000; Ireland: +/-€1 million; Latvia: +/-€140,000; Portugal: between €500,000 and €1 million; Spain: between €500,000 and €2 million, and the UK: +/-£1 million. Can a similar criticism be made regarding acquisition of long-term residency status, which a 2003 Directive (2003/109) created as an EU status giving a right to reside in any (participating) member state?<sup>91</sup> The 2003/109 Directive has harmonised at EU level a common status of long-term resident third-country national. A common set of rules apply for granting long-term residency status to third-country nationals: a) they must have resided *legally and continuously* for a period of five years in the territory of a member state; b) they must be able to support themselves and their family members and have done so throughout the period; c) they must have all-risk health insurance and d) if the member state so requires, they have to comply with integration measures. Once acquired, long-term residency status gives the holder the right to move and reside anywhere in the EU (except Denmark, Ireland or the UK) provided that they can pay for themselves. Access to employment can be made subject to restrictions.

Most of the academic attention on the long-term residence Directive has focused on how it allows member states to apply restrictions and further conditions on permanent residency, not on ways in which they can apply it more favourably to certain categories of third-country nationals, for instance super-rich foreigners. Can member states also instrumentalise this status to get donations to their treasuries from rich third-country nationals? One key question is whether the five-year residence status can 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. The Directive allows EU member states to apply few exceptions to the criteria of 'continuity' enshrined in Article 4.3.<sup>92</sup> According to Recital 17 of the Directive:

...harmonisation 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.<sup>93</sup>

Yet, because the five-year residence requirement is now contained in EU secondary legislation, it cannot be applied as flexibly as member states' national provisions. The Luxembourg Court is ultimately responsible

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<sup>91</sup> Council Directive 2003/109 concerning the status of third country nationals who are long-term residents, [2004] OJ L 16/44, 23.1.2004. For an analysis see S. Carrera (2009), *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers, pp. 171-196. See also E. Guild (2004), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International, European Law Library and D. Acosta (2011), *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship*, Leiden: Martinus Nijhoff Publishers.

<sup>92</sup> Article 4.3 of the Directive establishes: "3. Periods of absence from the territory of the Member State concerned shall not interrupt the period referred to in paragraph 1 and shall be taken into account for its calculation where they are shorter than six consecutive months and do not exceed in total 10 months within the period referred to in paragraph 1. In cases of specific or exceptional reasons of a temporary nature and in accordance with their national law, member states may accept that a longer period of absence than that which is referred to in the first subparagraph shall not interrupt the period referred to in paragraph 1. In such cases member states shall not take into account the relevant period of absence in the calculation of the period referred to in paragraph 1."

<sup>93</sup> Refer also to Article 13 on 'More favourable national provisions' of the Directive which states: "Member states may issue residence permits of permanent or unlimited validity on terms that are more favourable than those laid down by this Directive. Such residence permits shall not confer the right of residence in the other member states as provided by Chapter III of this Directive."

for the correct application and interpretation of the 2003/109 Directive<sup>94</sup> and a member state's application of the Directive which would defeat its objective, that is to say to ensure that third-country nationals obtain long-term residency status after five years residence in a member state, would surely be anathema to the Court. By attaching a higher value to the applicants' wallet, investor residency schemes may even undermine one of the main goals of the EU long-term residence Directive, which frames the five years of residence in the territory of a member state as the most relevant criterion for acquiring the status of long-term resident.<sup>95</sup>

The Directive does not foresee the possibility of member states selling long-term residency status. While some member states sell residency status and may even call it 'permanent' under their respective national laws, if the conditions of the Directive are not fulfilled then the status cannot be EU permanent residency status in light of Directive 2003/109. Thus it cannot give the holder the right to move to and live in any other member state. The consequence is that the purchase of residency status in one member state does not have any impact on other member states until the purchaser has lived for five years in the first member state and fulfilled the conditions of the Directive that apply to the acquisition of EU permanent residence status. Moreover, there is no point purchasing residence in Denmark, Ireland or the UK to get the EU status unless the person wants only to live in that country as even after five years residence they will not gain EU long-term residency status. For the others, the purchaser will have to stay put for five years before planning to move anywhere else in the EU.

#### 4.4 So why only Malta?

Malta is certainly not the only member state with investor/donor citizenship and residence programmes. A number of EU member states have them with facilitated entry and residence conditions to investors, sometimes even envisaging a swifter (indirect) access to nationality by applicants. Despite the existence of these programmes in other EU states, the European Parliament Resolution on EU Citizenship for sale (Section 3) only singled out Malta and called for the country to bring its citizenship scheme in line with the 'EU's values'. No other member state was expressly named in the Resolution. It is equally interesting that no EU-level discussion took place in the beginning of 2013 when the then newly elected Cypriot government publicly announced its plans to introduce the Scheme for Naturalisation of Investors, only a few months prior to the Maltese government presenting the IIP at the end of the same year. It appears that the European Commission is currently analysing similar schemes in other member states. Yet there is no publicly available information about the particular cases under examination and its scope.<sup>96</sup>

It is perhaps the case that the Maltese citizenship-for-sale affair cannot be understood without looking at the domestic political struggles between the Maltese government and the Nationalist Party (PN) led by Simon Busuttil, and the links between the latter (who was an MEP from 2009-12) and Brussels actors. That notwithstanding, the ways in which the affair has been handled may affect other existing or future passport-for-sale programmes and donor migration schemes in other member states. The EU's intervention over the Maltese IIP could otherwise be accused of being discriminatory in nature. This was an issue raised during the

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<sup>94</sup> Refer to K. Groenendijk (2006), "The Legal Integration of Potential Citizens: Denizens in the EU in the final years before the implementation of the 2003 directive on long-term resident third country nationals", in R. Bauböck, E. Ersboll, K. Groenendijk and H. Waldrauch (eds), *Acquisition and Loss of Nationality*, Volume I: Comparative Analyses: Policies and Trends in 15 European Countries, Amsterdam: Amsterdam University Press, pp. 385-410; See also K. Groenendijk (2007), "The Long-Term Residents Directive, Denizenship and Integration", in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart Publishing, pp. 429-450.

<sup>95</sup> Recital (6) of the Directives stipulates: "The main criterion for acquiring the status of long-term resident should be the duration of residence in the territory of a Member State. Residence should be both legal and continuous in order to show that the person has put down roots in the country. Provision should be made for a degree of flexibility so that account can be taken of circumstances in which a person might have to leave the territory on a temporary basis."

<sup>96</sup> According to a written answer by Reding to the EP, "The Commission is analysing similar schemes in all member states concerned in order to see if any further action is required, to make sure that the minimum requirement of a 'genuine link' to the country is met." ([www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-013318&language=EN](http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-013318&language=EN)).

negotiations between DG Justice and the Maltese authorities during January 2014, when the Maltese representatives called the Commission to respond similarly to other member states with programmes not requiring ‘effective residency’ as a condition for naturalisation. The EU has successfully claimed ownership at times of ensuring that member states domestic dispositions over the status of nationality comply with the set of legal standards and principles of law recognised at international and European level as well as the obligations that they have undertaken towards other states and the EU as a whole. The next section examines the legal arguments that backed up EU intervention and led to the modifications of the Maltese IIP.

## 5. Legal grounds backing EU intervention: Post-national citizenship principles and accountability venues

The political reactions by the Commission and the European Parliament were unprecedented as regards questions related to the regulation of nationality of a member state of the Union. For the first time, informal pressures and the threat of infringement proceedings by the Commission led to substantive amendments of a member state law on grounds of acquisition of nationality. Few commentators had anticipated the ways in which the affair has developed and been settled. Shaw (2014) concluded: “The case for a legal obligation 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”.<sup>97</sup> Referring back to AG Maduro Opinion in the CJEU ruling Rottmann,<sup>98</sup> Shaw concluded that Maduro’s suggestion that the case of mass naturalisations of third-country nationals by a member state would go against the principle of loyal cooperation enshrined in Article 4.3 TEU would not be applicable in the case of the Maltese IIP because “the effects of the Maltese provisions will be marginal in terms of number and thus have little impact on other Member States”.<sup>99</sup>

Still, the Commission successfully managed to intervene and persuade the Maltese authorities to amend the IIP. How did this happen? Two principal grounds played a relevant role during the negotiations between DG Justice and the Maltese authorities on the revision and the subsequent amendments of the Maltese Citizenship Act and the IIP: first, supranational legal standards and judge-made general principles of law (section 5.1); and second, the EU principle of sincere or loyal cooperation (section 5.2). As will be ultimately argued, this supranational framework of European and international standards provides us with a set of principles and accountability venues affecting in different ways nation-states’ margin of appreciation for grant and loss of citizenship, in particular when their actions or inactions affect or have an impact over supranational citizenship individual freedoms and rights and international relations.

### 5.1 Supranational standards and judge-made principles

One of the main subjects of controversy since the start of the Malta passport-for-sale affair was the outright selling of Maltese nationality and citizenship of the Union without the need for applicants to show any sort of ties with Malta. As Vice-President of the Commission expressed in her speech before the European Parliament’s Plenary on the 15 January 2014: “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”.<sup>100</sup> This was also a point taken by the European Parliament’s Resolution on EU Citizenship for Sale of 16 January 2014,<sup>101</sup> which underlined that “EU citizenship implies the holding of a stake in the Union and depends on a person’s ties with Europe and the member states or on personal ties with EU citizens”. As discussed in section 4, the result of the Commission’s intervention was translated into a series of subsequent amendments to the IIP included in the

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<sup>97</sup> J. Shaw (2014), “Citizenship for sale: Could and Should the EU Intervene?”, in A. Shachar and R. Baübock (eds), *Should Citizenship be for Sale?*, EUI Working Papers, RSCAS 2014/01, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, Florence, p. 33.

<sup>98</sup> Opinion Advocate General Pöiares Maduro, 30 September 2009, Case C-135-08, *Janko Rottmann v Freistaat Bayern*.

<sup>99</sup> *Ibid.*, p. 33.

<sup>100</sup> V. Reding, “Citizenship must not be up for sale”, European Commission, Speech/14/18, 15 January 2014.

<sup>101</sup> European Parliament resolution *on EU citizenship for sale*, 2013/2995(RSP), 16 January 2014, paragraph 7.

Maltese Citizenship Act which aimed at ensuring the fulfilment of a ‘genuine link’ through the introduction of an ‘effective residence’ status in Malta prior to naturalisation.<sup>102</sup>

The ‘genuine link’ argument used by the European institutions constitutes an import from a standard in public international law according to which there must be an effective connection or some sort of tie between an individual and the State whose nationality the person acquires or possesses. While states keep their monopoly of action when determining who is or is not a national, the argument continues, international law has recognised the power to safeguard against arbitrary or artificial situations of naturalisation and nationality-related decisions, where there are effects in the relations amongst States (Hall, 1995).<sup>103</sup> The International Court of Justice (ICJ) gave birth to this theory in the landmark ruling *Liechtenstein v Guatemala* (“*Re Nottebohm*”) of 1955,<sup>104</sup> where it held that nationality constitutes:

...a legal bond having as its basis a *social fact of attachment*, a *genuine connection* of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact *more closely connected* with the population of the State conferring nationality than with that of any other State.<sup>105</sup> (Emphasis added)

The ICJ gave special relevance to the existence of an ‘effective link’ between the person and the state for determining that genuine connection, and ruled in favour of Guatemala not to recognise the nationality of Mr. Nottebohm as he lacked any prior “bond of attachment” or had very marginal links with Liechtenstein.<sup>106</sup> Amongst the factors playing a role in determining the existence of ‘the link’, the ICJ highlighted the need to take into consideration, amongst others, issues such as the habitual residence of the individual concerned, which in the case of Mr. Nottebohm was not met either as he had no prolonged residence in that country at the time of his application for naturalisation in Liechtenstein, and no intention of remaining in the country.<sup>107</sup> However, current interpretations of the Nottebohm decision consider that conferral of Liechtenstein nationality did not entitle Liechtenstein to give diplomatic protection; the conferral of nationality was in fact valid in spite of lacking a genuine link.

