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The selling of nationality and its derivate EU-citizenship

An evaluation of the Maltese affair in the light of European and international Law

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<tr>
<td>CERD</td>
<td>Convention on Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>ECN</td>
<td>European Convention on Nationality</td>
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<tr>
<td>E.g.</td>
<td>Exempli gratia (for example)</td>
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<td>EU</td>
<td>European Union</td>
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<td>Ibid</td>
<td>Ibidem (in the same place)</td>
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<tr>
<td>I.e.</td>
<td>Id est (that is)</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IIP</td>
<td>Individual Investor Program</td>
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<td>PICJ</td>
<td>Permanent International Court of Justice</td>
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<td>UN</td>
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<td>TEU</td>
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1 Introductory notes

1.1 Factual background

The granting of nationality has for a long time been considered a sovereign right of the nation state. It gives the individual the rights governed by the nation state’s law, thereby constituting an acceptance of the individual in the domestic community. However, we have seen a continuing globalisation, internationally and particularly in Europe, approaching the nation states. In international law and EU-law the nationals profit necessarily from regulations that prevent them from being without legal rights. Simultaneously, the acquisition of nationality does not only seem to affect the nation state itself. Indeed, the state, and frequently the national herself, can invoke certain legal concepts and rights against the other states because of the connection between the state and its national.

In October 2013 the Maltese government introduced a legal initiative for the selling of citizenship, also called Individual Investor Program (IIP). The regulation would be a part of the Maltese Citizenship Act. For a contribution of 650 000 €, an investor would become a citizen through naturalisation.¹ This term signifies the state’s granting of nationality upon an individual’s request, and occurs therefore subsequently to the individual’s birth.² No other condition, except from the financial contribution, was originally attached to the IIP. It was estimated to generate 30 million € a year to the Maltese government.³ Whatever reasons there would be behind the new Maltese nationals request, the internal market and the free movement would in all cases be available for financially big third country nationals, e.g. Saudi-Arabs, Chinese and Russians, desiring to take advantage of these EU-concepts.

Domestically, the IIP rendered criticism, both in the public opinion and from the political opposition. According to a survey made by Malta Today, a poll rating of 53 % was against the bill and only 23 % was in favour of it.⁴ The opposition termed the IIP a ‘prostitution of Malta’s identity’ and called for certain amendments to the bill, demanding a certain

¹ Times of Malta, Investors may buy Maltese citizenship, 8 October 2013.
² For a more detailed description, see section 4.1.
³ Times of Malta, PM defends Citizenship-on-sale scheme, 9 October 2013.
⁴ Debono, J, MaltaToday, Malta says yes to budget, no to sale of citizenship, 11 November 2013.
period of stay in Malta preceding the acquisition and a larger contribution by the investor. The Maltese government defended the IIP but increased the amount to be invested, and added that a specific part of the investment should be in property. Contrarily to critics fearing the consequences on an EU level, a spokesperson for the Maltese Prime Minister stated:

While the Government does not anticipate any action to be taken by the European Commission or other institution, any attempt to diminish Malta’s sovereign right to grant citizenship would be met with a robust defence based on principles which have been established and agreed in international law.

The EU-Parliament and the Commission did not share Malta’s view. After holding a plenary session on the 15 of January 2014, where strong criticism was directed against Malta, the EU-parliament drafted a resolution condemning the IIP. The resolution stated that the IIP “undermines the very concept of European citizenship”, which ‘implies the holding of a stake in the Union and depend on a person’s ties with Europe.’ The Parliament ‘[acknowledged] that matters of residency and citizenship are the competence of the Member States’ but called on the member states ‘to take possible side effects into account.’ In this context, the Parliament emphasized the principle of sincere cooperation enshrined in the Treaty on the European Union (TEU). As a consequence, the EU-Parliament ‘[called] on the Commission, as the guardian of the Treaties, to state clearly whether these schemes respect the letter and spirit of the Treaties […]’.

Before dealing with the actual response from the Commission, it is of interest to consider what the Vice-President of the Commission, Viviane Reding, stated at the EU-Parliament’s session. As stressed by several member states and parliament members, Reding expressed that the granting of member state nationality automatically rendered the national a citizen of the EU. The EU-citizen can hence benefit from several rights enshrined in the Treaties. Therefore, ‘naturalisation decisions are not neutral with regard to other Member States and to the EU as a whole.’ Consequently, although the national citizenships are to be ‘regulated only by the national law of each Member State’, ‘Member States should use their prerogatives to award citizenship in a spirit of sincere cooperation[…] [italics added]’. Hence, ‘in compliance with the criterion used under

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5 Individual Investor Program of the Republic of Malta Regulation, L.N. 450, B 5308, Maltese Citizenship, para 6 (5), 6 (6).
6 Times of Malta, PM defends Citizenship-on-sale scheme, 9 October 2013.
**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 [italics added].’ Otherwise it would be to the prejudice of the EU-citizenship, which ‘is a fundamental element of our Union’ and, thus, ‘one cannot put a price tag on it.’

Reding was indeed very clear. As emphasized in the subsequently drafted EU-Parliament resolution, though conferral of nationality is an exclusive competence of the member state, the IIP would entail obligations for the EU and the other 27 member states. This while Malta would directly benefit from it. It would not be a sincere cooperation. According to Reding and the Commission, a sincere cooperation would instead be the conferring of nationality only when a genuine link exists between the potential national and the member state.

The application of the genuine link test is something new to EU-law. This test has got its origin in international law and derives from the International Court of Justice’s (ICJ) famous case Nottebohm⁹ from 1955. The Commission’s rejection of the Maltese IIP did consequently not just have its origin in EU-law, but also in international law.

Having the speech of the Vice President of the Commission in mind, the fact that the Commission commenced considering if there was a basis for infringement proceedings¹⁰ did not come as a surprise. The Commission proceeded with the evaluation of the IIP and on the 29 of January 2014 the Commission met with the Maltese Government. On the same day, Malta and the Commission issued a joint press release, announcing the adding of a residence requirement of 12 months preceding the granting of citizenship. In this way the IIP now included ‘genuine links to Malta.’¹¹

For the first time, the EU had intervened and called into question a member state’s arrangement concerning the acquisition of nationality.¹² Nevertheless, one might question if the Commission’s view was in accordance with EU-law. One thing is to consider that the Maltese IIP was fraudulent, another is to legally intervene. It is hard not to suspect

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⁸ Speech by Viviane Reding, Vice-president of the EU-Commission, Citizenship must not be up for sale, Plenary Session debate of the European Parliament on ‘EU citizenship for sale, Strasbourg.
⁹ Liechtenstein v Guatemala, ICJ, Reports 4, 1955.
¹¹ European Commission, Press Release, Joint Press Statement by the European Commission and the Maltese Authorities on Malta’s Individual Investor Programme (IIP), MEMO/14/70, 29.01.2014.
that the political dimension of the Maltese IIP might have affected the EU’s dealing with the affair.

E.g. Sweden did not agree with the Commission. According to an official at the Swedish government dealing with matters concerning citizenship, Sweden’s standing was that the exclusive member state competence regarding nationality hindered the application of EU law.\(^\text{13}\) With this approach the IIP was considered to be outside of the EU-law ambit. Sweden, thus, did not raise any objections.

Furthermore, a comparative outlook reveals that Malta is not the only member state offering simplified immigration arrangements for those who are ready to open their wallets. In e.g. Bulgaria and Cyprus, citizenship through naturalisation, or long term residence, is granted in exchange of investment.\(^\text{14}\) Similarly, Austria offers an opportunity to citizenship on the sole basis of an investment, might be that the Austrian regulation is more discrete and determined on a case to case-basis.\(^\text{15}\)

### 1.2 Purpose and scope

The overall purpose of this thesis is to evaluate if selling of nationality and similar arrangements are in accordance with EU-law and international law. I will treat this purpose through a review of the material ground the Commission used to intervene. The following questions shall be relevant: did the EU have the legal authority to intervene? If so, which was the correct ground for intervention? Additionally, why was the IIP not in accordance with international law?

It might be that Malta had a very clear and direct arrangement offering nationality directly through an investment. Yet, it was not the only example, as we have seen. According to article 4 TEU, ‘The Union shall respect the equality of Member States before the Treaties’. Malta was the only member state explicitly mentioned in the Parliament resolution, a message later executed by the Commission. This is however a procedural matter and it falls consequently outside of the purpose.

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\(^{13}\) Information acquired through interview with Henry Mårtensson, Deputy Director at the Swedish Ministry of Employment.

\(^{14}\) Carrera, supra note 12, p. 10.

\(^{15}\) Carrera, supra note 12, p. 11.
Still, there are several other member states with similar nationality arrangements. These member states could possibly be exposed to a similar treatment from the EU. Hence, the EU’s right and adequacy to intervene is important to evaluate.

In its resolution, the EU-parliament referred to EU-values thereby implying that the IIP constituted a breach of these. The EU-values are certainly parts of the TEU, art. 2-3. However, these values have previously not been invoked though the situation has probably demanded it. E.g., the controversial constitutional amendments in Hungary, generally criticised for, inter alia, undermining the independence of the judiciary and limiting religious freedom, did not provoke any enforcement procedures from the Commission simply because they do not seem to be of wide application in connection to the EU-values. Instead, despite their partially legal character, the EU-values relevant for the IIP seem to have a rather political character. Excluding the EU-values from further evaluation aims at trying to arrive at solid conclusions based on legal certainty and reasoning.

1.3 Method and outline

In the foregoing, I have discussed the relevant parts of the EU-Parliament’s resolution, the Commission Vice-President’s speech and the joint statement. After studying these referred documents and actions, I am of the opinion that the evident political dimension of the subject especially affected the resolution. Undeniably, the EU-Parliament is a political institution. A quite perceptible political dimension can also be noted in the Commission Vice-President’s speech.

It is with the factual consequence of the EU-Parliament’s and the Commission’s actions that I am trying to find the legally pertinent parts and arguments. In this way, I am trying to respond to this political character of the affair. The aim of this thesis is to examine the legal points of the Maltese affair. The reader is referred to consult the mentioned sources to make up her mind about the circumstances.

16 European Parliament resolution, supra note 7.
18 European Parliament resolution, supra note 7.
19 Speech by Viviane Reding, supra note 8.
In the present context the international law is of grand relevance, firstly because the international law is a part of EU-law (see section 2) and secondly because of the fact that the Vice President of the Commission used international law as an argument against Malta. One way of discussing the subject could potentially have been to depart from international law, proceeding to EU-law. In that way the international law would have been the foundation that the EU-law would have had to adapt itself to. On the contrary, I have chosen to examine the EU-dimension before dealing with the international law. The thesis’ focus on the EU-institutions’ actions, that the EU-aspect is most clearly apparent, motivates this choice. In addition, the very nature of the EU makes it logical to first conclude if the EU had the legal authority to question the IIP. The member states have transferred sovereignty to the Union but only in limited fields. Thus, if the matter falls outside of the EU-law’s ambit, the Commission’s actions can be considered as non-valid and unworthy reviewing in the light of international law.

By choosing this as my method for evaluating the IIP, I am aware of the potential shortcomings from an international law view. It is possible to argue that the thesis focus on the permissibility of the Maltese IIP under EU-law instead of finding the most suitable and ideal nationality law according to international law. I will, nevertheless, try to give a general description of the conditions for deciding nationality under international law, as well as its particular points relevant for the IIP.

I consider that the following plan properly embraces the parts of EU-law and international law relevant for the Maltese affair and its particularity. The first part contains a starting point through the examination of the nature of EU-law and its interaction with international law (section 2). Next follows an examination of the EU-citizenship and the acquisition of nationality as a matter within EU-law (section 3). Ensuing, the relevant parts of international law are treated. Especially the genuine link test, and its convenience in the present context, is examined (Section 4). Thereafter, the overall legal adequacy of the IIP and similar arrangements are evaluated (section 5). Lastly, a summary finalises this thesis (section 6).
2 The nature of EU-law

2.1 The legal particularity of the EU

Since the establishment of the European Steel and Cole Community the Union, as it has developed into, might be said to constitute something particular in international law. The Court of Justice of the European Union (CJEU) stated in *Van Gend & Loos* that ‘the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights […] and the subjects of which comprise not only Member States but also their nationals.’\(^{21}\) It was in this case the CJEU established the concept of direct effect, giving the individuals the possibility to directly complain to the CJEU. Moreover, the CJEU evidently classified the Union as a revolutionary phenomenon in international relations. From that moment and forward, the Union’s *sui generis* character has been reiterated frequently.\(^{22}\) Indeed, the Union, ‘having its own institutions, its own personality and capacity of representation on the international plane,’\(^{23}\) can be regarded as special, bearing marks of a federal-type structure.\(^{24}\)

In *Parti écologiste ‘Les Verts’*, the CJEU, furthermore, emphasised the ‘constitutional character’ of the European Economic Community Treaty.\(^{25}\) As enshrined in art. 5 TEU, the Union’s competence is restricted by the principle of conferral. The treaties, i.e. the constitution, is thus the ground for the legitimacy of EU-measures. The Union has competence in the domains where the member states have limited their sovereignties. In addition, the Union should refrain from actions that can be achieved by the member states themselves, according to the principle of subsidiarity. Its action should neither exceed what is necessary to obtain the result steaming from the objectives, pursuant to the principle of proportionality. These latter principles also emerge from art. 5 TEU.

Ultimately, the Union’s competence can be judicially reviewed by the CJEU according to art. 263 of the Treaty on the Functioning of the European Union (TFEU). In this way, the principles of conferral, subsidiarity and proportionality shall be secured. On the other hand, if a situation is supposed to be dealt with at a Union-level, the Commission can


\(^{23}\) Flamino Costa v. E.N.E.L., Case 6/64.


commence infringement proceedings against a member state, subsequently leading to the referral of the case to the CJEU, art. 258 TFEU. The CJEU can, thus, give a final ruling on the competence of, and suitability of a measure from, the Union, art. 260 TFEU.

Returning to the IIP, one might ask if the Commission’s, at that time, pending infringement procedure would have been legal. Hypothetically speaking, was nationality outside of the scope of the treaties, the infringement proceedings were not legal and they would have been overruled by the CJEU.

2.2 The interaction between EU-law and international law

The EU legal order can potentially be characterised as constituting one of its kind. On the contrary, the EU was created through the application of international law and, mainly, treaty law. When emphasising the EU’s special character in international law, the CJEU could have been seen as striving for autonomy. The EU intended to be granted some sort of special status in international law. This kind of reluctance from regional organisations towards international law has been denominated ‘jurisdictional egocentrism’. The regional organisation wants to protect its power by stressing its very nature. In the light of a lack of stare decisis in international law, this reluctance can potentially be regarded as unproblematic. There is no obligation for the CJEU to take international law, and the precedents of other international organisations, into consideration. However, even though the EU, as a special regime, may legally offer a lex specialis-rule in relation to international law constituting lex generalis, certain rules in international law should be taken into consideration. Seeing it from a member state’s perspective, the EU acting contrarily to international law, but in accordance with EU law, might well provoke the member state’s responsibility under international law. This while the member state is obliged to follow the principle of supremacy and execute what the EU demand.

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26 Timmermans, supra note 22, pp. 181-182.
30 E.g. Amministrazione della finanze dello Stato v. Simmenthal, Case 106/77.
Following the early years of striving for autonomy, the EU of today has a more positive attitude towards international law.\textsuperscript{31} In \textit{Poulsen} the CJEU established that the EU ‘must respect international law in the exercise of its powers.’\textsuperscript{32} The CJEU made use of international customary law in this judgement. Further on, in \textit{Bosphorus}, the CJEU first used a United Nations (UN) Security Council resolution as an interpretative aid and then took ‘massive violations of human rights and humanitarian international law’ into consideration when applying the principle of proportionality.\textsuperscript{33} In addition, in the case \textit{Opel Austria} the Vienna Convention on the Law of Treaties (Vienna Convention) and its art. 18, prescribing the principle of good faith, was mentioned.\textsuperscript{34} The CJEU was, however, careful not to use this principle to nullify an EU-regulation, which is a part of the secondary law. The CJEU came instead to the same conclusion applying EU-law as it would have come to applying the Vienna Convention.\textsuperscript{35} Moreover, in \textit{Brita GmbH v Hauptzollamt Hamburg-Hafen}, the CJEU referred to several provisions of the Vienna Convention, e.g. art 31, interpreting third country agreements.

Concerning ICJ-rulings and more generally international courts’ rulings, there were first few of these mentioned by the CJEU.\textsuperscript{37} The attitude seem to have changed. In e.g. \textit{Racke} an ICJ-ruling was taken into account.\textsuperscript{38} Furthermore, in the mentioned Opel Austria-case, the CJEU laid down that ‘the principle of good faith is a rule of customary international law whose existence is recognised by the International Court of Justice (see the judgment of 25 May 1926, German interests in Polish Upper Silesia, CPJI, Series A, No 7, pp. 30 and 39) and is therefore binding on the Community.’\textsuperscript{39}

Returning to the treatment of the Maltese affair, the genuine link test was regarded as a consequence of the principle of loyalty, not the direct legal basis. Nevertheless, it constitutes a use of a case from international law. From initially taking a restrictive approach towards international law, the CJEU of today indeed takes advantage of several sources of international law, e.g. ICJ-rulings. The logic of the referral to an ICJ-ruling

\textsuperscript{31} Timmermans, supra note 22, p. 193.
\textsuperscript{32} Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp, C-286/90.
\textsuperscript{33} Bosphorus Hava Yollari Turizm ve Ticaret v. Minister for Transport, Energy and Communications, Ireland and the Attorney General, C-84/95.
\textsuperscript{34} Opel Austria GmbH v. Council of the European Union, T-115/94.
\textsuperscript{35} Timmermans, supra note 22, p. 191.
\textsuperscript{36} Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen, C-386/08.
\textsuperscript{37} Bronckers, supra note 28, pp. 603-604.
\textsuperscript{38} A. Racke GmbH & Co. v. Hauptzollamt Mainz, C-162/96.
\textsuperscript{39} Opel Austria GmbH v. Council of the European Union, T-115/94.
does not mean, however, that the particular ruling Nottebohm was used in an appropriate way. It appears furthermore from the mentioned CJEU-rulings as international law constitutes a part of EU-law, giving the consequence that international law norms should not be contradicted by the EU-institutions. In addition, as was pointed out above, practical reasons can be put forward by the member states that are obliged to comply with both EU-law and international law.

The adequacy of the referral to the Nottebohm-case and the other relevant parts of international law will be examined in section 4. To begin with, it is appropriate to understand the importance of the EU-citizenship and evaluate if the Union had the competence to intervene against Malta.
3 The EU-citizenship and its ambit

3.1 The EU-citizenship

3.1.1 The rights conferred by the EU-citizenship

The EU-citizenship was introduced by the Treaty of Maastricht in 1993. Subsequently, it was of great importance to the contracting parties of the Lisbon Treaty since they, according to the Lisbon Treaty’s preamble, were ‘RESOLVED to establish a citizenship common to nationals of their countries’. This should be true considering that citizenship and citizens’ rights are mentioned on several places in the primary law.\footnote{Art. 3 TEU, part 2 TFEU and title 5 of the Charter of Fundamental Rights of the European Union.}

Art. 3 TEU promises that ‘The Union shall offer its citizens an area of freedom, security and justice without internal frontiers…’. Moving on, the EU-citizenship is specified under title 5 TFEU. According to art. 20 TFEU ‘Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.’ The latter, the fact that the EU citizenship shall be additional, is also reiterated in art. 9 TEU under ‘Provisions of democratic principles.’