Moving now to the European Union, the Court of Justice of the European Union (CJEU) has controversially constrained itself from looking at issues related to the choices of member states in deciding who has or does not have ‘the closest connection’ or link with their country, and consequently who is entitled to the right of

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<sup>102</sup> European Commission, Press Release, Joint Press Statement by the European Commission and the Maltese Authorities on Malta’s Individual Investor Programme (IIP), European Commission – MEMO/14/70, 29.01.2014.

<sup>103</sup> S. Hall (1995), *Nationality, Migration Rights and Citizenship of the Union*, Dordrecht: Martinus Nijhoff Publishers.

<sup>104</sup> [1955] International Court of Justice, Reports 4.

<sup>105</sup> Page 23 of the judgment.

<sup>106</sup> The ICJ ruled: “Naturalization was asked for not so much for the purpose of obtaining legal recognition of Nottebohm’s membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations – other than fiscal obligations – and exercising the right to the status thus acquired”. Refer to pages 25 and 26 of the judgment. The ICJ concluded that the nationality had been granted “without regard to the concept of nationality adopted in international relations.” The ICJ highlighted that Mr Nottebohm had “sought dispensation from the condition of three years’ residence as prescribed by law, without indicating the special circumstances warranting such waiver”, p. 15.

<sup>107</sup> See p. 22 of the judgment. The ICJ concluded that “his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years - on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there.” p. 25.

residence there and can be considered a European citizen for the purposes of Union law.<sup>108</sup> The CJEU has nevertheless reiterated in several rulings that member states' decisions laying down the grounds of acquisition and loss of nationality must be exercised in "due regard of [Union] law".<sup>109</sup> As the 2010 *Rottmann* case demonstrated,<sup>110</sup> even though the acquisition and loss of nationality remains regulated under the exclusive remits of member states' legal systems, the fact that the case at hand presented a foreign element or a "cross-border dimension" brought it within the scope of European law, and hence could not be considered as a purely internal situation.<sup>111</sup> This judgement constituted one of the legal grounds used by DG Justice in its negotiations with Malta over the IIP.<sup>112</sup> The Luxembourg Court also reiterated that the obligation for member states to have due regard to Union law in the exercise of the member states' competence, which encompasses the obligation for national regulations setting the conditions for the acquisition and loss of nationality to be compatible with the EU rules and respect the rights of Union citizens.<sup>113</sup> As introduced above, one of the central aspects of the Advocate General Opinion in the *Rottmann* ruling was the relevance of the general principles of EU law in restricting the legislative power of member states in nationality matters, in particular the EU principle of sincere cooperation, which in his view "could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalization of nationals of non-member states".<sup>114</sup>

## 5.2 The principle of sincere cooperation re-loaded

The general principle of EU law, which played a most decisive role in the Malta citizenship-for-sale affair, was indeed the principle of sincere or loyal cooperation. This principle effectively means that the Union and the member states shall, in full mutual respect, assist each other in carrying out tasks that flow from the Treaties. Further, it requires member states to facilitate the achievement of the Union's tasks and to refrain from any measure that could jeopardise the attainment of the Union's objectives. As Lang (1990) has argued, Article 4 TEU obliges member states to abstain from introducing measures jeopardising the objectives of the Treaties, and the respect of general principles of EU law constitutes "a necessary condition for the operation of Community law".<sup>115</sup> The principle is formally enshrined in Article 4.3 TEU (previously Article 10 EC Treaty and former Article 5 EC Treaty before the entry into force of the Amsterdam Treaty in 1999).<sup>116</sup>

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<sup>108</sup> C-192/99 *Kaur*, 20 February 2001. See P. Shah (2001), "Case note on *Kaur*", *European Journal of Migration and Law*, Vol. 3, No. 2, pp. 271-278. For a critique refer to E. Guild (2004), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International, Chapter 4 (The Residence/Citizenship Nexus). Guild argues that "The hands-off approach of the ECJ is in sharp contrast to that of the European Commission of Human Rights (ECmHR)...when faced with a politically sensitive case but one where the ECmHR had already found a breach of article 3, inhuman and degrading treatment, instead of taking up the challenge of European Civil Rights, the ECJ backed off with the implicit argument of lack of jurisdiction", p. 76.

<sup>109</sup> Refer for instance to Case C-369/90, *M. V. Micheletti and others v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239, paragraph 10; See also Case C-192/99, *The Queen v. Kaur*, [2001] ECR I-1237 and Case C-200/02, [2004] ECR I-9925 – *Zhu and Chen v Secretary of the State for the Home Department*; and Case C-148/02 *Garcia Avello* [2003] ECR I-1163. Refer to S. Carrera and M. Merlino (2009), *State of the Art on the European Court of Justice and Enacting Citizenship*, CEPS Special Report, Centre for European Policy Studies, Brussels, April.

<sup>110</sup> Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, 2 March 2010.

<sup>111</sup> Refer to paragraph 10 of the AG Maduro Opinion.

<sup>112</sup> "EU Commission prepares legal challenge on Malta passport sales", *EUobserver* (<http://euobserver.com/justice/122843>).

<sup>113</sup> AG Maduro Opinion, paragraph 23. For an analysis, see J. Shaw (ed.) (2011), *Has the European Court of Justice Challenged Member State sovereignty in Nationality Law?*, EUI Working Papers, RSCAS 2011/62, EUDO Citizenship Observatory, Florence.

<sup>114</sup> Paragraph 30 of the Opinion. The former AG also pointed out in paragraph 31 that another general principle of importance is the protection of legitimate expectations.

<sup>115</sup> T. Lang (1990), "Community Constitutional Law: Article 5 EEC Treaty", *Common Market Law Review*, Vol. 27, pp. 645-681, page 654.

<sup>116</sup> Article 4.3 reads as follows: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member State



The provision includes two general duties or positive obligations for the member states in their mutual relations as well as those with the EU:<sup>117</sup> First, a reciprocal obligation to assist each other and second, a duty to take any measure facilitating the fulfilment of obligations emerging from primary or secondary EU law. It also covers one specific prohibition or negative obligation, which consists of abstaining from adopting measures jeopardising the Union's objectives. The principle of loyalty has configured itself as one of the most dynamic provisions in the Treaties, in particular its centrality in the regulation of EU-member states relationships and cooperation in the functioning of the European law (Klamert, 2014).<sup>118</sup> The role played by the CJEU here has been fundamental in understanding the principle as a *legal duty* for member states (including judicial and non-judicial authorities) to respect their obligations enshrined in Article 4.3 TEU in defence of the general Union's interests.<sup>119</sup> The CJEU has considered the principle as a key component of the EU legal system, lying at its core basis,<sup>120</sup> and as a duty of general application across the various areas of European law.

As Craig and de Búrca (2011) have pointed out, the Court has often emphasised that the "...duty of genuine cooperation is of general application and does not depend either on whether the Community competence is exclusive, or on any right of the Member State to enter into obligations towards non-member countries".<sup>121</sup> This corresponds with the ways in which the principle of sincere cooperation has been examined in the academic literature in areas where the scope of Community competence has been tenuous or in the hands of member states' exclusive competence, in particular: first, EU international relations; second, in the context of national enforcement of EU law by judicial and non-judicial authorities; and third, judicial cooperation in criminal matters. The main issue of debate in foreign affairs questions has been the unity of the EU in international relations, so that member states don't enter into negotiations and are constrained in exercising their own foreign policy competences and conclude agreements deviating from the common position adopted by EU on the international stage.<sup>122</sup> A similar influence can be ascertained in the context of the national

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shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."

Former Article 10 of the Treaty Establishing the European Community read as follows: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of the Treaty."

<sup>117</sup> K. Mortelmans (1998), "The Principle of Loyalty to the Community", *Maastricht Journal of European and Comparative Law*, Vol. 5, p. 86.

<sup>118</sup> For an in-depth discussion of the principle of loyal cooperation and a useful classification of its role in the EU legal system refer to M. Klamert (2014), *The Principle of Loyalty in EU Law*, Oxford Studies in European Law, Oxford: Oxford University Press.

<sup>119</sup> Case 22/70 ERTA (29) / Cases 3, 4 and 6/76 Kramer (n 30) / Opinion 2/91 (n 45) / Opinion 1/94 (n 41) / Case C-378/92 Commission v Spain [1993] ECR I-5095 / Case C-303/93 Commission v Italy (18 May 1994, paragraph 7). For analysis of more than forty CJEU cases refer to J.T. Lang (2003), "Development s, Issues and New Remedies – The Duties of National Authorities and Courts under Article 10 EC Treaty", *Fordham International Law Journal*, Vol. 27, No. 6, pp. 1904-1939. As Lang argues "the importance of Article 10 [now Article 4 TEU] is greatly underestimated. There are several reasons for this. Perhaps the most important is that when the Court gives a judgment which is in fact based on Article 10, it usually refers to its previous judgements but not to Article 10 itself. In particular, the Court repeatedly refers to the equivalence and effectiveness principles, ..., without mentioning Article 10", p. 1906.

<sup>120</sup> Joined Cases 6 and 11/69 *Commission v. France* [1969] ECR 523, paragraph 16; see also Case 43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455, paragraph 28). See John Temple Lang (1990), *Community Constitutional Law: Article 5 EEC Treaty*, (1990) 27 CMLRev 645.

<sup>121</sup> Case C-433/03 *Commission v Germany* (n 186) / Case C-266/03 *Commission v Luxembourg* (n 186).

<sup>122</sup> E. Neframi (2010), "The Duty of Loyalty: Rethinking Its Scope Through its Application in the Field of EU External Relations", *Common Market Law Review*, Vol. 47, pp. 323-359, which provides an analysis of the changes brought by the Lisbon Treaty, in particular in what concerns the area of EU external relations. See also C Hillion, "Mixity And Coherence in EU External Relations: The Significance of the Duty of Cooperation", *CLEER Working Paper 2009/1* (also published in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited - The EU and its Member States in the*

enforcement of EU law as regards remedies before domestic tribunals, which covers questions of procedural competence under the exclusive responsibility of member states as well as the procedural conditions under which EU rights are to be protected.<sup>123</sup>

The principle of loyalty has been also of relevance to EU criminal justice cooperation, which before the entry into force of the Lisbon Treaty in 2009 used to fall within the remits of member states' exclusive powers or intergovernmentalism. Still, the application of the principle of sincere cooperation over these domains was confirmed by the CJEU in the Case C-105/03 *Pupino* (2005), where a tribunal in Italy posed the question to the CJEU whether the Framework Decision on the rights of crime victims in criminal proceedings had an 'indirect effect' similar to Directives, sincere cooperation as enshrined in Article 4.3 TEU applies also to member states when they act within the scope of CFSP, and the Court concluded that this principle also applies to the old third pillar.<sup>124</sup> The CJEU followed the Opinion expressed by Advocate General Kokott in the same case, who underlined that member states are bound by a duty of mutual loyalty in EU law and that comes from the provisions of the Treaties calling for creation of an

ever-closer Union among the peoples of Europe, on the basis on the basis of which relations between the member states and between their peoples can be organised in a manner demonstrating consistency and solidarity. That objective will not be achieved unless the member states and institutions of the Union cooperate sincerely and in compliance with the law.<sup>125</sup>

The above indicates that the scope *ratione materiae* of the principle of sincere cooperation extends also to areas of intervention in domains of 'overlapping' competence between the Union and national arenas, or even in domains where member states keep the monopoly of action. By analogy, could this apply also to nationality and citizenship matters, and is so, how?

### 5.3 Sincere cooperation, nationality and the genuine link: Living apart together?

The extent to which general principles of EU law have remodelled member states' autonomy on the regulation of nationality matters has been subject to rich discussion in the literature.<sup>126</sup> De Groot (2003) has argued that certain actions or inactions by EU member states in regulating the grounds of acquisition and loss of nationality could be in violation of EU general principles, such as the principle of sincere cooperation. In his view, such confrontation could arise when a member state would (by surprise) confer its nationality to a

*World*, Hart Publishing (2010); and M. Cremona (2008), "Defending the Community Interest: The Duties of Cooperation and Compliance", in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals*, Hart Publishing.

<sup>123</sup> Refer to Case C-186/98 *Nunes and de Matos*, pp. 219-222. See also Case C-45/76 *Comet BV v Siergewassen*; Case C 179/84 *Bozetti*, and even here the CJEU later on imposed two requirements or twin principles: First, the principle of equivalence (remedies at domestic level to ensure compliance with national law must be available in the same manner to ensure compliance with EU law), and second the principle of practical possibility (national procedures must not make the exercise of an EU right impossible in practice, effective judicial review). The Court ruled according to Craig and de Búrca that "Member States are required by EU law – more specifically by Article 4.3 TEU – to take 'all effective measures to sanction conduct which affects the financial interests' of the EU". P. Craig and G. de Búrca (2011), *EU Law: Text, Cases and Materials*, Fifth Edition, Oxford University Press.

<sup>124</sup> The CJEU found in paragraph 42 that "...given the identical binding effect of both types of provision and the need to ensure the useful effect (*effet utile*) of EU law, nothing prevents the Court from recognizing the duty on national authorities, and particularly national courts, to interpret national law in conformity with EU law, and the existence of a duty of loyal cooperation similar to that laid down in Article 10 TEC within the Treaty on European Union". It also went onto saying that "It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in paragraph 26 of her Opinion."

<sup>125</sup> Paragraph 26 of the Opinion.

<sup>126</sup> C. Gortázar Rotaecche (2013), "Identity, Member States Nationality and EU Citizenship: Restitution of Former European Nationals v. Naturalisation of New European Residents?", in E. Guild, C. Gortázar Rotaecche and D. Kostakopoulou (eds), *The Reconceptualisation of European Union Citizenship*, Leiden: Brill Nijhoff, pp. 15-32.

large or disproportionate number of persons holding the nationality of a non-EU member state, without prior consultation with the other member states and Brussels.<sup>127</sup> As we have seen in the previous section of this essay, this was a position later followed by AG Maduro Opinion in *Rottmann*.<sup>128</sup> D'Oliveira (1999) has been of a different opinion. In his view the lack of consultation would not imply a violation of the principle of solidarity between the member states in these cases, “owing to the fact that neither Member States, not the Commission, nor the Council or any other Community institution have called since 1957 for any revision or implementation..., it appears that the lack of solidarity with the Community in this area is not an issue”.<sup>129</sup>

The Malta citizenship-for-sale provides us now with a tangible example where the European institutions, in particular the Commission and the European Parliament, have strongly reacted against a national measure on grounds of acquisition of nationality and called for its modification, and where the principle of loyal cooperation has been brought to the forefront of the discussions. The application of the sincere cooperation duty in the Maltese affair however is not exempted from a number of open questions which call for further consideration and reflection. Neframi (2010) has rightly pointed out that the ‘duty of loyalty’ varies according to the facet of the Union’s interest.<sup>130</sup> Yet, how was the Union’s interest affected in the Malta citizenship-for-sale affair? The first step in determining the applicability of this provision to the Maltese citizenship programme is identifying the task at hand and the objective at risk.

A likely candidate for any attack on the Maltese passport-for-sale programme could be the coherence of the internal market. Selling passports to people who want to enjoy free movement within the EU could be regarded as inconsistent with the spirit of the internal market.<sup>131</sup> Malta was seen to take advantage of the margin of manoeuvre on grounds of nationality to design a citizenship investor scheme for its own economic interests whose main attractiveness included the possibility for applicants to move and reside elsewhere in the EU. It would be difficult for the internal market to be disproportionately perturbed by the arrival or intra-EU mobility/residence of a few thousand people (+/- 1,800) on newly purchased Maltese passports. Yet, perhaps for once, numbers were not so central in this case. What may be learned from the Malta citizenship-for-sale affair is that when determining the compatibility of member states’ actions/inactions on grounds of acquisition of nationality their *qualitative* effects may sometimes take precedent over quantitative ones. While the consequences of the Maltese IIP would be indeed marginal in pure numerical terms, the qualitative or substantive effects of the IIP seemed to be given far more weight: putting a price tag on Maltese nationality, quoting Vice-President Reding, led to a more disturbing dilemma for European institutions: how much does EU citizenship cost?

The commercialisation of Union citizenship went even one step further in the case of Malta by the introduction of a private-sector actor as the intermediary between the state and foreigners seeking to purchase citizenship. This was a point that the Commission did not particularly emphasise, yet it was one of the most objectionable aspects of the sale of Maltese citizenship from the perspective of the EU. As we have studied in section 2 above, the operational implementation of the IIP was put in the hands of a

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<sup>127</sup> R.-G. De Groot (1998), “The Relationship between the Nationality Legislation of the Member States of the European Union and European Citizenship”, in M. La Torre (ed.), *European Citizenship: An Institutional Challenge*, Kluwer Law International, pp. 115-147; See also R.-G. De Groot (2003), “Towards a European Nationality Law”, Inaugural Lecture, University of Maastricht, pp. 20 and 21. As a Commission representative declared in the Maltese Press, “Malta might have had to consult other member states before proceeding with the IIP”. See “IIP / Brussels contemplating infringement proceedings against Malta”, *Malta Today*, 18 January 2014 ([www.maltatoday.com/mt/en/newsdetails/news/national/IIP-European-Commission-contemplating-infringement-proceedings-against-Malta-20140118](http://www.maltatoday.com/mt/en/newsdetails/news/national/IIP-European-Commission-contemplating-infringement-proceedings-against-Malta-20140118)).

<sup>128</sup> Opinion Advocate General Poiares Maduro, 30 September 2009, Case C-135-08, *Janko Rottmann v Freistaat Bayern*.

<sup>129</sup> H.U. Jessurun d'Oliveira (1999), “Nationality and the European Union after Amsterdam”, in D. Okeeffe and P. Twomey, *Legal Issues of the Amsterdam Treaty*, Oxford, pp. 395-412, at p. 405. This was also acknowledged by de Groot who stated that “Nevertheless, much depends, of course, on the reaction or non-reaction of the other Member States and the Commission” (p. 21).

<sup>130</sup> E. Neframi (2010), “The Duty of Loyalty: Rethinking Its Scope Through its Application in the Field of EU External Relations”, *Common Market Law Review*, Vol. 47, pp. 323-359.

<sup>131</sup> Article 3.3 of the Treaty on the European Union.

concessionaire. A private business has been charged with finding wealthy people who would like another passport and selling to them the idea of buying a Maltese one. The bargain for citizenship and the merits and weaknesses of purchasing Maltese citizenship (as opposed to some other one) fell to a commercial enterprise. From the way in which the concessionaire advertises the Maltese programme, one could conclude that the people whom the business is targeting do not particularly want to live or reside in Malta.<sup>132</sup> The company anticipates that what will attract the customer is the possibility to move and live in some other EU member state or even the US.<sup>133</sup> Thus the price of Maltese citizenship is based on the acquisition of EU citizenship, and the rights and freedoms that it bestows. The people buying Maltese citizenship really want to live somewhere else in the EU and are willing to pay the price to Malta. From this perspective, Malta could be seen as a free rider charging a hefty price for people to buy something that other EU states provide and pay for – residence in their country and Union citizenship.<sup>134</sup>

Therefore the main EU objective at risk by the Maltese IIP was the very status of citizenship of the Union. The Preamble of the Treaty on the European Union (TEU) stipulates member states' commitment to "resolve to establish a citizenship common to nationals of their countries". This sentence needs to be read along with the Union's objectives outlined in Article 3 of the Treaty on the European Union (TEU),<sup>135</sup> Part Two of the Treaty on the Functioning of the European Union (TFEU), and Title V of the EU Charter of Fundamental Rights (Citizens Rights). In light of the kind and scope of the responses by the European Commission and the European Parliament (section 3 above), tagging a price to citizenship of the Union by the Maltese IIP were deemed by European institutions to jeopardize the substance of citizenship of the Union and its common nature to nationals of EU countries. Allowing the richest third-country nationals to obtain fast-track EU citizenship (without any other criteria being considered) was additionally considered to be discriminatory in nature.<sup>136</sup>

In order to address these concerns, one of the main demands by the European Commission for Malta to address its duty of sincere cooperation was to introduce a "genuine link" or "genuine connection" developed in the above-mentioned ICJ *Nottebohm* judgement for awarding Maltese citizenship to any applicants under the IIP. The Commission understanding of 'the link' was a requirement calling Maltese authorities to introduce "an effective residence status in the country" requirement prior to the acquisition of Maltese nationality. The 'linking factor' in nationality matters however bears some reflection. What is that genuine link really about? What are the exact grounds for determining that a link is *de facto* 'genuine'? How to determine those links or 'bond' in an objectively verifiable manner? The line of argumentation by the ICJ in

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<sup>132</sup> Refer to <https://www.henleyglobal.com/citizenship-malta-citizenship>. See also the current controversy concerning a commission formula on sales, which according to the *Times of Malta* "Henley Estates are asking for 80 per cent of the commission on sales resulting from their referrals of clients of the citizenship scheme, with 60 per cent going to the chain of entities leading to Henley and Partners, as well as to Henley and Partners itself. They also want a high commission on rentals. However, the real estate agents in Malta believe that their cost structure means this level of commission would not be sustainable". Refer to [www.timesofmalta.com/articles/view/20140316/business-news/First-applicants-for-Maltese-citizenship-are-approved.510827](http://www.timesofmalta.com/articles/view/20140316/business-news/First-applicants-for-Maltese-citizenship-are-approved.510827)

<sup>133</sup> See "Malta's VWP impact on US immigration to be reviewed in 2014", *Malta Independent*, 24 November 2013.

<sup>134</sup> This was a point raised by the above-mentioned European Parliament Resolution on EU citizenship for sale which stated in paragraph 10 that "Notes that ongoing competition for more attractive investment conditions or financial resources may lead to a lowering of the standards and requirements for obtaining Schengen Area residence permits and EU citizenship".

<sup>135</sup> Article 3.2 TEU states that objective that "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers...".

<sup>136</sup> Article 3.3 highlights that the Union "shall combat social exclusion and discrimination and shall promote social justice and protection...". This provision also covers intergenerational solidarity, economic, social and territorial cohesion and solidarity among member states, cultural and linguistic diversity, the euro and peace, security and sustainable development in its relations with the world (including here human rights protection). Refer also to European Parliament resolution *on EU citizenship for sale*, 2013/2995(RSP), 16 January 2014, paragraph K, which stated that "whereas concerns exist as regards possible discrimination because these practices by Member States only allow the richest third-country nationals to obtain EU citizenship, without any other criteria being considered".

*Nottebohm* has been in fact subject to rich and critical scholarly debate, and there are various ways to interpret it.