In the mentioned art. 20 TFEU, the rights granted to the holders of the EU-citizenship are stated. These rights are thereafter separated in ensuing articles. First of all, the EU-citizen has the right to free movement within the territorial frontiers of the EU, art. 21 TFEU. Furthermore, outside of the EU-territory the EU-citizen has the right to diplomatic protection\footnote{About this notion, see 4.2.1.} from another member state present should the national citizen in question’s state be absent in the third country, art. 23 TFEU.\footnote{One can wonder in how many of the third countries Malta had a Diplomatic Mission.} Art. 22 TFEU also grants the EU-citizens fundamental political rights, i.e. the right to vote and stand as candidate in elections to the EU-parliament and in municipal elections. Another right of principle is moreover the possibility to petition to the EU-parliament and to apply to the European Ombudsman, art. 24 TFEU. Furthermore, art. 18 TFEU, and its prohibition against discrimination on the ground of nationality, is to be emphasised. Together with the free
movement, this right to non-discrimination on the ground of nationality has had a central impact on the EU’s single market and legal integration project.\textsuperscript{43}

Previous to the introduction of the EU-citizenship several scholars saw it as having merely symbolic significance.\textsuperscript{44} This has to do with the last wording of art 20 TFEU: ‘These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.’ In this way, since the free movement had been economic in its character, the EU-citizenship was merely a ‘market citizenship’.\textsuperscript{45} Indeed, the CJEU had in several cases ruled that economically non-active nationals would not profit from the treaties.\textsuperscript{46} A member state national non-active economically was, as a consequence, not able to rely on the right to free movement or non-discrimination.

Concerning the applicability of EU-law, it has also been established in case-law that ‘wholly internal situations’ are not covered by the treaty. Thus, to apply the EU-law, the situation must show some sort of external element.\textsuperscript{47} An individual working in her own member state can, in general, not rely on the EU-law, simply speaking. A result of this doctrine is the admissibility of reverse discrimination. A member state can apply discriminating measures on its own nationals residing in the state since nationals of other member states are protected by the applicable EU-law.\textsuperscript{48} There is hence a possibility for the member state to treat its own nationals worse than the nationals of another member state.

Regarding the wording of art. 20 TEU, establishing that the EU-citizenship should be ‘additional’ and ‘not replace’ the national one, one could agree with the view that was expressed in the literature on an early stage, that the EU-citizenship had not superseded the nationality of a member state. Rather it had added a second circle of rights to the first circle having its origin in the national citizenship. Hence, as the EU-citizenship was


\textsuperscript{44} Kostakopoulou, \textit{Ideas, Norms and European Citizenship: Explaining Institutional Change}, 68(2) MLR, pp. 233-267, on p 234.


\textsuperscript{46} Inter alia, joined cases C-297/88 and C-197/89, Massam Dzodzi v. Belgian State.

\textsuperscript{47} R. v. Saunders, Case 175/78.

\textsuperscript{48} Craig & De Burca, \textit{EU-law. Text, cases and materials}, p. 778.
limited to the effects expressly stated in the treaties, it lacked the generality that comes with a national citizenship.49

However, as we will see, the situation is not this easily explained in the present state of affairs. The CJEU has revolutionarily developed, and taken advantage of, the EU-citizenship.

3.1.2 The evolution of the EU-citizenship

To understand the evolution of the EU-citizenship, it is essential to take notice of the principally important ruling 

Grzelczyk50 from 2001. In this case, the CJEU laid down that ‘[t]he status of citizen of the European Union is destined to be the fundamental status of nationals of all the Member States, conferring on them, in the fields covered by Community law, equality under the law, irrespective of their nationality [italics added].’

The EU-citizenship had previously been mocked for constituting a concept that is no more than symbolic,51 why the words ‘fundamental status’ could have been seen as a continuing on this path. However, as will be presented, this was not the case.

A few years earlier the important ruling 

Martinez Sala52 affected the view on the EU-citizenship and the free movement. This case concerned a Spanish national who was residing in Germany and who had previously been employed there. Martinez Sala demanded a child-raising allowance according to German law but it was refused by the German authorities. Since Martinez Sala was considered non-active economically, she was not supposed to benefit from the treaties and the prohibition against discrimination. Nonetheless, the CJEU, without stating if the case concerned a worker or not, laid down that somebody legally residing in a member state has the right to be treated in the same way as a national concerning benefits within the scope of the Treaty. The CJEU has thereafter kept on widening the ambit of the treaties by applying them on subjects classically seen as economically non-active, such as students53 and job-seekers.54

49 Closa, Citizenship of the Union and Nationality of Member States, CML 32, pp. 485-517, on pp. 493-494.
50 Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, C-184/99.
51 Shaw, supra note 48, p. 1.
52 Martínez Sala v. Freistadt Berlin, Case C-85/96.
54 Vatsoura and Koupantanzte v. Arbeitsgemeinschaft (ARGE Nürnberg 900), C-22/08 and 23/08.
Furthermore, Martinez Sala has been understood as the linchpin for a development towards the autonomy of the EU-citizenship. The CJEU established in Baumbast that through art. 20 TFEU, the EU-citizenship entails a ‘directly effective right to reside’ under the limitations laid down in primary and secondary law. Subsequently, in Chen, a baby could rely on the directly effective and autonomous right to residence in art. 20 TFEU. The baby’s mother, a third country national, was also granted the right to residence since the opposite ‘would deprive the child’s right of residence of any useful effect.’

The approach to the concept wholly internal situation, excluding the application of the EU-law, also appears to have changed through the introduction of the EU-citizenship. First, the CJEU treated a situation where a Belgian and Spanish national wanted to invoke the EU-citizenship and the right to non-discrimination on the ground of nationality against Belgium, as a situation within EU-law. Later on, the CJEU proved itself capable of treating a situation where the individual was neither of double member state nationality nor in another state than his proper member state, as a situation within the EU-law ambit. The parents of a child could rely on the EU-citizenship of their child to have the right to stay in the member state. The opposite would, according to the CJEU, force children in the same situation to move from the member states ‘being unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.’

After having pointed out these evolutions, a couple of balancing observations should be made. Firstly, the CJEU seems to treat the EU-citizenship as secondary to the economic statuses as self-employed or workers. Secondly, these economic statuses appears to offer the individual the right to more social and material benefits than the EU-citizenship does autonomously.

The introduction of the EU-citizenship nevertheless has changed the playground. As we have seen, the CJEU has broadened the scope of the treaties to persons not previously covered by EU-law, affirmed the autonomy and direct effect of the EU-citizenship and shrunk the applicability of the concept of wholly internal situations. Returning to the Grzelczyk-judgement, we can conclude that the CJEU did not proceed with a symbolic

56 Baumbast and R v. Secretary of State for the Home Department, C-413/99.
57 Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department, C-200/02.
58 Carlos Garcia Avello v. Belgian State, C-140/02.
59 Ruiz Zambrano v. ONEM, C-34/09.
60 Craig & De Burca, supra note 48, p. 847 with further references to case-law.
language expressing a platitude when stating that the EU-citizenship is ‘destined to be the fundamental status’ of member state nationals. Instead of stating that the wording constituted the present state of affairs, the CJEU was laying down an aspiration. Much still remains to be developed and clarified of the evidently dynamic EU-citizenship.

In all cases, the evolution of the EU-citizenship deserves a new approach. It is no more exclusively dependant on the other fundamental freedoms. Instead it has grown at the expense of the nationalities of the member states. The combined rights of free movement and non-discrimination have provided EU-citizens with benefits that previously were reserved to the nationals. Concerning rights, one should, instead of seeing EU-citizenship as strictly additional to the member state nationalities, regard the two concepts as composite and complex, in this way avoiding to see them as separate and different in character.

3.1.3 A review of the evolution of the EU-citizenship

As we have seen in the previous passage, the CJEU has constituted an engine in the integration process widening the scope of the treaties to favour the mobile EU-citizens. It is, in many cases, hard not to come to the conclusion that the CJEU has gone further than expected when having regard to the treaty wording. Art. 20 TFEU deserves to be reiterated: ‘These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.’ Yet, why would the member states institute an EU-citizenship, notwithstanding the new political rights, mentioning e.g. free movement if this already was granted previously to its introduction? Furthermore, comparing the language of the provisions concerning the EU-citizenship and the traditional economic freedoms, the EU-citizenship uses a more constitutional language while the classic, economic freedoms, such as the free movement of goods, are formulated in a market language. These observations could constitute valid points for the expansion of the EU-citizenship.

63 Elsmore & Starup, supra note 45, p. 111.
64 Shaw, J, supra note 43, p. 3.
65 Elsmore & Starup, supra note 45, p. 108.
66 Ibid, p. 112.
Still, there are several reasons why the EU should pay attention in this context. The CJEU is often accused of intruding in state matters, such as immigration and welfare, applying the free movement and non-discrimination provisions extensively.\textsuperscript{67} This while statistics show that a few, only 2.7% of the EU’s population in 2013, were residents in another member state than their member state of origin.\textsuperscript{68} In addition, the still existing wholly internal situation-doctrine render it possible to reversely discriminate the member states’ stationary nationals. A small minority is favoured while a majority can be disadvantaged. This kind of arrangements can perhaps serve the greater good by favouring the free movement in the long run. Benefits for mobile citizens should potentially encourage the stationary ones. The EU, with its progenitors, was, however, established for over 60 years ago. The reluctance to integrate in another member state cannot still be ignored.

The EU-citizens unwillingness to move might be easier to understand when departing from the point that the EU seems to lack a common identity between the peoples.\textsuperscript{69} The EU-citizenship provokes indeed several difficult issues, including its limits. It is a notion the EU should be cautious with, this at least until a common ground among the EU, the member states and the citizens can be found concerning the concept.\textsuperscript{70} It is to be reiterated that it is the member states that remain the masters of the treaties (see further discussion in section 5), thereby ultimately deciding the content of the treaties.