Scholars like Hall (1995) have argued in favour of the ICJ doctrine and emphasized that the duty of sincere cooperation would be breached when a member state confers its nationality on a person who does not possess a genuine link with that State, as his/her clothing as a national of that member state could be considered to be ephemeral, abusive or simulated, and hence contravene the standard enshrined in *Nottebohm*.<sup>137</sup> Others have been critical about the narrowness of the genuine link concept and the high level of subjectivity left in the hands of the nation-state in trying to determine the existence of links such as ‘bond of attachment’ or other ‘social ties’, which has in the past posed fundamental rights challenges. Guild (2004) for instance has alluded to the ways in which states have misused the genuine link requirement to exclude certain groups of people from their citizenship and security of residence status in a manner contrary to non-discrimination on the basis of race and ethnicity.<sup>138</sup> The case of the British nationals from East Africa who were excluded from residency in the UK under the Commonwealth Immigrant Act of 1968 constitutes a case in point. The European Commission of Human Rights (ECmHR) of the Council of Europe declared the Act to be contrary to Article 3 of the European Convention of Human Rights, i.e. inhuman and degrading treatment by discriminating on the basis of race or colour.<sup>139</sup> This did not preclude the UK from passing the British Nationality Act in 1981 and re-allocating citizenship to those persons presenting ‘a link’ to the UK which was dependent on whether a parent was born in the UK, and therefore categorised the East African Asians as ‘British Overseas Citizens’ without a right of residence and falling outside the meaning of UK nationals for the purposes of Union citizenship law. Indeed, as Kruma (2012) has highlighted, there is a lack of agreement and common understanding on a harmonised approach on the exact scoping and definition of the ‘effective’ and ‘genuine’ link among scholarly literature and the relevant international and European legal instruments.<sup>140</sup>

The European Parliament’s and European Commission’s insistence on the link as the most important dimension within the larger context of the principle of sincere cooperation can be therefore seen as a double-edged argument raising a fundamental dilemma from the angle of Union citizenship. The residence criteria could arguably constitute one of the more objectively verifiable factors of the relationship between a person and the country granting naturalisation. Yet, what is precisely ‘habitual’, ‘effective’ or ‘functional’ residence for the purposes of citizenship law? As the Maltese citizenship-for-sale affair illustrates, the exact meaning and scope of residence remains grey or contested, and is still subject to a certain degree of arbitrariness and flexible application with respect to wealthy foreigners. On the other hand, by supporting the *Nottebohm* standard the European institutions may be in fact fuelling nationalistic misuses by member states of the genuine link as a way to justify restrictive domestic policies on the acquisition of nationality – such as those culturally-driven components of the ‘genuine link’ related to ‘social ties’ or integration/assimilation tests – whose compatibility with other EU general principles (such as that of non-discrimination, diversity and fundamental rights) remains at stake (Carrera, 2009; Carrera & Guild, 2010).<sup>141</sup>

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<sup>137</sup> S. Hall (1995), *Nationality, Migration Rights and Citizenship of the Union*, Dordrecht: Martinus Nijhoff Publishers. According to Hall “A duty of solidarity must include refraining from acts, within the scope of that duty, which are deceptive or misleading towards those to whom the duty is owed. Any deceptive or misleading act by a Member State towards other Member States or the Community institutions can be categorized as a breach of the duty of solidarity even without the element of real or potential economic disruption...”. See also S. O’Leary (1992), *Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows*, 12 Yearbook of European Law 353.

<sup>138</sup> E. Guild (2004), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International, Chapter 4 (The Residence/Citizenship Nexus), pp. 68-81.

<sup>139</sup> *East African Asians* [1973] 3 EHRR 76.

<sup>140</sup> K. Kruma (2012), *An Ongoing Challenge: EU Citizenship, Migrant Status and Nationality (Focus on Latvia)*, Lund University, Faculty of Law, pp. 58-63. She also argues that in the context of the EU, where free movement is a key component of citizenship of the Union, the effective link test becomes less relevant and of limited application.

<sup>141</sup> S. Carrera (2009), *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers, pp. 383-387. S. Carrera and E. Guild (2010), *Are Integration Tests Liberal? The ‘Universalistic Liberal Democratic Principles as Illiberal Exceptionalism*

Consequently, the dilemma that emerges from the insistence by the European Parliament and the Commission on the need for member states to ensure and strengthen the genuine connection could paradoxically lead to the reinforcement of nationalism in determining who is or is not an EU citizen and the possible exclusion of certain groups of people from EU citizenship in a manner that is inherently in tension with non-discrimination. A similar dilemma can be found in the critical analysis carried out by Shachar and Hirschl (2014) on cash-for-passport programmes in the EU which put up for sale what they call “*Olympic citizenship*” to the world’s moneyed elite.<sup>142</sup> By advocating the prohibition of these programmes and instead over-valuing the public act of naturalisation and the need for the existence of a “*just nexi*” or “*real connections*” between the state granting nationality and the individual, these authors may be indirectly supporting the uses of exclusionary and nationalistic citizenship practices by the nation-state focused on testing ‘the link’ or integration of the applicant in a constructed set of national liberal democratic values artificially ascribed to the civic fibre of ‘the receiving society’.

After all, when moving within the EU legal system, EU member states had been specifically prohibited by the Luxembourg Court from questioning the citizenship decisions of other member states and following strictly the *Nottebohm* line of reasoning on the genuine link. In the *Micheletti* case, the CJEU held that as long as a member state acknowledges someone as its citizen,<sup>143</sup> other member states are not permitted to look behind that decision, including the existence of a link, in order to justify restrictions to EU citizenship rights and freedoms.<sup>144</sup> Also, as highlighted above, the Commission might not have taken duly into consideration that while the ICJ did not consider that *Nottebohm* was entitled to diplomatic protection by Liechtenstein, the conferral of nationality was in fact valid in spite of lacking a ‘genuine link’. By bringing back a certain reading of the ICJ argumentation on the genuine link enshrined in the *Nottebohm* ruling in nationality matters for the purposes of Union citizenship, the Commission may be providing member states with the possibility to re-use or misuse the lack of real links argument for limiting and/or restricting EU citizenship freedoms.

A way to address this conundrum could have been instead to underline the contravention of the principle of sincere cooperation from the free-riding logic; so that Malta and other EU member states with similar programmes are acting as free riders, charging a price for people to buy something that other EU member states provide and pay for – residence in their country and/or Union citizenship freedoms. Also, the outright selling and commercialisation of citizenship by the intervention of a private sector actor as intermediary affects the very concept and substance of European citizenship. Moreover, in understanding and interpreting the genuine link standard, the Commission could have more carefully considered the jurisprudence by the European Court of Human Rights in Strasbourg on citizenship-related rights, which has usefully underlined the incompatibility between some of the uses given by some EU member states of the genuine link or connection with non-discrimination and equality treatment principles in the field of citizenship (See section 5.1 above).<sup>145</sup> True, the residence requirement may well constitute one of the few available ways to reduce the arbitrariness enjoyed by states selling citizenship of the Union. Yet, the risk of the genuine link argument is to take us closer to nationalism in the domain of citizenship, which defies the purposes of citizenship of the Union as the fundamental status of nationals of EU member states,<sup>146</sup> having at its basis (according to the EU Treaties) the fight against discrimination and the promotion of social justice and fundamental rights.

As regards the procedural components of the principle of sincere cooperation, the question could be posed whether Malta should have consulted other EU member states and the European institutions prior to the

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<http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/255-how-liberal-are-citizenship-tests?showall=&start=8>.

<sup>142</sup> A. Shachar and R. Hirschl (2014), “On Citizenship, States and Markets”, *Journal of Political Philosophy*, Vol. 22, No. 2, pp. 231-257.

<sup>143</sup> J. d’Oliveira (1993), “Note of the Case C-390/90 *Micheletti v Delegación del Gobierno de Cantabria*”, *Common Market Law Review*, Vol. 30, p. 623.

<sup>144</sup> See also C-200/02 *Zhu and Chen* [2004] ECR I-9925.

<sup>145</sup> See for instance G.-R De Groot and O. Vonk (2012), “Nationality, statelessness and ECHR’s Article 8: Comments on *Genovese v Malta*”, *European Journal for Migration Law*, Vol. 4, No. 3, pp. 317-325.

<sup>146</sup> Case C-184/99, *Grzelczyk* [2001] ECR I-6193.

adoption of the IIP. This was highlighted by a European Commission representative in the Maltese press, who said that “Malta might have had to consult other member states before proceeding with the IIP”.<sup>147</sup> While the mere act of informing or consulting the European counterparts and institutions would not have excused Malta’s breach of EU general principles, the European Commission could have put more emphasis on the necessity for any current and future national action/inaction affecting directly or indirectly EU citizenship rights and freedoms, and hence the substance of citizenship of the Union, to be subject to exchange of information and/or prior consultation to other EU member states and its own Commission services, and give some clear guidance on what kinds of restrictions exist on member states when granting citizenship which result from their duty of sincere cooperation in EU law.<sup>148</sup> This would have been in line with the request put forward by the European Parliament in the Resolution on EU citizenship for sale, which called on the Commission to issue recommendations and guidelines in order to prevent such investor/donor citizenship schemes in the EU.<sup>149</sup> A similar comment could be made with respect to the investor residency programmes examined in section 4.2 above. It appears that these EU member states have not lived up to their obligations to report to the European Commission and other EU states on the adoption and implementation of these schemes as they clearly have an impact on Union’s citizenship and free movement objectives as well (Geyer, 2007).<sup>150</sup>

Apart from considerations related to the normative specificities of the principle of sincere cooperation in the EU legal system and its application to nationality matters, the Maltese citizenship-for-sale affair has perhaps most importantly revealed the relevance of a set of European and international principles providing a ‘post-national constellation’ (Habermas, 2001) of normative and accountability channels and venues affecting the State’s discretion on the attribution, limits or revocation of citizenship rights to individuals.<sup>151</sup> ‘Post-national’ is here used as meaning the increasing deprivation of the classic nation-state of its formally enshrined and autonomous attributes and competences, such as enforcing individual and citizenship rights. This transformed constellation of post-national citizenship principles is exerting ever more influence over the boundaries of ‘who’ is a foreigner and ‘who’ is a citizen in the European Union, as well as the traditional sovereign right of states to determine who are nationals and who are citizens, and the delivery of supranational citizenship rights, which is subject to increasing dynamism and pressures in Europe. It is here where the Maltese citizenship controversy might have constituted more of a breakthrough in the changing facets of citizenship of the Union.

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<sup>147</sup> “IIP / Brussels contemplating infringement proceedings against Malta”, *Malta Today*, 18 January 2014 ([www.maltatoday.com.mt/en/newsdetails/news/national/IIP-European-Commission-contemplating-infringement-proceedings-against-Malta-20140118](http://www.maltatoday.com.mt/en/newsdetails/news/national/IIP-European-Commission-contemplating-infringement-proceedings-against-Malta-20140118)).

<sup>148</sup> As Lang (2003) has emphasized “it is well established that even in the absence of any express duty under Community secondary legislation, national authorities have duties under Article [4.3] to provide information requested by the Commission to enable it to assess whether the Member States is in breach of its obligations under EC law.” See T. Lang (2003), “Developments, Issues and New Remedies – The Duties of National Authorities and Courts under Article 10 EC Treaty”, *Fordham International Law Journal*, Vol. 27, No. 6, pp. 1904-1939.

<sup>149</sup> European Parliament, Resolution on EU Citizenship for Sale, paragraph 11 “Calls on the Commission to assess the various citizenship schemes in light of European values and the letter and spirit of EU legislation and practice, and to issue recommendations in order to prevent such schemes from undermining the values that the EU has been built upon, as well as guidelines for access to EU citizenship via national schemes”.

<sup>150</sup> This would be in line of Council decision 2006/688/EC of 5 October 2006, OJ L 283/40 of 14.10.2006, which stipulates in Article 2.1 that member states have an obligation to “communicate to the Commission and the other member states information on the measures that they intend to take, or have recently taken, in the areas of asylum and immigration, where these measures are publicly available and are likely to have a significant impact on several member states or on the European Union as a whole”. See F. Geyer (2007), “Germany’s Regularisation of November 2006: Committed to an EU Immigration Policy?”, CEPS Commentary, Centre for European Policy Studies, Brussels, February.

<sup>151</sup> J. Habermas (2001), *The Postnational Constellation: Political Essays*, Cambridge, MA: MIT Press, Chapter 4, pp. 58-112, where he explores the conditions for a democratic politics beyond the nation-state through the lenses of the European Union, as well as the arguments for and against a post-national democracy.

## 6. Conclusions

The Malta citizenship-for-sale affair has reopened a question that has remained outstanding since the origins of citizenship of the Union in 1993 and its progressive development to date: Can EU member states' actions on the acquisition and loss of nationality still be freely practiced without any EU supervision and accountability? The Maltese Individual Investor Programme (IIP) allowing for the outright sale of Maltese nationality to wealthy foreigners provoked tremendous criticism both domestically and by European institutions. The price of Maltese citizenship was largely based on the acquisition of EU citizenship, and the free movement rights that it confers on the beneficiaries. In an unprecedented move in nationality matters at EU levels, the European Parliament and the European Commission expressed their opposition against the adoption of the investors' scheme and called on Malta to implement a series of amendments in the IIP initiative. The main demand by the Commission was for Malta to introduce a "genuine link" for awarding Maltese citizenship to any applicants under the IIP in the form of an effective residence requirement.

Few anticipated the affair and the ways in which it developed. The limited quantitative effects of the Maltese investor programme concerning the total number of potential beneficiaries were expected to be minor for other EU member states. Yet, while the case for EU intervention was a difficult one to argue, the European Commission announced the start of work on infringement proceedings against Malta and subsequently succeeded to convince the Maltese authorities to amend the citizenship scheme in line with some EU demands. How did this happen and which were the legal grounds backing up European institutions' intervention? This essay started by providing a background to the passports-for-sale controversy and an assessment of the main concerns emphasised by European institutions.

While Malta has been the only EU member state expressly singled out by European institutions to bring its citizenship scheme in line with the 'EU's values', Malta is not by far the only member state having investor/donor citizenship and residence programmes in the EU. A comparative analysis in a selection of EU member states has revealed that there at least two others where EU citizenship has a price tag, namely Cyprus and Bulgaria. A common characteristic of some of these citizenship investors' schemes is that they call on applicants to guarantee a financial donation to the State, going beyond the actual 'investment' in the country. We have argued that these member states may be taking advantage of their exclusive competence on questions of acquisition/loss of nationality to implement 'attractive' schemes for wealthy foreigners pursuing their own national economic advantages and interests to the detriment of those of the Union as a whole. One of the key components that are advertised for these programmes to be 'attractive' is the possibility to move and reside elsewhere in the EU than in the state that has pocketed the money. This positions these member states as free-riders unjustly benefiting from the attractiveness of life elsewhere in the Union and the substance of citizenship of the Union.

There are additionally nine EU member states – Bulgaria, Cyprus, Greece, Hungary, Ireland, Latvia, Portugal, Spain and the UK – with immigrant investor programmes offering fast-track access to residence status and even nationality, where the wealth status of the applicant constitutes the central connecting factor for benefiting from a privileged migratory status and security of residence/settlement in the country. The concept of 'investment' differs from state to state, yet they present some common features, such as the need for applicants to acquire property in the country, depositing a minimum amount of capital in a national bank or investing in state bonds. Yet, EU immigration law provides some limits as regards their margin of manoeuvre in golden visa/residence migration schemes. The status of third-country national long-term resident has been harmonised at EU levels with the adoption of the 2003/109 Directive concerning the status of third-country nationals who are long-term residents. The Directive does not foresee the possibility for member states to sell long-term resident status to rich non-nationals. Therefore, while some member states may actually be selling residence status and even calling it 'permanent' under their national law, if the conditions of the Directive are not fulfilled then the status cannot be EU permanent residence in light of EU law. In contrast to the selling of Union citizenship, the direct consequence is that these programmes cannot provide the holder with a right to move to and live in any other member state, so there is no direct 'EU benefit' for rich non-nationals.

It is therefore striking to see that no other EU member state has been called to attention by the European institutions, which could give rise to arguments of inequality of treatment among member states. Maltese citizenship-for-sale cannot however be properly understood without paying due attention to the domestic



political struggles between the current Maltese government and the opposition party, and the links of the latter with European institutional actors. Beyond the specific political disputes backing up the affair, this essay has argued that the EU responses can be seen as a legal precedent in ascertaining the lawfulness of current investor citizenship programmes across the Union as well as future nationality-citizenship disputes related to member states' actions/inactions on the acquisition of nationality. Contrary to preliminary assumptions, the Commission succeeded in persuading Malta to change the IIP.

The Commission and the European Parliament have successfully claimed co-ownership over citizenship matters, especially when domestic regulations have an impact over supranational citizenship individual freedoms and the EU general principle of sincere cooperation. While the quantitative implications of the IIP would be limited in relation to the number of applicants benefiting from the scheme and potentially moving/residing in other EU member states, the European institutions gave preference to the qualitative repercussions of selling nationality over the very concept of citizenship of the Union. The Maltese citizenship-for-sale programme jeopardised the duty of sincere cooperation by putting at risk the substance of Union citizenship; EU citizenship freedoms should not be for outright sale. What legal arguments did Commission use to induce the introduction of legislative changes into the Maltese IIP proposal and the grounds for acquisition of Maltese citizenship by wealthy foreigners? The European institutions made special reference to a set of supranational legal standards and judge-made general principles of law, in particular the need for Maltese nationality law to ensure a 'genuine link' between the applicant for naturalisation and the country in the form of an effective residence requirement. The lack of this 'link' was viewed by European institution as a violation of the EU principle of sincere or loyal cooperation.

The European institutions' insistence on the genuine link as a key component of the larger context of the principle of sincere cooperation poses a fundamental dilemma from the angle of Union citizenship: what is this genuine link really about? While 'effective residence' could constitute one of the most objective ways to ensure legal certainty in the citizenship by investment naturalisation in Malta, the actual concept of genuine link and 'effective residence' are still open to a certain degree of arbitrariness and margin of manoeuvre by State authorities in the domains of nationality and citizenship. The genuine connection argument has also justified member states' use of discriminatory practices and naturalisation conditions – in the form of integration tests – calling upon applicants to show societal ties or assimilation to the receiving country. The incompatibility between these practices and other EU general principles, such as non-discrimination, remains very much at stake. By insisting mainly on the genuine link standard; European institutions may be fuelling nationalism in the determination of who is or is not an EU citizen by member states.

This essay has suggested that European institutions should have instead emphasised the IIP contravention of the principle of sincere cooperation on the basis of the following two objections: first, the free-riding logic characterising citizenship-for-sale schemes, according to which these EU member states are in fact selling free movement and residence in other EU member states; and second, the outright selling and commercialisation of Union citizenship through the intervention of a company. Both elements have profoundly affected the very concept and substance of citizenship of the Union. And while the exact number of beneficiaries of citizenship by investment programmes may be quantitatively irrelevant, the negative qualitative implications of the free-riding and commercial aspects inherent in these schemes take precedence in determining the violation of the principle of sincere cooperation. Also, more careful consideration could have been given to the jurisprudence by the European Court of Human Rights in Strasbourg on citizenship-related rights and the misuses by states of the genuine link argument. Concerning the procedural components of the principle of sincere cooperation, the European Commission could have put more emphasis on the need for EU member states like Malta to consult other EU member states and the European institutions before introducing national laws affecting the substance of citizenship of the Union.

Can the case be seen as a breakthrough for the Union's role in nationality matters? The Maltese citizenship-for-sale affair represents a first direct incursion of European institutions in a previously exclusive terrain of competence by EU member states – namely the grounds for bestowing citizenship. It has shown the relevance and increasing importance of a set of European and international general principles limiting the discretion of member states in citizenship matters and providing an institutional design for scrutinising their actions in light of their implications for supranational citizenship freedoms, and limiting their discretion in determining the scope of the citizenry. Clearer EU guidance is nevertheless now needed on the kinds of

restrictions member states must respect in granting citizenship, based on their duty of sincere cooperation in EU law. There is probably no need for the EU to engage with member states on these nationality rules. But when member states' rules on granting citizenship are designed to take advantage of wealthy people's desire to acquire EU citizenship enabling them to live and freely move to all other member states, then it is in the interests of the whole of the EU to ensure that there is fair play.

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## **Annex 1. Individual Investor Programme of the Republic of Malta**

### **SCHEDULE<sup>152</sup>**

#### **Contribution Requirements and Schedule of Fees**

##### **1. Contribution Requirements**

The following contributions shall be required as a minimum to qualify for citizenship under the programme:

- (a) main applicant: EUR 650,000 (six hundred and fifty thousand euro), of which a non-refundable payment of EUR 10,000 (ten thousand euro) shall be remitted as a non-refundable deposit prior to submission of the application;
- (b) spouse: EUR 25,000 (twenty five thousand euro);
- (c) for each and every child below 18 years of age: EUR 25,000 (twenty five thousand euro);
- (d) for each and every unmarried child between 18 years of age and 26 years of age: EUR 50,000 (fifty thousand euro);
- (e) for each and every dependant parent above 55 years of age: EUR 50,000 (fifty thousand euro).

##### **2. Schedule of Fees**

The following fees shall be payable under each application:

(1) Due diligence fees:

- (a) main applicant: EUR 7,500 (seven thousand five hundred euro);
- (b) spouse: EUR 5,000 (five thousand euro);
- (c) for each and every child aged between 13 years of age and 18 years of age: EUR 3,000 (three thousand euro);
- (d) for each and every dependant unmarried child between 18 years of age and 26 years of age, EUR 5,000 (five thousand euro);
- (e) for each and every dependant parent above 55 years of age: EUR 5,000 (five thousand euro).

(2) Passport fees and bank charges fees:

- (a) Passport: EUR 500 (five hundred euro) per person;
- (b) Bank charges: EUR 200 (two hundred euro) per application.

(3) The contribution requirements and the fees stipulated in this Schedule shall apply in respect of applications and grants of citizenship under the programme notwithstanding the provisions of any other regulations.

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<sup>152</sup> Individual Investor Programme of the Republic of Malta Regulations, 2014, L.N. 47 of 2014, Maltese Citizenship Act (CAP. 188), B 341.

## Annex 2. Investor Citizenship Programmes in the EU

	Law	Authority	Investment or Donation	Residency	Other Criteria	Number of Beneficiaries
<b>AUSTRIA</b>	Article 10.6 Austrian Nationality Act <sup>153</sup>  Not officially recognized programme	Government of the Republic of Austria	“Significant direct investment (passive investments in government bonds do not qualify)” and “The foreign investor must make an extraordinary contribution alongside his investment, such as bringing new technologies to the country or creating a substantial number of new jobs”. <sup>154</sup>	N/A	“In addition to standard documentary requirements (passports, birth and marriage certificates, etc.), a completely clean personal record (certificate of no criminal record), a comprehensive CV and business background information as well as impeccable references must be provided by all applicants...applicants are normally required to attend an interview in Austria” <sup>155</sup>	2008: 39 2009: 40 2010: 30 2011: 29 2012: 0 2013: 0 <sup>156</sup>

<sup>153</sup> Article 10.6 of the Federal Law concerning the Austrian Nationality (Nationality Act, 30 July 1985, Federal Law Gazette of the Republic of Austria, FLG No. 311/1985).

<sup>154</sup> Refer to Henley & Partners ([www.henleyglobal.com/citizenship-austria-citizenship](http://www.henleyglobal.com/citizenship-austria-citizenship)). According to the information provided in their website “Under the citizenship-by-investment provisions, an applicant is required to invest actively in the Austrian economy, for example in the form of a joint venture or direct investment in a business that creates jobs or generates new export sales.”

<sup>155</sup> Ibid.

<sup>156</sup> Statistics published by Times of Malta, Austria denies it has ever sold citizenship – Council insists various factions are ‘misinterpreting laws’, 23 January 2014 ([www.timesofmalta.com/articles/view/20140123/local/Austria-denies-it-has-ever-sold-citizenship.503690](http://www.timesofmalta.com/articles/view/20140123/local/Austria-denies-it-has-ever-sold-citizenship.503690)).