Returning to the IIIP, obviously the granting of a Maltese nationality would confer a range of rights upon the citizen while the corresponding obligations would arise for all of the member states. In addition, besides the EU-citizenship rights, the classical economic free movements, i.e. free movement of goods (art. 34 TFEU), labour (art. 45 TFEU), services (art. 56 TFEU) and capital (art. 63 TFEU), are granted to the EU-citizens. The importance of an EU-citizenship for the individual should not be underestimated. This conclusion is even more apparent having regard to the evolution, and the dynamically widening character, of the EU-citizenship.

\textsuperscript{67} Shaw, J, supra note 55, p. 6.
\textsuperscript{68} According to statistics from Eurostat, in 2013 13.7 million EU-citizens were living in a member state with the citizenship of another member state. Explained Eurostat statistics, Migration and migrant population statistics, and the total population of the EU in 2013 was 505.7 million people, Explained Eurostat statistics, Population and population change statistics. The 2.7%, i.e. 13.7/505.7, is a slightly different figure compared to 2.5% in 2008, presented in Eurostat Statistics in Focus, 94/2009, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008.
\textsuperscript{69} Kruma, An ongoing challenge : EU citizenship, migrant status and nationality. Focus on Latvia, p. 139.
\textsuperscript{70} Elsmore & Starup, supra note 45, p. 113.
Simultaneously, the EU-citizenship, and the acquisition of it, becomes progressively controversial because of its corresponding obligations for the member states. This controversy is of relevance for the continuation of this thesis. As we saw in section 1, the EU-institutions urged Malta to grant nationality having regard to the EU-citizenship.\footnote{Speech by Viviane Reding, supra note 8.}

### 3.2 The acquisition of nationality as a matter within EU-law

#### 3.2.1 Nationality – an exclusive member state competence

Art. 20 TFEU prescribes, as already mentioned, that ‘Every person holding the nationality of a Member State shall be a citizen of the Union.’ The wording seems to establish that it is up to the member state to decide who should either acquire or loose its nationality and, as a consequence, the EU-citizenship. In this way the EU-citizenship has been described as derivate from the nationality of a member state.\footnote{Closa, supra note 49, p. 510.} Consequently, the defining of who is to be a national of a member state is an exclusive competence belonging to the member state.\footnote{Bernitz, Medborgarskapet i Sverige och Europa: räckvidd och rättigheter, p. 164.}

Despite the wording of art. 20, this exclusive competence cannot have been self-explanatory to the member states when they drafted the relevant provisions. They were instead cautious formulating two texts. The first one, Declaration on nationality of a member state, annexed to the Treaty of Maastricht, reads as follows:

> The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned [...].\footnote{Official Journal C 191/01 of 29 July 1992, p. 98.}

Pending the Danish accession, which was preceded by a negative referendum in Denmark, the European Council drafted the so-called Edinburgh-decision:

> The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The
question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.\textsuperscript{75}

These two texts affirm the statement above, nationality is an exclusive competence of the member state. In addition, the EU-citizenship is separate to, and does not affect, the member state nationality.\textsuperscript{76} However, these texts were not parts of the treaties and their legal importance can consequently be put into question. The primary law is composed of the treaties (art.1 TEU), the Charter of Fundamental Rights of the European Union (art. 6 TEU) and the protocols annexed to the treaties (art 51 TEU). Furthermore, it is not possible to regard the texts as amendments of the treaties since the unique way of amending the treaties is through the processes envisaged in the treaties. This was made clear in the Defrenne-case.\textsuperscript{77} It is thus doubtful how these texts can affect the legal standing of art. 20 TEU, which is a part of the primary law.

Guidance can be found by using the Vienna Convention and its art. 2(1)(d) that gives the possibility to make a reservation. It would however be illogical if all the member states simultaneously agreed to a wording of the Treaty and modified it.\textsuperscript{78} The texts in question should thus not constitute reservations.

These texts should instead be regarded as interpretative aid for the deciding of nationality. According to art. 31 of the Vienna Convention, an international law instrument already referred to by the CJEU (above 2.2), the words of a treaty shall be interpreted in their context. The context is, inter alia, composed of ‘any agreement relating to the Treaty which was made between the parties in connection with the conclusion of the treaty [...]’ and, in addition to the context, ‘any subsequent agreement between the parties regarding the interpretation of the treaty [...]’ shall be taken into consideration. Thus, departing from the Vienna Convention, these texts can serve as interpretative aid. This conclusion is supported by case-law. The CJEU has even made use of a unilateral declaration from the UK, clarifying which of the Empire’s citizens the EU-law should cover, as interpretative aid. The declaration was taken into consideration because ‘[t]he Contracting Parties were fully aware of its content and the conditions of accession were determined on that basis.’\textsuperscript{79}

\textsuperscript{75} Official Journal C 348/01 of 31 December 1992.
\textsuperscript{76} See another view in the discussion above, 3.1.2.
\textsuperscript{77} Defrenne v. Société Anonyme Belge de Navigtion Aérienne Sabena, Case 43/75.
\textsuperscript{78} Hall, \textit{Nationality, Migration Rights, and Citizenship of the Union}, p. 107.
\textsuperscript{79} The Queen v. Secretary of State for the Home Department ex parte Kaur, C-192/99.
Similarly to the member states, the Commission was, in 1993, of the view that nationality is an exclusive member state competence, stating that every national of a member state is ‘automatically a citizen of the Union.’\textsuperscript{80} One could thus question the indispensability of the two mentioned texts. Certain scholars were of the view that these only had a political importance since nationality obviously was supposed to be an exclusive member state competence.\textsuperscript{81}

3.2.2 An initially wide discretion for the member states

Dealing with the question of the member states’ conferring of nationality for Union purposes, a most relevant and cited judgement is the Micheletti-case.\textsuperscript{82} Micheletti was an Argentinian and Italian national. He had never resided in Italy, but, instead, he had profited from Italy’s generous nationality rules granting nationality on the ground of bloodline. Micheletti tried to establish himself professionally in Spain but the free movement was refused by the Spanish authorities. The decision was based on the Spanish Civil Code which, in case of double nationality, demanded that the nationality of the state where the person in question had had his habitual residence should prevail. Thus, Micheletti was considered an Argentinian national, which placed him outside the scope of EU-law. The CJEU held the Spanish arrangement to be in breach of EU-law and stated:

\begin{quote}
Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.
\end{quote}

Spain was consequently obliged to recognise the Italian nationality of Micheletti. As nationality was up to each state to decide, since it is an exclusive competence, the other member states were not permitted to add conditions for the applicability of EU-law.

This wide discretion of the member state for the granting of nationality was also apparent in the above treated case \textit{Kaur}. In this case, the CJEU accepted a declaration adopted when the UK joined the EU, stating that so called overseas citizens, e.g. Indians, would

\textsuperscript{80} COM (1993) 702 Final.
\textsuperscript{81} Inter alia, Closa, supra note 49, p. 512.
\textsuperscript{82} Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, C-369/90.
not be considered nationals for Union purposes. They were hence excluded from the ambit of EU-law. While Kaur considered, e.g., her freedom of movement to be violated, the court was of the view that ‘[…] such rights never arose in the first place.’\(^8^3\)

The CJEU used the same approach in the mentioned case \textit{Chen}.\(^8^4\) The parents of Chen had been informed by lawyers about the particularity of Irish nationality law granting nationality by birth in the territory. Moving to the UK would subsequently provoke a cross boarder situation, the opposite to a wholly internal situation, triggering the EU-law’s protection of baby Chen, consulted the lawyers.\(^8^5\) The British authorities argued that the situation was an illegal circumvention of national law under the protection of the EU-law, and that such an abuse should not be sanctioned by the Union.

The CJEU agreed that the baby Chen’s parents had, by giving birth on Ireland, had the intention of residing in the UK. Nevertheless, the court, reiterating the Micheletti-judgement and the compulsory process to acknowledge other member state nationalities for the purpose of EU-law, did not question Chen’s status as an EU-citizen. It is hard not to agree with Kochenov who has considered the case to be an example of the possible forum-shopping for nationality.\(^8^6\) The plurality and absurdity of nationality laws do not seem to have posed a problem for the CJEU. This can be put in contrast to the genuine link-test, stressed by the Commission and later agreed upon through the joint statement,\(^8^7\) which restricts the margin of appreciation of the member state by imposing a requirement of connection between the state and its new national. It should be difficult to reconcile the standing of the CJEU in \textit{Chen} with the response to the Maltese affair. In the former, the discretion seems to have been almost limitless, and in the latter, a clear limit for the member states was introduced.

\(^8^3\) The Queen v. Secretary of State for the Home Department ex parte Kaur, C-192/99.

\(^8^4\) Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department, C-200/02.

\(^8^5\) Hofstotter, \textit{A Cascade of Rights, or Who shall Care for Little Catherin’? Some reflections on the Chen Case}, ELW 2005 pp. 548-558, on p. 548.

\(^8^6\) Kochenov, \textit{Rounding up the circle: The mutations of member states’ nationalities under pressure from EU citizenship}, EUI Working Papers, RSCAS 2010/23, p. 20.

\(^8^7\) European Commission, Press Release, Joint Press Statement by the European Commission and the Maltese Authorities on Malta’s Individual Investor Programme (IIP), supra note 11.
3.2.3 A more nuanced approach to the member state’s exclusive competence

The observant reader paid attention to the obiter dicta\(^{88}\) in *Micheletti*: ‘Under international law, it is for each Member State, *having due regard to Community law*, to lay down the conditions for the acquisition and loss of nationality [italics added].’ Hence, the Member States seems to have an exclusive competence in the area of nationality, but they must still take the EU-law into account. This approach appears inconsistent though not new. The CJEU has already adopted this approach dealing with matters such as patronymic surnames\(^{89}\) and direct taxation\(^{90}\), and both of these subjects are outside of the EU’s competence. Indeed, one can necessarily distinguish between the ambit of EU-competence and EU-law, the latter being broader.\(^{91}\)

The applicability of this approach on nationality matters can, however, be called into question. Nationality has been considered to be in some way ‘different’, referring to the EU-citizenship as subordinate or dependant.\(^{92}\) On the other hand, the need to embrace the thought about the nationalities and the EU-citizenship being composite and complex (above 3.1.2), when dealing with the determination of nationalities, has been stressed in the literature.\(^{93}\) The concepts are not autonomous, neither superior one to the other.\(^{94}\) Common sense implies, as a consequence, that EU-citizenship cannot be stringently derived from the nationality of a member state in all cases.\(^{95}\) Another conclusion would not proportionally take the two concepts into consideration.