	Law	Authority	Investment or Donation	Residency	Other Criteria	Number of Beneficiaries
<b>BULGARIA</b>	<p>Bulgarian Citizenship Act, SG, 136, November 18, 1998., amended SG 41, April 26, 2001, amended SG 54, May 31, 2002, amended in February 2013<sup>157</sup></p> <p>Last amendment: SG 108/17 December 2013</p>	<p>Ministry of Justice</p> <p>President of the Republic</p>	<p>Refer to criteria for obtaining permanent residence in Bulgaria provided in Annex 3 below</p>	<p>Art. 40. (Amend., SG 42/01) (1) of the FRBA, emphasis that “The revoking of the right of stay of a foreigner in the Republic of Bulgaria shall be imposed when: 6. is found that the foreigner, who was granted a long-term or permanent residence permit, was absent from the territory of the member states of the European Union for a period of 12 consecutive months, except in cases of permitted permanent stay.</p> <p>This possibility exists since May 2009.</p>	<p>Art. 12a (new - SG 16/13) Person, who is granted a permanent residence permit on the grounds of Art. 25, Para 1, items 6 and 8, item 13 – in relation with Art. 25c, Para 2 and 3; and Art. 25, Para 1, item 16 of the Foreigners in the Republic of Bulgaria Act amt acquire Bulgarian Citizenship if he/she meets the requirements of Art. 12, items 2, 3 and 4.</p> <p>The applicants will acquire Bulgarian citizenship without the need to prove: First, control of the Bulgarian language (which in normal cases is ascertained according to an Ordinance by the Minister of Education, Youth and Science), and second, without the need to be released from his present citizenship at times of acquiring Bulgarian citizenship (Article 12.5 and 12.6 of the BCA.</p> <p>Art. 14a (new – SG 16/13) (1) Person, who is not a Bulgarian citizen but meets the requirements of Art. 12, items 1 and 3, may acquire Bulgarian citizenship by naturalisation if:</p> <p>1. not less than one year ago he/she is granted permanent residence in the Republic of Bulgaria permit on the</p>	N/A

<sup>157</sup> [http://eudo-citizenship.eu/admin/?p=file&appl=currentCitizenshipLaws&f=BUL%20Law%20on%20Bulgarian%20Citizenship%20%28consolidated%20version%202013\\_English%29.pdf](http://eudo-citizenship.eu/admin/?p=file&appl=currentCitizenshipLaws&f=BUL%20Law%20on%20Bulgarian%20Citizenship%20%28consolidated%20version%202013_English%29.pdf)  
[http://www.bulgarianembassy-london.org/index.php?option=com\\_content&task=view&id=107&Itemid=175](http://www.bulgarianembassy-london.org/index.php?option=com_content&task=view&id=107&Itemid=175) and [http://www.investbg.government.bg/files/useruploads/files/legal\\_guide\\_2013.pdf](http://www.investbg.government.bg/files/useruploads/files/legal_guide_2013.pdf) and <http://www.investbg.government.bg/en/pages/legal-guide-200.html>

	Law	Authority	Investment or Donation	Residency	Other Criteria	Number of Beneficiaries
					<p>grounds of Art. 25, Para 1, item 6 or 8 of the Foreigners in the Republic of Bulgaria Act and invested not less than BGN 1 million into the capital of a Bulgarian trade company, which company performs a priority investment project, certified as per the Encouragement of Investments Act.</p> <p>2. not less than 1 year ago he/she was granted a permanent residence in the Republic of Bulgaria permit on the grounds of Art. 25, Para 1, item 13 in relation with Art. 25c, item 1 of the Foreigners in the Republic of Bulgaria Act, during which year the executed and entered into exportation investments are maintained over the minimal level required for the issuance for an investment certificate class A as per the Encouragement of Investments Act, evidenced by the Ministry of Economy, Energy and Tourism.</p> <p>(2) In the cases of Para 1, item 2, the Bulgarian company shall not :</p> <ol style="list-style-type: none"> <li>1. be announced in insolvency or in initiated procedure of insolvency or have a concluded agreement with the creditors as per Art. 740 of the Commerce Act;</li> <li>2. be in liquidation procedure;</li> <li>3. have monetary obligations to the State or to the municipality as per Art. 162, Para 2 of the Tax-Insurance Procedure Act, found with</li> </ol>	



	Law	Authority	Investment or Donation	Residency	Other Criteria	Number of Beneficiaries
					<p>an effective act of a competent body, except for the cases where the obligations are prolonged or postponed;</p> <p>4. have due labour remunerations to workers and employees, found with an effective punitive decree.</p> <p>(3) Check up and control over the all circumstances and conditions enlisted in Para 1, item 2 shall be executed on the base of financial accounts and reports on the enterprise activity certified by a registered under the Independent Financial Audit Act auditor, references from the National revenue Agency, the municipalities, as well as other relating documents, presented by the person envisaged in Para1 or collected ex officio.</p>	

	Law	Authority	Investment or Donation	Residency	Other Criteria	Number of Beneficiaries
<b>CYPRUS</b>	Scheme for Naturalisation of Investors, <sup>158</sup> 24.5.2013.	Council of Ministers	<ul style="list-style-type: none"> <li>• €2 million purchase of shares/bonds with National Treasury, and €0.5 million donation to Research and Technology Fund; OR</li> <li>• Direct investments in Cyprus of €5 million; OR</li> <li>• Personal fixed term deposits for three years in Cypriot banks or deposits of privately owned companies or trusts of €5 million; OR</li> <li>• A combination of mixed investment and donation to a State Fund of €5 million; OR</li> <li>• Business activities: The applicant must be a shareholder or beneficiary owner of a company in Cyprus and during the last three years it has paid to State funds at least €500.000 per annum; OR</li> <li>• Impaired deposits on one or both of the abovementioned Banks amounting to a total of at least €3.0 million.</li> </ul>	The applicant must hold a permanent privately-owned residence in the Republic of Cyprus, the market value of which must be at least €500.000, plus V.A.T.	The applicant must have a clean criminal record and must not be included on the list of persons whose property is ordered to be frozen within the boundaries of the EU.	N/A

<sup>158</sup> Scheme for Naturalisation of Investors in Cyprus by exception on the basis of subsection (2) of section 111A of the Civil Registry Laws of 2002-2013, Council of Ministers Decision dated 24.5.2013 ([www.moi.gov.cy](http://www.moi.gov.cy)). See also Article 111 of the Civil Registry law 2002 (N.141(I)/2002).

	Law	Authority	Investment or Donation	Residency	Other Criteria	Number of Beneficiaries
<b>IRELAND</b>	Statement of Intent, in relation to the exercise by the Minister for Justice of his discretion under section 16 of the Irish Nationality and Citizenship Act, 1956, as amended by the Irish Nationality and Citizenship Act 1986, to waive the provisions of section 15(c) of the Act  <b>Abolished in 1998</b>	Ministry of Justice, Equality and Law Reform	<i>Before 1994:</i> a wealth and job creation project' of a minimum of £500,000.  <i>After 1994:</i>  1. Obligation for applicants to buy a residency in Ireland and retain it for a minimum period of five years, where s/he should reside at least 60 days during the next two years following naturalisation.  2. Foreign investors should guarantee a net contribution of at least £1 million for a period of at least five years and, in the case of a loan, seven years.  3. Where the investment was in the form of a loan it should be for a duration of at least seven years at an interest rate not greater than whichever was the lower of the representative Government bond yield on the secondary market or the Dublin Interbank Offer Rate, less one percentage point in each case. The loan should be made by the applicant direct to the firm concerned, without involvement by any intermediary. The loan arrangement should be transparent and open to scrutiny and be such as to prevent the loan being factored or sold on.	<i>Before 1994:</i> Concerning residence, the applicant was still required to fulfil the condition to intend in good faith to continue to reside in the State after naturalization.  <i>After 1994:</i> The residency requirement was eased by only demanding applicants to acquire residence in Ireland and spend a 'reasonable amount of time' in Ireland corresponding with a minimum of 60 days over the previous two years since the granting of nationality	<i>Before 1994:</i> The requirements of the programme were outlined in a Statement of Intent, <sup>159</sup> which mentioned no minimum figure for any applicant to qualify for the programme. It appears that investments in the order of £500,000 appeared to have been the norm.  <i>After 1994:</i> Additional criteria were added:  4. The investment should be for a period of minimum five years, and should be audited to receive annual certification;  5. The number of jobs created should be measurable and a direct consequence of the investment;  6. The investment should be evidenced with audited and certified confirmation, and be monitored by an independent agency to ensure that the conditions for investment were maintained.  7. A police certificate by the police authorities in the country of origin, with express permission by Irish authorities to further investigate it.	From 1989 to 1998 a total number of 169 persons, along with 24 spouses and children were naturalised, and investments of over £100m were made.

<sup>159</sup> Statement of Intent waiving the residency condition stipulates in Section 15(c) of the Act, which stated that the Minister would accept naturalization when: “(a) the applicant acquired a residence in the State, had been resident in the State for two years and had spent a reasonable amount of time here over the two years; (b) the Minister was satisfied, on the advice of a Minister of the Government, that the applicant had established a manufacturing or international services or other acceptable wealth and job creating project here that was viable and involved a substantial investment by the applicant.”

	Law	Authority	Investment or Donation	Residency	Other Criteria	Number of Beneficiaries
<b>MALTA</b>	Individual Investor Programme (IIP), <sup>160</sup> February 2014	Minister of Interior Identity Malta Agency (Ministry of Interior) and a concessionaire (Henley & Partners)	At least €1.15 million comprising: <ul style="list-style-type: none"> <li>• €650,000 donation (plus €25,000 for spouse, €25,000 by child and €50,000 by dependent family member (70% to the National Development and Social Fund); AND</li> <li>• €150,000 investment in bonds/shares; AND</li> <li>• €350,000 property investment or residential immovable property for a minimum annual rent of €16,000</li> </ul>	Proof of residing in the country for a period of at least twelve months preceding the day of the issuing of the certificate of naturalisation	<ul style="list-style-type: none"> <li>• Written undertaking of investment and/or donation</li> <li>• Oath of allegiance in Malta</li> <li>• Global health insurance</li> <li>• Facultative personal interview</li> <li>• Not providing false information</li> <li>• Having a criminal record, subject to criminal investigation and a potential threat to national security</li> <li>• Has been denied a visa to a country with which Malta has visa-free travel arrangements and has not subsequently obtained a visa to the country that issued the denial.</li> </ul>	N/A

Source: Authors' own compilation.

<sup>160</sup> Individual Investor Programme of the Republic of Malta Regulations, 2014, L.N. 47 of 2014, Maltese Citizenship Act (CAP. 188), B 341. See also Citizenship (Amendment) Regulations, 2014, L.N. 17 of 2014, Maltese Citizenship Act, CAP. 188.