3.2.4 Having due regard to EU-law when conferring nationality

How to have due regard to EU-law regarding nationality was brought to a head in the preliminary ruling *Rottmann*.\(^{96}\) Rottmann was an Austrian national who moved to

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\(^{88}\) D’Oliveira, Case C-369/90, M. V. Micheletti and others v. Delegacion del Gobierno en Cantabria, Judgment of 7 July 1992, not yet reported., CML 30, pp. 623-637, on p. 634.

\(^{89}\) Garcia Avello v. Belgian State, C-148/02.

\(^{90}\) Marks & Spencer plc v. David Halsey (Her Majesty’s Inspector of Taxes), C-446/03.


\(^{94}\) Davis, supra note 92.

\(^{95}\) Kochenov, supra note 93.

\(^{96}\) Janko Rottmann v. Freistaat Bayern, C-135/08.
Germany after having been wanted for alleged fraud. He then became a German national through naturalisation, automatically losing his original, Austrian nationality in accordance with Austrian law. The German authorities subsequently revoked Rottmann’s nationality owing to the fact that he had kept secret the allegations against him in Austria. Rottmann was therefore stateless and, consequently, deprived of his EU-citizenship.

The CJEU referred to Micheletti and reiterated the phrase about having due regard to EU-law. Because of the fact that Rottmann would lose his EU-citizenship by the deprivation of his German nationality, the court found the affaire to be, ‘[…] by reason of its nature and its consequences […]’, a matter for EU-law. The situation was not an internal matter of the member state because of Rottmann’s future limited possibility to make use of his EU-citizenship, which would not exist.

Thereafter, the court found that the member state certainly had a legitimate interest to protect the nationality and its bond of solidarity and respect between the nationals and the state. Several interests actualised, the national court should, therefore, make use of a proportionality test to weigh the consequences of a withdrawal of nationality against each other.

The CJEU sent mixed messages concerning the scope of the judgement.97 On the one hand, it is possible to regard the judgement as limited to the facts. The court was careful to point out the particularity of the case, the deprivation of a naturalisation, initially depriving the individual of his first member state nationality, because of a fraudulent behaviour by the individual. The court even made a distinction with the Kaur-judgement (see above 3.2.2), expressing that Kaur had never been an EU-citizen, opposite to Rottman’s situation. Hence, the precedent could be strictly limited.

On the other hand, the CJEU stated in the end of the judgement ‘[…] that the principles stemming from this judgment with regard to the powers of the Member States in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, apply both to the Member State of naturalisation and to the Member State of the original nationality.’ Having lost his original Austrian nationality, the message was accordingly sent to Austria to observe EU-law for the possible reacquisition

97 Davis, supra note 92.
of Austrian nationality.\footnote{De Groot & Seling, The consequences of the Rottmann judgement on Member State autonomy – The Court’s avant-gardism in nationality matters, in Has the Court of Justice Challenged Member State Sovereignty in Nationality Law?, ed. Shaw, J, EUI Working Papers RSCAS 2011/62.} Furthermore, the CJEU based its judgement on the Micheletti-case which, as we have seen, concerned the recognition of an acquisition of nationality. The CJEU probably expressed itself between the lines, and opened up the way for evaluating nationality laws of the member states regarding both loss and acquisition. A loss was in this case undeniably against EU-law, but also an acquisition could fall within the EU-law ambit.

There can be different opinions about the proportionality test as a solution to the Rottmann-situation. Indeed, Rottmann was about to become stateless as well as EU-citizenship-less. In connection to the fact that EU-citizenship has developed, and no longer can be seen as strictly additional to, and derivate from, nationality, it could have been more appropriate to give stricter and clearer guidance to the national courts avoiding an ambiguous application of EU-law to the expense of the EU-citizen.\footnote{Kochenov, supra note 93.} Still, the mixed messages from the CJEU were probably not a coincidence. Nationality is a sensitive policy area where strictly guiding principles and statements run the risk of provoking severe objections. A proportionality test may have been a balanced answer to Rottmann’s situation, which concerned much more than the individual Rottmann (see section 5).\footnote{Shaw, J, Concluding thoughts – Rottmann in context, in ‘Has the Court of Justice Challenged Member State Sovereignty in Nationality Law?’ , ed. Shaw, J, EUI Working Papers RSCAS 2011/62.}

3.2.5 Malta having due regard to EU-law

From the Rottmann-case it is at least clear that certain nationality issues can be affected by, and must be in compliance with, EU-law. The Rottmann-case can perhaps be regarded as an attempt to be cautious in the area of nationality while still stating the fact that all nationality law must have due regard to EU-law. In any case, the importance of the EU-citizenship should accurately not be denied.\footnote{Ibid.} Taking its dynamic character into consideration, the fact that the importance of the EU-citizenship probably will increase, also means that its corresponding vulnerability should not be neglected. The EU-citizenship cannot entirely depend on the member states. The member states might have formulated their view in the mentioned declaration and decision (3.2.1) but, still, they had always had the opportunity to do it through the form of a protocol that would have formed
part of the primary EU-law.\textsuperscript{102} Hence, both the loss and the acquisition of EU-citizenship should be subject to judicial review from the EU.

Before considering how the IIP conformed to EU-law, I would like to discuss the Micheletti-precedent. As outlined in section 2, the international public law serves as a part of EU-law. Indeed, an attribution of nationality in violation of international law is also a violation of EU-law.\textsuperscript{103} It is imperative for Malta to comply with both EU-law and international law, the latter forming part of the former. Returning to the Micheletti-precedent, Malta should have observed the rules of EU-law as well as the rules of international law when it adopted the IIP. If the IIP was in conformity with these, then both the EU and the other member states should have recognized it. In the following, I will begin by examining the IIP:s compliance with EU-law and thereafter, in section 4, with international law.

The exclusive competence concerning nationality will continue to be in the hands of the member states. The requirement of having due regard to EU-law should, thus, not concern the secondary law. Coming to another conclusion would mean that the EU surprisingly possesses competence in the area of nationality. One should instead have recourse to the primary law.

In the context of the Maltese IIP, it is first to be distinguished from the Rottman-case. The matter did concern the acquisition, not the loss, of nationality. A potential Maltese citizen could not rely on the EU-citizenship rules to question the intervention of the EU-institutions. The CJEU was pretty clear in the Kaur-case, having never been covered by EU-law, Kaur could not rely on the EU-citizenship to question national legislations or measures. Thus, although \textit{Rottmann} clears the way for reviewing member states’ nationality laws concerning acquisition, there should still, at least, be a large discretion for the member states. Nationality laws not open to judicial review, or discriminatory nationality arrangements placing a disproportionate burden on a specific group thereby risking to constitute a direct or indirect discrimination,\textsuperscript{104} could otherwise have

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\textsuperscript{102} Davis, supra note 92.
\textsuperscript{104} ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited,’ art 18, TFEU.
\end{flushleft}
constituted potential grounds for scrutiny.\textsuperscript{105} Such a tendency towards a member state discretion is enhanced\textsuperscript{106} by what the CJEU proclaimed in Rottmann:

It is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.\textsuperscript{107}

Hence, while there should exist a possibility to review member state nationality laws on the ground that the third country individual’s interest is not duly regarded, the member state discretion seems manifest. Such a discretion may not be equally wide if the individual is already a national of another member state. This was not, however, the problem with the Maltese IIP, which, instead, probably attracted wealthy individuals from third countries. The relevant relationship was the one between the Union and the member states, as was put forward by the EU-institutions. The principle of sincere cooperation is of particular interest in this context.

3.3 Having due regard to the principle of sincere cooperation

3.3.1 The principle of sincere cooperation

The principle of sincere cooperation is regulated in art. 4.3 TEU. It has been established as one of the fundamental provisions of the primary law.\textsuperscript{108} According to the CJEU, this principle signifies a duty of ‘[...] solidarity which is at the basis of [...] the whole of the Community system.’\textsuperscript{109} In practice, the principle has also proved worthy playing an essential role in the evolutionary progress of EU-law.\textsuperscript{110}

Concerning the applicability of this principle, it emerges from case-law that it is one of the provisions of primary law that has to be respected when the member states exercise their exclusive competences.\textsuperscript{111} In addition, concerning its applicability, both the member

\textsuperscript{105} Murphy, \textit{Immigration, integration, and the law : the intersection of domestic, EU and international legal regimes}, p. 239.
\textsuperscript{106} Ibid.
\textsuperscript{107} Janko Rottmann v. Freistaat Bayern, C-135/08.
\textsuperscript{108} Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, Case 43/75.
\textsuperscript{109} Commission v. France, Joined Cases 6 and 11/69.
\textsuperscript{111} Netherlands v. Zwartfeld, C-2/88.
states and the EU are obliged by it.\textsuperscript{112} Thus, there shall reciprocally be a sincere cooperation amongst the member states and between the EU and the member states.

The first two passages of art. 4.3 imposes positive obligations on the member states and the Union to respect and assist each other and carry out the EU-law and its obligations. One remark should here be made before continuing. The only obligation mentioned, considering the action and words of the EU-institutions in connection to the Maltese affair, was Malta’s towards the EU and the other member states. One could, however, argue for a positive obligation for the EU towards Malta, alternatively an obligation to stay passive. Malta came out of the financial crisis.\textsuperscript{113} In this way, the selling of citizenship could be a response to the general situation at hand. The permissibility could have helped the economy of a member state. It could at least have been expected from the EU-institutions to mention the reciprocity of the principle of sincere cooperation. Yet, this does not mean that the Maltese IIP was in accordance with the principle of sincere cooperation. The Union is composed of multiple states. No state is the only one that desires to improve its economy. The EU-law has, in different domains and in general, rejected economic reasons as a ground for derogation.\textsuperscript{114} The relevant relation and action was, consequently, the one steaming from Malta towards the EU and the other member states.