### Annex 3. Investor Residency Programmes in the EU<sup>161</sup>

	Law	Document / Status	Criteria
<b>BULGARIA</b>	<p>Foreigners in the Republic of Bulgaria Act (FRBA), as amended in February 2013,<sup>162</sup> amend. SG. 16/19 Feb 2013 (see also amend. SG. 23/8 Mar 2013, amend. SG. 52/14 Jun 2013, amend. SG. 68/2 Aug 2013, amend. SG. 70/9 Aug 2013)</p> <p>Last amendment: SG108 /17 December 2013r.</p>	Permanent Residence Permit	<p>Art. 24 FRBA: Long-term residence permit can be acquired by foreigners,<sup>163</sup> who hold visa under art. 15, par. 1” (visa for long-term residence with a validity term of up to 6 months and with a right to reside in Bulgaria up to 180 days) and:</p> <p>19. (amend. SG 16/2013) have invested the amount of no less than BGN 600 000 – for each foreigner, for the acquisition of real estate property in the Republic of Bulgaria or the foreigner is the owner of more than 50% of the share capital of a Bulgarian commercial company, has invested the same amount in the share capital of the company and by doing so, the company has acquired a real estate property in Bulgaria for the same amount; to the date of filing of the application for the permit of long-term residence, the foreigner or the legal entity must have repaid the entire amount, which should be in an account at a licensed Bulgarian credit institution, and if the real estate is acquired with a loan, the part of the loan which is not reimbursed should not exceed 25%;</p> <p>20. (amend. SG 16/2013) have made an investment in an economically underdeveloped region, as defined by the Investment Encouragement Act by repaying into the share capital of a Bulgarian commercial company at least BGN 250 000, whereas the foreigner is a shareholder and owns at least 50% of the company’s share capital and the result of the investment is the acquisition of new long-term material and immaterial assets of at least BGN 250 000 and at least 5 new jobs for Bulgarian citizens have been created and maintained for the entire period of residence, certified by the Ministry of Economy, Energy and Tourism.</p> <p>Article 25 FRBA (amend., SG 11/05; amend. - SG 36/09) states that permanent residence permit may be granted to foreigners if: 6. who have invested in the country over BGN 1,000,000 or increased their investment by such an amount through the acquisition of:</p> <ul style="list-style-type: none"> <li>a) shares of Bulgarian companies, traded on a Bulgarian regulated market;</li> <li>b) debentures and treasury bonds and their derivatives, issued by the state or by the municipalities with a maturity date after at least 6 months;</li> <li>c) ownership in a separate part of the property of a Bulgarian company with at least 50 percent state or municipal share in the capital under the Privatisation and Post-privatisation Control Act;</li> </ul>

<sup>161</sup> This Annex does not include a full (EU-28) picture of investor residency programme. The analysis does not cover either self-employed and entrepreneur schemes as they are a completely a different category of immigration rules which are mainly related to the creation of employment and new businesses in the receiving country.

<sup>162</sup> <http://blogs.kupenov.net/index.php/en/15-foreigners-in-the-republic-of-bulgaria-act> [http://eudo-citizenship.eu/admin/?p=file&appl=currentCitizenshipLaws&f=BUL%20Law%20on%20Bulgarian%20Citizenship%20%28consolidated%20version%202013\\_English%29.pdf](http://eudo-citizenship.eu/admin/?p=file&appl=currentCitizenshipLaws&f=BUL%20Law%20on%20Bulgarian%20Citizenship%20%28consolidated%20version%202013_English%29.pdf)

<sup>163</sup> <http://www.ivlawfirm.com/en/wp-content/uploads/2013/03/Bulgarian-Citizenship-as-per-2013-Law-Amendments-ENG.pdf>

	Law	Document / Status	Criteria
			<p>d) holdings or shares, owned by the state or the municipalities in a Bulgarian company under the Privatisation and Post-privatisation Control Act;</p> <p>e) Bulgarian intellectual property - copyright or related rights subject-matter, patent protected inventions, utility models, trademarks, service marks or industrial design;</p> <p>f) rights under concession contracts on the territory of the Republic of Bulgaria.</p> <p>One of the most important changes accepted in December 2013 is the adoption of new subparagraph 7 in article 25, par.1 of FRBA, restoring the opportunity for a permanent residence permit to be issued to foreign nationals who have invested BGN 1,000,000 with a licensed Bulgarian credit institution on the basis of a fiduciary management contract for at least five years. The circumstances regarding the made investment shall be ascertained by the Bulgarian Investment Agency. There is a condition that for the same period the deposit shall not be used to secure loans from other financial institutions in Bulgaria.<sup>164</sup></p> <p>8. (new - SG 36/09) who have invested the amount of at least BGN 6,000,000 in the capital of a Bulgarian company, which shares are not traded on a regulated market;</p> <p>16. (new – SG 16/13) have made an investment in the state by depositing in the share capital of a Bulgarian trade company no less than BGN 500,000, where the foreigner is a partner or shareholder with registered shares and owns more than 50 % of the share capital of the company and as a result of the investment have been acquired new tangible and intangible assets amounting to not less than BGN 500 000 and at least 10 new positions are opened for Bulgarian citizens for the residence period and this is verified by the Ministry of Economy, Energy and Tourism.</p> <p>The waiting period for the permanent residence permit can be waived for those who have invested more than \$500,000 in the Bulgarian economy.<sup>165</sup> Persons who have received a certificate for class investment / priority investment project.<sup>166</sup></p> <p>Permanent residence permit holders are exempted from physical presence or residency in the country as stipulated in Art. 40. (Amend., SG 42/01) (1) of the FRBA, which emphasis that “<i>The revoking of the right of stay of a foreigner in the Republic of Bulgaria shall be imposed when: 6. (amend. - SG 36/09; amend. – SG 9/11; amend. – SG 21/12; amend. – SG 16/13) is found that the foreigner, who was granted a long-term or permanent residence permit, was absent from the</i></p>

<sup>164</sup> [http://mackrell.net/content/uploads/papers/NEWSLETTER\\_EN\\_01\\_2014.pdf](http://mackrell.net/content/uploads/papers/NEWSLETTER_EN_01_2014.pdf)

<sup>165</sup> D. Smilov and E. Jileva (2013), *Country Report: Bulgaria*, EUDO Citizenship Observatory, May, European University Institute, Robert Schuman Centre for Advanced Studies, Florence, p. 12.

<sup>166</sup> [http://www.investbg.government.bg/files/useruploads/files/legal\\_guide\\_2013.pdf](http://www.investbg.government.bg/files/useruploads/files/legal_guide_2013.pdf), see also <http://www.investbg.government.bg/en>

	Law	Document / Status	Criteria
			<p>territory of the member states of the European Union for a period of 12 consecutive months, except in cases of permitted permanent stay under Art. 25, Para 1, Items 6, 7, 8 and 13, as well as regarding family members of a person under Art. 25, para 1, items 6, 7, 8, 13 and 16<sup>167</sup>. This possibility exists since May 2009.<sup>167</sup> The permit will be also expedited in an accelerated procedure.</p> <p>Art. 25a. (New, SG 42/01) Permit for stay in the Republic of Bulgaria, without the presence of the requirements of this Act can be obtained by foreigners who have contributions to the Republic of Bulgaria in the public and economic sphere, in the sphere of the national security, science, technology, culture or sport.</p>
<b>CYPRUS</b>	Regulation 6(2) of the Aliens and Immigration Regulations, 2013 <sup>168</sup>	Immigration Permit to applicants who are third country nationals and intent to invest in the Republic of Cyprus (Immigration Permit Category F)	<ul style="list-style-type: none"> <li>• Secured minimum annual income of €30,000, from sources other than employment in Cyprus (+€5,000 by dependent person)</li> <li>• A Title of ownership or contract of sale, of a property in Cyprus, a house, apartment or other building, of a minimum market value of €300,000 and proof of payment for at least €200,000.</li> <li>• confirmation letter from a Cypriot Bank stating that he has deposited a minimum capital of €30,000 in an account</li> <li>• Criminal Record Certificate and no threat to public order</li> <li>• No intention to work or engage in any kind of business in Cyprus</li> <li>• Health insurance policy</li> <li>• Visit Cyprus at least once every two years</li> </ul>
<b>GREECE</b>	<p>Law 4146/2013, Establishment of a friendly investment environment for strategic and private investments, July 2013.</p> <p>Decision of the Ministry of Interior Nr. 23195, Gov't Gazette B' 1279/28-5-2013.</p>	<p>Residence permit by real estate acquisition / Entry Visa for Real Estate Acquisition</p> <p>And/or</p> <p>Residence permit by strategic investment</p>	<p>The Greek Programme offers two alternative routes for residence permits in the context of investment in the country: first, purchase of real estate; and second, strategic investment.</p> <p>First, the purchase of real estate property of a minimum value of €250,000 in: purchase of real estate property, or timesharing agreement with a duration of a least 10 years, or lease with a duration of at least 10 years of hotel facilities or furnished homes in combined tourist facilities (Article 8§2 of Law 4002/2011).</p>

<sup>167</sup> The normal rule is the following: Five years according to Article 25(1).5 of the Foreigners in the Republic of Bulgaria Act (FRBA) which states that “*have resided legally and continuously in the territory of the Republic of Bulgaria for the last 5 years prior to submission of the application for permanent residence and who have not been abroad for more than 30 months during this period...*”.

<sup>168</sup> <http://www.moi.gov.cy/moi/crmd/crmd.nsf/All/689810B07B2F3A91C2257A69001F7F33?OpenDocument>

	Law	Document / Status	Criteria
			<p>A special ‘entry visa for real estate acquisition’ will apply (either a C Schengen visa or a D national visa); in both cases the beneficiary is entitled to travel to other Schengen countries for up to 90 days per six-month period. Among the requirements necessary for the visa to be issued include: copy of notarial act proving the state acquisition and that the applicant has assets whose value exceeds €250,000. The acquisition can also taken place through a legal entity.</p> <p>The holder of any of these visas will need to submit an application for residence permit, which will be issued for the duration of 5 years. The permit may be renewed for another 5 years each time, as long as the applicant still owns the property.<sup>169</sup> These years of residence do not count for obtaining Greek nationality.<sup>170</sup></p> <p>Second, another route consists of ‘strategic investment’.<sup>171</sup> No specific value/quantity is provided. Here the applicant will be issued a national visa (type D) by the competent Greek consulate, and will receive a residence permit by strategic investment. The permit will be issued for the duration of 10 years. There is an intermediary where the application will need to be submitted (Invest in Greece Agency).</p>
<b>HUNGARY</b>	Act II of 2007, Art 28 (3)-(11), as amended by Act CCXX of 2012.	Residence permit to applicants who are third country nationals	<ul style="list-style-type: none"> <li>• applicant shall be a majority owner in a company registered lawfully in its seated home country</li> <li>• the State Debt Centre issued bonded debt shall be purchased from the lawful agency entitled by the Hungarian government</li> <li>• the bounded debt term shall be at least five years</li> <li>• applicant shall provide information on the company</li> <li>• to purchase a minimal bounded debt of €250,000</li> <li>• residence permit is valid for five years at most</li> </ul>
<b>IRELAND</b>	Immigration Act 2014, Immigrant Investor Programme (IIP), S.I. No. 258 of 24 July 2012, Guidelines	Residency permission	<p><i>Before 15 July 2013:</i></p> <p>Any applicant will need to fulfil the following conditions or any of the following investment options:</p> <p>First, immigrant investor bonds: a minimum of €2 million invested in a 5 year bond issued by the National Treasury Management Agency.</p>

<sup>169</sup> For more information on supporting documents refer to [http://www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit\\_ependytes\\_en.pdf](http://www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit_ependytes_en.pdf)

<sup>170</sup> [http://vardikos.com/wp-content/uploads/2012/10/GR4146\\_2013\\_IMM\\_PROR\\_EN\\_VV.pdf](http://vardikos.com/wp-content/uploads/2012/10/GR4146_2013_IMM_PROR_EN_VV.pdf)

<sup>171</sup> As defined in Decision by Interministerial Committee of Strategic Investments, Law 3894/2010, Gov’t Gazette A’ 204).



	Law	Document / Status	Criteria
			<p>Second, enterprise investment: a minimum of €1 million invested in an Irish enterprise or spread over a number of enterprises for a minimum of 3 years. The enterprise must be registered and headquartered in Ireland, and the investment must support the creation or maintenance of employment.</p> <p>Third, Mixed investment: Investment in a residential property of minimum value of €1 million, which must be matched with an immigrant investor bond investment</p> <p>Fourth, endowment: €500,000 philanthropic donation by an individual (a project of public benefit in the arts, sports, health, cultural or educational field).</p> <p><i>After 15 July 2013:</i></p> <p>Applicants will need to fulfil the following conditions or any of the following investment options:</p> <p>First, immigrant investor bonds: €1 million invested in the bond at 0% interest rate;</p> <p>Second, €500,000 invested in an Irish enterprise for 3 years</p> <p>Third, investment in a residential property of minimum value of €450,000 and a straight investment of €500,000 into the immigrant investor bond, giving a minimum investment of €950,000. The level of investment into the bond would no longer be linked to the value of the property purchased.</p> <p>Fourth; endowment: €500,000 philanthropic donation by an individual (€400,000 where 5 or more individuals pool their endowment for one appropriate project).</p> <p>The applicant will be granted residence for two years which may be renewable for a further three years. After 5 years of residence under the programme the applicants can apply for long-term residence in Ireland. Applicants may be also granted multi-entry visas for the same duration. During this period, beneficiaries need to have private medical insurance and not recourse to public funds.</p> <p>The IIP states expressly that “<i>This Programme does not confer Irish citizenship on successful candidates. Persons granted residence under the Immigrant Investor Programme may apply for Irish citizenship under the terms of the Irish Nationality and Citizenship Acts and will be assessed according to the criteria provided for in that legislation</i>”. Or “<i>The Immigrant Investor Programme does not provide for preferential access to citizenship for successful applicants. Successful applicants are free to apply for citizenship in the normal manner under the provisions of the Irish Nationality and Citizenship Acts 1957-2004</i>” (page 14).</p>

	Law	Document / Status	Criteria
LATVIA	<p>Immigration Law,<sup>172</sup> 22 April 2010</p> <p>*****</p> <p>Immigration Law, after amendments in 20 January 2011 [shall come into force from 4 February 2011] and 26 May 2011 [shall come into force from 16 June 2011]</p>	Residence Permit for investors and/or acquisition of immovable properties	<p>Chapter IV (Residence Permits), Section 23.</p> <p>(1) A foreigner has the right to request a temporary residence permit in accordance with the procedures prescribed by this Law:</p> <p>28) for a period of time not exceeding five years, if he or she has invested in the equity capital of the capital company at least LVL 25 000 and during a financial year the capital company pays in total in the budget of the State and self-government as taxes at least LVL20 000;</p> <p>29) for a period of time not exceeding five years, if he or she has acquired in the Republic of Latvia and he or she owns one or several immovable properties in Riga, Riga planning region or cities, the total amount of transactions of which is at least LVL 100 000, one or several immovable properties outside Riga, Riga planning region or cities, the total amount of transactions of which is at least LVL 50 000, as well as in the case, if he or she does not have and never has had debts of payments of immovable property tax and the payment of the amount of transactions has been performed via clearing; and</p> <p>30) for a period of time not exceeding five years, if he or she has made financial investments in the credit institution of the Republic of Latvia in the amount of at least LVL 200 000 in the form of subordinated capital (subordinated loan or subordinated bonds) of a credit institution, if the term of such transaction is not less than five years and in accordance with the deposit provisions it may not be terminated prior to the term of repayment of the deposit.</p> <p>*****</p> <p>28) for a period of time not exceeding five years, if he or she has invested in the equity capital of the capital company, increasing it, or has invested in the equity capital of the capital company, founding a new capital company, and the investment is at least:</p> <p>a) LVL 25 000, and it has been performed in a capital company, which employs no more than 50 employees, the annual turnover or annual balance of which does not exceed LVL 7 million and which during the economic year pays not less than LVL 20 000 in taxes into both the State budget and local government budget,</p> <p>b) LVL 100 000;</p> <p>29) for a period of time not exceeding five years, if he or she has acquired in the Republic of Latvia and he or she owns one or several immovable properties in the planning region of Riga or cities,</p>

<sup>172</sup> [http://www.latio.lv/files/e0500\\_-\\_immigration\\_law.pdf](http://www.latio.lv/files/e0500_-_immigration_law.pdf)

	Law	Document / Status	Criteria
	<p style="text-align: center;">*****</p> <p style="text-align: center;">Law “Amendments to the Immigration Law”, The Latvian Herald, No.250, 20.12.2013 [came into force on 01.01.2014]<sup>173</sup></p>		<p>the total value of the immovable property being at least LVL 100 000, or one or several immovable properties outside the planning region of Riga or cities, the total value of the immovable property being at least LVL 50 000, if the following conditions exist concurrently:</p> <ul style="list-style-type: none"> <li>a) he or she does not have and has never had payment debts of immovable property tax,</li> <li>b) the total value of immovable properties was paid for by non-cash settlement,</li> <li>c) immovable property which has been acquired from a legal person or natural person registered in the Republic of Latvia, who is a citizen of Latvia, a non-citizen of Latvia, a citizen of the Union or foreigner, who is staying in the Republic of Latvia with a valid residence permit,</li> <li>d) the total cadastral value of immovable properties acquired in the planning region of Riga or cities was not less than LVL 30 000 at the time of acquisition thereof or the total cadastral value of immovable properties outside the planning region of Riga or cities was not less than LVL 10 000 at the time of acquisition thereof. If the cadastral value is less than that indicated in this Sub-clause, the total value of immovable properties shall not be less than the market value of immovable properties specified by a certified assessor of immovable property;</li> </ul> <p>30) for a period of time not exceeding five years, if he or she has made financial investments in the credit institution of the Republic of Latvia in the amount of at least LVL 200 000 in the form of subordinated capital (subordinated loan or subordinated bonds) of a credit institution, if the term of such transaction is not less than five years and in accordance with the deposit provisions it may not be terminated prior to the term of repayment of the deposit.<sup>174</sup></p> <p style="text-align: center;">*****</p> <p>A number of important amendments were proposed in October 2013, which would have introduced quotas for residence permits issued to investors as well as increased the investment amount to €150,000. According to Silina-Osmane (2014), “<i>The draft amendments to the Immigration Law envisaged even more extensive changes in respect of granting of residence permits to investors, but they were not adopted.</i>”<sup>175</sup></p>

<sup>173</sup> [http://www.emn.lv/wp-content/uploads/APR-2013\\_Part\\_2\\_Latvia\\_EN.FINAL\\_.pdf](http://www.emn.lv/wp-content/uploads/APR-2013_Part_2_Latvia_EN.FINAL_.pdf)

<sup>174</sup> <http://www.pmlp.gov.lv/en/home/services/residence-permits/doc2/banks2.html>

	Law	Document / Status	Criteria
<b>PORTUGAL</b>	<p>Order 1661-A/2013 (Amends Order 11820-A/2012) of the Ministry of Foreign Affairs and of the Ministry of Internal Affairs, published in the Portuguese Official Journal [DR 19 SÉRIE II] of 28 January 2013</p> <p>Order 11820-A/2012 of the Ministry of Foreign Affairs and of the Ministry of Internal Affairs, published in the Portuguese Official Journal [DR 171 SÉRIE II, 1º SUPLEMENTO] of 4 September 2012</p>	Golden Residence Permit for Investment Activities (ARI) (Golden Visa)	<p>The Golden Residence Permit for Investment (Golden Visa) is available to all foreign national investors who are not citizens of the EU. To qualify the investor will need to make an investment in Portugal either privately or through a company conducting at least one of the following investment operations in Portugal:</p> <ul style="list-style-type: none"> <li>• Capital investment with a minimum value of €1,000,000 in a Portuguese company.</li> <li>• Establishing a Portuguese company that employs more than ten people.</li> <li>• Acquisition of Real Estate property with a minimum value of €500,000</li> </ul> <p>Moreover, the following document/criteria apply:</p> <ul style="list-style-type: none"> <li>• Proof that the applicant has transferred into an account of which he / she is the sole or first holder of capital, or to purchase interests or shares in companies;</li> <li>• Deeds of purchase – or promissory contract for the purchase – of property, containing a declaration by a banking institution accredited in National Territory certifying the effective transfer of capital for this purchase, or for the advance payment, in value equal to, or in excess of, 500 thousand Euro; and up-to-date certificate issued by the Land Registry, containing in the case of a promissory contract and where legally viable, the registration of the act.</li> <li>• Hold a valid passport;</li> <li>• Hold a Schengen Visa, when applicable, and legalise their entry with SEF within 90 days from the date of their first entry in Portugal;</li> <li>• Deliver a criminal record issued by their country of origin or by the country where they have been residing for more than one year;</li> <li>• Deliver a declaration giving their consent to a criminal record check in Portugal;</li> <li>• Up-to-date declarations issued by the Portuguese Tax Authorities and by the Portuguese</li> <li>• Social Security confirming the absence of any debts to those entities;</li> <li>• Affidavit, signed by the applicant, undertaking the responsibility of fulfilling the</li> <li>• requirements correlated to the investment activity conducted in national territory;</li> <li>• Health insurance;</li> <li>• Receipt of ARI application fee (€513, 75).</li> </ul> <p>The permit shall be renewable for a period of two years provided that the main requirements remain valid.</p>

<sup>175</sup> [http://www.emn.lv/wp-content/uploads/APR-2013\\_Part\\_2\\_Latvia\\_EN.FINAL\\_.pdf](http://www.emn.lv/wp-content/uploads/APR-2013_Part_2_Latvia_EN.FINAL_.pdf)

	Law	Document / Status	Criteria
<b>SPAIN</b>	<p>Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, Title IX, Article 178</p> <p>Ley 14/2013 de apoyo a los emprendedores y su internacionalización, BOE 28/IX/2013, 19 Septiembre 2013, Chapter II: Investors (Articles 63-67)</p>	<p>Procedure for the authorization of entry, residency and work of foreigners for employment purposes with economic, social or labour interest</p> <p>Residence Visa for Investors</p>	<p>*A significant investment of capital in the country:</p> <ul style="list-style-type: none"> <li>• An initial investment of at least €2 million government bonds and public debt; OR at least €1 million in shares of Spanish firms or banks; or</li> <li>• Acquisition of property or property investment in Spain for at least €500,000; or</li> </ul> <p>The applicant will need to provide proof of investment 60 days before the presentation of the application for visa. It will grant the right to reside for a period of at least one year in Spain.</p> <p>For those applicants aiming at staying a longer period, the residency authorization will be extended to the entire Spanish territory which will last for a period of 2 years, after the expiration it is possible to ask for renovation for an extra two-year period. Additional requirements will apply here: First, having travelled to Spain at least once during the validity of the investor visa; Second, proof that the investment will be at least equal to the one which was made for the issuing of the visa; Third, proof that the applicant is owner of the property which was acquired; Fourth, proof that the activities have indeed represented a benefit of general public interest.</p>
<b>UNITED KINGDOM</b>	<p>UK Immigration Rules, 245E-245EF<sup>176</sup></p>	<p>Points-Based Immigration System, Tier 1 (Investor)</p>	<p>This route is “<i>for high net worth individuals making a substantial financial investment to the UK.</i>” A pass mark of 75 points is needed, which is granted in two possible situations:</p> <ul style="list-style-type: none"> <li>• Applicants have at least £1,000,000 of their own money in a regulated financial institution in the UK; or</li> <li>• Applicants have: First, own personal assets exceeding £2,000,000 in value (and they are not subject to any liabilities), and second, have money held in a regulated financial institution and disposable in the UK of at least £1,000,000 (which may include money loaned to them).</li> <li>• English language (as applicants are not expected to need to work) and proof means of subsistence requirements (as “<i>they are extremely wealthy</i>”) are waived.<sup>177</sup></li> <li>• Applicant must not fall under other general grounds of refusal and “<i>must not be an illegal entrant</i>”.</li> <li>• “<i>The applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded.</i>”</li> </ul>

<sup>176</sup> Refer to [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/279721/Immigration\\_Rules\\_-\\_Part\\_6A.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279721/Immigration_Rules_-_Part_6A.pdf)

<sup>177</sup> See <http://www.workpermit.com/uk/tier-1-visas-investors.htm>

	<b>Law</b>	<b>Document / Status</b>	<b>Criteria</b>
			<p>Entry clearance will be given for a period of 3 years and four months, subject to a number of conditions, including: no recourse to public funds, registration with the police, not appointment as a doctor or dentist in training, no employment as professional sportsperson.</p> <p>A Tier 1 (Investor) Migrant might qualify for Indefinite Leave to Remain (stay for settlement) if the following requirements are met: The applicant must not fall for refusal under the general grounds for refusal, and must not be an illegal entrant; The applicant must have a minimum of 75 points; The applicant must have demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom; and the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded.</p>

*Source:* Authors' own compilation.



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