Returning to the wording of art. 4.3 TEU, there is also a third provision which reads as follows: ‘The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives [italics added].’ As we are in front of the problem where Malta should not have used its exclusive competence in a certain manner, we are dealing with a negative obligation as in this cited provision.

A careful examination of art. 4.3 TEU reveals its problematically general wording. The CJEU has established certain limitations to the application of the principle of sincere cooperation because of its generality. The principle of sincere cooperation can never in itself create duties. It gets instead its peremptory force in connection with another rule of EU-law, or objective of the EU. Furthermore, this rule or objective has got to be clear.

\textsuperscript{112} Commission v. Federal Republic of Germany, C-94/87.
\textsuperscript{113} Shaw, J., supra note 17.
\textsuperscript{114} See, e.g., the restrictive derogation rules in art. 107 TFEU, especially 107 (3a), and concerning the free movement of persons, Commission v. Netherlands, C-542/09.
enough to deserve forming a basis for precise, legal obligations. The purpose of the principle of sincere cooperation is not to fill every gap in Union law. Different rules and objectives of relevance to the Maltese IIP shall be examined in the following.

3.3.2 Sincere cooperation and the internal market

The internal market as an objective is already enshrined in the preamble of the Lisbon Treaty. It is also prescribed in art. 3 TEU: ‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress[…].’ Regarding this objective, it has been asserted that the selling of citizenship could constitute an insincere measure. Esteeming a few thousand people would take advantage of the Maltese IIP, it would amount to a disproportionate perturbation of the internal market not managing the disturbance.

Approximately the same problem has previously been presented in the form of mass-naturalisation. Such an act would result in a great number of new citizens that would provoke an economic dislocation and expose the EU’s ‘[…] labour market, its market for services and any market affected by the right of establishment to serious disruption possibly to the point of jeopardising the Treaty’s objectives.’ This view was also stressed in Rottmann by Advocate General Maduro, who proposed that the mass-naturalisation could constitute a non-permitted measure by a member state.

The mass-naturalisation was interestingly never brought up by the court in the final judgement. Certainly, Maduro’s point was not necessary to solve the case. A mass naturalisation did not concern the deprivation of his nationality and, thus, it should be considered an obiter dictum. Nevertheless, it touched upon the admissibility of a member state’s nationality measure. Remembering the Micheletti-case, the CJEU has also proved capable of delivering obiter dicta.

Another aspect, connected to the Micheletti-case, is worth mentioning. Micheletti, an Argentinian national, had acquired an Italian nationality. Italy has had a generous

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115 Temple Lang, supra note 110, p. 1517-1519 with further references to case-law.
116 Carrera, supra note 12, p. 25.
117 Hall, supra note 78, pp. 65-66.
118 Opinion of Advocate General Poiares Maduro in Janko Rottmann v. Freistaat Bayern, C-135/08.
legislation for Latin Americans that are able to show that they have an Italian heritage.\textsuperscript{119} Such legislation must have posed more far-reaching disturbances to the internal market than the Maltese IIP. Still, the CJEU protected the Italian conferral of nationality in \textit{Micheletti}. One could perhaps state that in the Maltese affair, it was not the \textit{quantitative} aspect that posed the problem, but, instead, the \textit{qualitative} one. Economic disturbance to the internal market do not seem to have been crucial. Besides, wealthy Maltese nationals should logically not constitute a problem for the economic internal market.

The Maltese affair can also be viewed in another way. Nationality matters might be, and might have been, in breach of the principle of sincere cooperation, but the response from the EU depends on the reaction of the other member states. Indeed, nationality laws have got a clear political character touching on the member state’s sovereignty. Perhaps a member state has respected the nationality laws of other member states fearing its own nationality law could be questioned.\textsuperscript{120} Truly, the victims of Malta’s potential breach of the principle of sincere cooperation were its fellow member states.

3.3.3 Sincere cooperation and solidarity

The EU ‘[…] shall promote economic, social and territorial cohesion, and solidarity among Member States’ according to art. 2 TEU. Departing from this objective, Hall asserts that ‘[t]his duty includes an obligation not to engage in acts within the scope of the Treaty which are deceptive or misleading to other member states or to the Community.’ As a consequence, a member state should not confer nationality on individuals lacking a genuine link to the member state. Furthermore, the same author is of the view that a member state is under an obligation to consult its fellow member states and the Commission before introducing potentially deceptive nationality laws.\textsuperscript{121}

Returning to the limitations of the principle of sincere cooperation (above 3.3.1), one should bear in mind the necessary determination of an objective to create legal obligations. The principle of sincere cooperation does not create obligations on its own. It can be called into question if not the literary meaning of the word ‘solidarity’, from which Hall seems to deduce his point, as an objective, have a too broad meaning. Presumably, it does not possess the crucial clarity and specification to create a legal

\textsuperscript{119} Shaw, J, supra note 17.
\textsuperscript{120} Bernitz, supra note 73, p. 240.
\textsuperscript{121} Hall, supra note 78, pp. 66-68.
obligation. The opposite conclusion would not constitute a reasonable interpretation and lead to an unpredictable result for the member state. In addition, as we have seen above (3.2.1), the member states intended to keep their exclusive competence in the area of nationality. Referring to the broad wording of ‘solidarity’ to create a legal duty, in an area where the member states wished to restore their exclusive competence, would open the door to an excessive application of EU-law. Indeed, the EU-law is not composed of more than the member states have agreed to.

Nevertheless, even in the absence of an expressive obligation in the primary or secondary law, the member states are under a general duty to inform the Commission on its request. The Commission can accordingly investigate if there is a breach of EU-law. The Commission is the so called ‘guardian of the treaties’. Its approval to a nationality legislation would most certainly mean that it is permitted under EU-law. Yet, there is no obligation to consult the Commission and the other member states in the area of nationality.

3.3.4 Sincere cooperation and the EU-citizenship

The EU-citizenship is regulated in several parts of the treaties (above section 3.1). The preamble is clear about the object, the establishment of an EU-citizenship. Further on, the TFEU grants both political and economic freedoms to the EU-citizens. In addition, the importance and clarity of the EU-citizenship, already apparent in the treaties, becomes even more manifest considering the case-law attached to it. The EU-citizenship has got a large importance through the CJEU’s interpretation. Furthermore, the EU-citizenship still seems to be developing and growing in importance.

Considering the importance and clarity of the EU-citizenship as a concept in the objectives and rules of the Union, the EU-institutions seem to have delivered a valid reasoning in this part of the Maltese affair. The selling of nationality would expose the EU-citizenship. Both the evolution and the democratic character of the citizenship are arguments for coming to this conclusion. Selling the right to vote and to be treated in leastwise the same way as a member state national in her country, would probably not be

123 Bernitz, supra note 73, p. 240.
seen in a keen way by the EU-citizens and Malta’s fellow member states. As proposed above, the problem with the Maltese IIP was not quantitative but *qualitative*. It was qualitatively offensive because it menaced the special status the EU-citizenship constitutes.

The Maltese IIP should therefore be regarded as constituting a breach of the principle of sincere cooperation towards the EU-citizenship as an objective and concept. It is, yet, interesting and worth keeping in mind the Commission’s answer, the requirement of a year of residency. Would not this, also, prejudice the EU-citizenship?

Malta could probably have avoided to breach the principle of sincere cooperation by consulting the Commission in advance. The supervision of the treaties falls mainly on the Commission. May it be that Malta would have got a negative answer to its plan to sell its nationality and the EU-citizenship.

Summarising section 3, nationality laws might under certain circumstances fall within the EU-law ambit. This can be the situation if a member state is selling its nationality, since it does not constitute a sincere cooperation towards the EU-citizenship. In passing, the conclusion can be drawn that Sweden could, and should, have protested against the Maltese IIP (see Sweden’s standing above in section 1.3). What would have constituted a sincere cooperation is another question. The Commission did apparently consider it to be the acquisition of nationality when a genuine link exists between the individual and the member state. This assertion is, inter alia, what will be examined in the next section.
4 The significance of nationality in international law

4.1 A background on nationality in international law

There are several different ways through which an individual can acquire the nationality of a state: By birth, marriage, adoption, naturalisation or through the transfer of territory from one state to another. Since the IIP concerned a naturalisation, and acquisition through birth is the most common way of becoming a national, these are the procedures that will be examined further.

There are two principles that commonly govern the conferring of nationality after the birth of an individual. Those are *jus sanguinis*, whether the parent is a national, and *jus soli*, whether the birth took place on the territory. Naturalisation, on the contrary, is different compared to these two principles, this because the conferral occurs after the birth of the individual. Technically, a naturalisation refers to the situation where a state grants nationality to an individual upon her request. Among states it is moreover common that a residency requirement needs to be fulfilled before the naturalisation can be granted.

It can perhaps be stated that international law has had a hands-off approach towards the ways of acquisition of nationality. Thus, in 1923, the Permanent Court of International Justice (PICJ) stated the following in the advisory opinion Nationality Decrees Issued in Tunis and Morocco:

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question: it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

The same approach was taken in the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws (Hague Convention) from 1930. The Convention’s art. 1 reads as follows:

126 Kruma, supra note 69, p. 54.
127 Malancuk, supra note 125, p. 263.
129 PCIJ, Series B, No 4, 1923.
It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

It is true that this convention aims at regulating issues on a bilateral level, e.g. which nationality that is to be recognised if the individual possess two, instead of giving an obligation to regulate nationality in a certain manner. Nevertheless, it is confirming the view that is expressed in *Nationality Decrees Issued in Tunis and Morocco*, i.e., each state has a sovereign right to determine who is its national. This sovereignty depends however on what international law prescribes and how it develops.

As pointed out by Brownlie, nationality laws may very well touch upon the state’s sovereignty. A conferral of nationality decides that an individual can stay on the territory. It concerns as a consequence the territorial sovereignty. Yet, the nationality of an individual can have implications also under international law. It gives e.g. the state the alternative of invoking diplomatic protection towards another state if one of its nationals has been illegitimately wronged on the respective states territory (below 4.2.1). Thus, nationality cannot be considered to be a purely domestic matter.

Consequently, there may logically exist rules governing nationality in international law. Scholars have disagreed upon the point if there are customary rules permitting certain ways of conferring nationality above others. Brownlie, e.g., asserts that certain principles can be enshrined through the comparative studies of the domestic nationality laws. There should thus be some connecting factor between the state and the individual. Indeed, *jus sanguinis* and *jus soli* seems to be the main principles among states for conferring nationality. Between these two principles, though, there are different combinations and variations. Weiss, however, is of the view that one should be careful to conclude an *opinio juris*, subsequently a customary rule, from the comparing of nationality laws. Truly, behaviour is not equal to the conscious obligation to act in a certain way. Comparing the opinions of these scholars to the Nottebohm-precedent, which demanded

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130 Kruma, supra note 69, p. 49.
133 Kruma, supra note 69, p. 54.
a minimal condition for the conferral of nationality, seems to be settling with Brownlie’s view.

4.2 The Nottebohm-case

4.2.1 Diplomatic protection

The Nottebohm-case concerned diplomatic protection. This concept will therefore initially be elucidated, and serve as an appropriate point of departure, for the understanding of the case and its implications.

Diplomatic protection is based on two pillars: Firstly, an individual must have suffered an injury by a wrongful act, which can be attributed to another state. Secondly, the individual must be a national of the state invoking the responsibility. Fulfilling these conditions, the state may invoke measures such as consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retort, severance of diplomatic relations and economic pressures.

Even though the wrongful acts for which a state can be liable have increased in number, the principle stated by the PCIJ in The Mavrommatis Palestine Concessions-case remains the same: By intervening on the part of its nationals, the state is in reality asserting its own rights under international law. It is consequently the state that has a potential claim under international law. There is no right for the individual to diplomatic protection. The diplomatic protection thus pursues the traditional structure under international law where the states constitute the subjects.

Comparing this to EU-law, it is not hard to notice a basic difference: In EU-law the individuals are granted rights, which they can individually and legally claim towards the EU or the member states. Furthermore, as was noted above in section 3.1, the EU-citizen has the right to diplomatic protection whatever member state is present, thereby extending the possibility to invoke diplomatic protection to a state which normally would not be regarded as a party to the dispute. Moreover, the member states have through art. 344

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135 Shaw, M, International Law, pp. 808-809.
136 Ibid.
137 The Mavrommatis Palestine Concessions, PCIJ, Series A, No. 2, 1924.
138 Shaw, M, supra note 135, p. 809.
139 Ibid, p. 810.
TFEU, stating that every conflict concerning the interpretation of the treaties should be solved by the means provided in the treaties, shut out the possibility of invoking diplomatic protection against another member state. It can hence be concluded that the intention of the Union has been to internally exclude diplomatic protection, and to externally extend the application, thereby contrasting with the general conception of diplomatic protection in international law.

4.2.2 The merits and the judgement

The Nottebohm-case concerned the individual Friedrich Nottebohm who was born in Germany. He moved to Guatemala as an adult taking up residence and business in 1905. In 1939 Guatemala was still a neutral state in the World War II and Nottebohm decided to travel to his brother in Liechtenstein, which was a neutral state as well. After travelling between Hamburg and Vaduz several times sojourning in both countries, he applied for Liechtenstein citizenship through naturalisation following the advice of his attorneys. He was granted Liechtenstein citizenship and lost, as a consequence, his German one.

Early in 1940 Nottebohm returned to Guatemala, which subsequently entered the war against Germany in 1941. Nottebohm was thereafter deported by Guatemala as an enemy, German alien and his property was seized, retained and later expropriated.

Liechtenstein relied on the conception of diplomatic protection of its citizen Nottebohm to claim damages for the acts of Guatemala at the ICJ. Guatemala objected that Nottebohm’s Liechtenstein nationality had been acquired contrary to international law and, thus, Liechtenstein did not have the right to invoke the diplomatic protection since Nottebohm was not one of its proper citizens.

Before coming to a verdict, the ICJ restricted the scope of the judgement stating that the judgement concerned no more than diplomatic protection and that it did not have to decide with respect to all states but only if Nottebohm’s Liechtenstein nationality could be relied upon against Guatemala.

ICJ differentiated, thereafter, between nationality for domestic and international purposes, the former falling within the discretion of the state of nationality and the latter forced to be in accordance with international law to have implications for other states.

140 Hall, supra note 78, p. 77.
Returning to 4.1 above, one can see how the judgement corresponds to the Hague Convention making this differentiation. Furthermore, having regard to PICJ’s advisory opinion Nationality Decrees Issued in Tunis and Morocco, in Nottebohm the ICJ seems to have been of the view that the international law had expanded into requiring certain ways of acquisition of nationality.

As the case concerned diplomatic protection and hence had an international imprint, ICJ continued:

[...] nationality is 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. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national.

The court went on précising how this genuine connection could manifest itself by asking:

[...] does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?

Through this sort of genuine connection- or link-test, it may thus be determined which unique state is allowed to invoke diplomatic protection. The ICJ concluded that this state was not Liechtenstein since Nottebohm’s ties to this country were ‘extremely tenuous’. In addition, before coming to this conclusion, one should also regard the ICJ’s expressed concern that Nottebohm’s nationality was a deceptive arrangement to avoid the potential consequences of the war between Germany and Guatemala.

The judgement was not delivered unanimously, but with eleven votes to three. One of the dissenting judges, Read, emphasised the importance of nationality from the individual’s view. Consequently, the tests used should be objective and certain giving a predictable result. The genuine link-test lacked these qualities.

142 Advisory opinion Nationality Decrees Issued in Tunis and Morocco, PCIJ, Series B, No 4, 1923.
143 See also Hall, supra note 78, p. 62.
4.2.3 A contemporary approach to the importance of the Nottebohm-case

Referring to Nottebohm, Hall has asserted that international law imposes a presumption that nationalities should be internationally recognised, but that this presumption can be put aside if the nationality has its origin in abusive or similar creations,\textsuperscript{144} thus granting large importance to the judgement. Not all sources deduce such an importance from this case.

Art. 4 of the International Law Commission’s (ILC) Articles on Diplomatic Protection\textsuperscript{145} does not require a genuine link as a condition for exercising diplomatic protection. It demands instead that, e.g., a naturalisation should not be ‘inconsistent with international law’. In the commentary to this article, the ILC accentuates the ‘extremely tenuous’ connection between Nottebohm and Lichtenstein when discussing the genuine link-test. Because of the particularity of the case, the commentary proposes that it should be limited to ‘the facts of the case in question’ and therefore not form a general rule in international law.\textsuperscript{146} Furthermore, one should not neglect the fact that Nottebohm constituted a putative enemy alien. This may very well have had a considerable effect on the final judgement.\textsuperscript{147}

Accordingly, not only that the ICJ reduced the scope of the judgement to diplomatic protection (above 4.2.2) but also within this limited scope the case was probably, as the commentary claims, one of its kind.

The commentary moreover illuminates the fact that if a genuine link-test would be strictly applied, then millions of people would be excluded from diplomatic protection.\textsuperscript{148} Indeed, the test corresponds poorly to the growing globalisation.\textsuperscript{149} Advocate Generale Tesauro stated the following in the above presented case Micheletti:

\begin{quote}
I do not believe that the case before the Court constitutes an appropriate setting in which to raise the problems relating to effective nationality, whose origin lies in a “romantic period” of international relations […]\textsuperscript{150}
\end{quote}

\begin{itemize}
\item \textsuperscript{144} Ibid, p. 63.
\item \textsuperscript{145} Draft articles instituted by the ILC, a commission of the UN.
\item \textsuperscript{147} Crawford, supra note 132, p. 518.
\item \textsuperscript{149} Kruma, supra note 69, p. 61.
\item \textsuperscript{150} Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, C-369/90.
\end{itemize}
Though it may be difficult to comprehend exactly why the test is romantic according to Tesauro, one might presume Tesauro was referring to the old times when national states were strong, international relations less developed and migration less common. The inconvenience increases applying the genuine link-test on recent affairs. Without clear demographic frontiers between peoples, it is hard to accept the arbitrariness of the genuine link-test, as pointed out in Judge Read’s dissenting opinion.

Furthermore, the Council of Europe enacted in 1997 the, for nationality matters, important European Convention on Nationality (ECN). Art. 6 ECN, which regulates acquisition of nationality, does not require a genuine connection preceding a naturalisation. If one observes the text carefully, it only forbids the state to demand a residency of over ten years as a requirement for naturalisation.

Summarising, Kruma had a valid point stating that the genuine link-test generally is to be applied with caution. This conclusion should also concern the EU and its institutions.

4.2.4 The adequacy of the effective link-test on the Maltese affair

Before analysing whether the genuine link-test was appropriately applied to the Maltese affair, it is of interest to determine how the relevant EU-law should be categorised within the international law’s concept of nationality.

According to the Hague Convention (above 4.1), the state’s discretion is restricted by ‘[…] international conventions, international custom, and the principles of law generally recognized with regard to nationality.’ It should, on the one hand, be hard to see EU-law as a generally accepted part of international law.

On the other hand, the EU’s case-law in relation to nationality might well be seen as such a development of international relations as was pointed out in PIJC’s advisory opinion Nationality Decrees Issued in Tunis and Morocco. Although the CJEU is quite eager to assert the sui generis of the EU (above 2.2), it is still an innovative cooperation in international law that introduces its citizens as new subjects in international law, and has the right to enact rules concerning certain matters regardless of any veto of the states concerned. The EU can thus be regarded as such an envisaged development in

151 Bernitz, supra note 73, pp. 199-200.
152 Kruma, supra note 69, p. 62.
153 Hall, supra note 78, p. 20.
international law. Consequently, EU-law can legitimately constitute a restriction of the state sovereignty in nationality matters. Concluding this, the EU-law on nationality is not contrary to international law.

Still, notwithstanding this conclusion, the EU-institutions made use of a case from international law. This was probably to the advantage of the EU since the Nottebohm-case already existed and therefore possessed some sort of legitimacy. This should, however, also mean that the case is to be used in a proper and loyal way, otherwise not deserving much importance in the Maltese affair. Furthermore, one should not forget that the Commission referred to the Nottebohm-case, and its requirement of a genuine link to the state, as an outgrowth of the principle of sincere cooperation. It seems to have been some sort of hybrid between EU-law and international law. Thus, though EU-law is able to restrict the state sovereignty in international law, it is of importance whether the case was used properly. I will return to this question below.

In the literature it has generally been asserted that nationality granted in other ways than through *jus soli*, *jus sanguinis* or any other accepted principle in international law should not be recognised for union-purposes.\(^{154}\) It is hard to reconcile this thought with the above outlined (section 4.1). The main principle appears instead to be state sovereignty when it comes to nationality.

It is indeed difficult to find any conventions limiting the acquisition of nationality. Next, turning to the question of international customs, the one who asserts the presence should bear the burden of proving its existence. Finding common standards from comparative studies does not necessarily mean that an *opinio juris* exists. Besides, the one trying to find these common standards, proving an international custom, might become disappointed. In the present state of affairs it is not unusual that states grant nationality to persons with excellent skills in sports,\(^{155}\) great financial capacity (above, section 1) and distant blood-lines, i.e. a broad and liberal implementation of the *jus sanguinis* principle.\(^{156}\)

Concerning the adequacy of the Nottebohm-case in EU-law, the room should be limited. If the Nottebohm-precedent has got an actual function today, it is restricted to a minimal

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\(^{154}\) Bernitz, supra note 73, p. 245.


\(^{156}\) De Groot, supra note 103, pp. 9-10.
role in diplomatic protection. This while the traditional concept of diplomatic protection fits poorly within the legal order of the EU, both internally, between the member states, and externally, towards the third countries (above 4.2.3).

One could perhaps object that the EU generally demands closer cooperation and dialogue between its member states than international law does through the concept of diplomatic protection. The member states have through the Union, e.g., transferred parts of their sovereignty and subjected itself to a jurisdiction, the CJEU, whose rulings possess a peremptory force obliging the member states to execute them. This can be compared to the concept of diplomatic protection, which is rather characterised by dialogue and diplomacy. It could thus be asserted that the Nottebohm-precedent should be valid for the Union as well, since it is even more sensible to deceptive nationality arrangements than the concept diplomatic protection.

However, if there would be a gap in EU-law when it comes to provocative nationality laws, should not this be solved through honest reasoning? Is caution called for when applying the Nottebohm-precedent in the area of the original judgement, then an analogy should be even more distant. The Union should have been clear about introducing a new policy that was not a part of the existing EU-law. The presence of this new policy then would have demanded an amendment of the treaties since the exclusive competence is in the hands of the member states. It would certainly have led to bureaucratic difficulties. This must, nevertheless, be an acceptable consequence since it is the member states that ultimately decide the wording of the treaties.

4.3 Human rights and it’s prohibition against discrimination limiting the state’s discretion in nationality matters

4.3.1 Human rights’ importance for the acquisition of nationality

As I have been seeking to establish in the above, the sovereignty of the state remains manifest in international law. It is difficult to deduce any restriction from the sources that was examined in the previous section. However, as human rights generally have limited the state’s discretion in international law, e.g. through the concept Responsibility to

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157 About this concept, see above 4.2.1.
158 I disregard consequently the strictly limited possibility in art. 352 TFEU to enact legislation in areas where the union lacks competence.
Protect,\textsuperscript{159} the same evolution can be observed in nationality matters. This was on an early stage, in 1984, observed by the Inter American Court of Human Rights in an advisory opinion that concerned naturalisation rules in Costa Rica.\textsuperscript{160} Later on, the European Court of Human Rights (ECHR) has taken a similar approach, inter alia, in Kuric and others v. Slovenia.\textsuperscript{161} In this case, a nationality law was stated to be in breach of the right to private- and family life in art. 8 of the European Convention on Human Rights. The applicants had not opted for Slovenian nationality in the six months-period following the independence of Slovenia and they had therefore become stateless. The ILC has observed the same evolution concerning nationality matters in international law: ‘As a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided.’\textsuperscript{162} The approach has, as observed in these sources, altered towards paying greater attention to the individual, thus also affirming the dynamic character of nationality in international law. Indeed, if one should discuss a contemporary international law on nationality, it is within the sphere of human rights.\textsuperscript{163} Such a conclusion should strengthen the fact that the Nottebohm-case has a limited importance in the present international law on nationality (above 4.2.3).

The fact that everyone has the right to a nationality was already established in 1948 through the Universal Declaration of Human Rights and its art. 15. Although this provision is a part of a declaration, and therefore in principle should lack peremptory force, it is certainly a rule in international custom. It is hence binding.\textsuperscript{164} However, the fact that everyone has the right to a nationality does not mean that an individual can choose the nationality of a specific country.\textsuperscript{165} Regarding the acquisition of nationality, it should consequently be difficult to extract an obligation for the state to grant nationality.

\textsuperscript{159} UN Security Council’s Resolution 1674 (2006).

\textsuperscript{160} “Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that […] those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights”, Amendments to the naturalization provisions of the Constitution of Costa Rica/Advisory opinion by the Inter American Court of Human Rights, OC-4/84, (1984) 5 HRLJ, No 2-4.

\textsuperscript{161} Kuric and others v. Slovenia, ECHR, 26 June 2012.

\textsuperscript{162} Part 5 in the Commentary Preamble of Draft Articles on Nationality in Relation to the Succession of States with commentaries, International Law Commission 1999.

\textsuperscript{163} Bernitz, supra note 73, p. 182.


\textsuperscript{165} Bernitz, supra note 73, p. 192, and Kruma, supra note 70, p. 51.
in a certain case. An individual could hardly demand to be granted the Maltese nationality. For the Maltese affair, and particularly its response from the EU, the prohibition against discrimination is of greater relevance.

4.3.2 The prohibition against discrimination and the acquisition of nationality

The prohibition against discrimination is embodied both in the Universal Declaration of Human Rights, art. 7, and in the subsequent International Covenant on Political and Civil Rights, art. 26. Although these provisions have a rather general character, they are binding regardless of additional instruments aimed at reinforcing or expanding them. There is nevertheless no absolute principle of equality. To evaluate if something is discriminatory in the present context, the instruments which deal with discrimination in connection to loss and acquirement of nationality can be consulted with advantage. Those are the ECN and the Convention on Elimination of All Forms of Racial Discrimination (CERD).

Art. 1 (3) of the CERD stipulates that legal provisions concerning nationality, citizenship or naturalisation must not discriminate against any particular nationality. The CERD possesses an inherit, slightly progressive, interpretation. The provision implies hence that the state should have nationality laws, regarding e.g. naturalisation, that are neutral to the ethnic origin of the individual. States should moreover refrain from adopting policies that indirectly disqualifies certain groups from naturalisation. On the contrary, the state may have provisions demanding certain requirements as long as these are not discriminating.

The ECN grants a similar protection. Art. 5 lays down that ‘[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.’

166 Certain efforts have instead been made to reduce statelessness, both through facilitating the acquisition of nationality for stateless individuals and through limiting the ways in which a state can deprive the individual of her nationality, ECN and the Convention on the Reduction of Statelessness of the UN are examples of this.
168 Kruma, EU citizenship, Nationality and Migrant Status. An ongoing challenge, p. 73.
169 Ibid, p. 73.
170 Ibid, p. 74.
Notwithstanding this clear wording, the Convention’s explanatory note clarifies that states are allowed to fix certain criteria to determine their nationals, considering the very nature of nationality and its connection to the state.\(^{171}\) Furthermore, the possibility for the state to grant nationality in special situations or when the state so desires is still relevant and available. Consequently, e.g. language tests or tests on cultural integration should not, in principle, constitute arrangements in violation of the non-discrimination provisions.\(^{172}\) However, it is to be noted that discrimination may take not overt but covert form. Discrimination must be assessed on a case-to-case basis, evaluating the proportionality, to determine whether there is a direct or indirect discrimination.\(^{173}\) In addition, regarding language- and integration tests, these should not be used in a way to exclude certain undesired groups from citizenship, which seems to have been the case in certain European states. Such arrangements would probably amount to discriminatory treatments contrary to international law.\(^{174}\)

Concerning the Maltese affair, the instruments that have been examined above do not present the financial capacity of the individual as a discriminatory ground. Moreover, the state still has got the power to determine certain citizenships on a selective basis when it is in the particular state’s interest. It should thus be hard to consider that human rights constituted a problem for the initial IIP. The response from the EU-institutions introducing a genuine link-test however deserves a more scrupulous examination. It might very well be that it was not the IIP that constituted a problem in this context but, instead, the genuine link-test.

Although the prohibited discriminatory field will be evaluated on a case-to-case basis, and therefore is hard to foresee, it is still worth reflecting over what the genuine link-test implies. The ICJ’s test of a genuine link aims at finding the unique state that the individual has got the nearest connection to, by considering the individuals tradition, establishment, interests, activities and family ties (see above 4.2.2). Concerning these criteria, the ICJ seems to have desired to emphasise the unique national culture of each state. It is not without concern that it may be expressed that the Commission’s new policy of a genuine link to the member state suppress nationalistic ideas and feelings, in contradiction to the anti-discrimination instruments prohibiting non-proportional nationality laws that

\(^{171}\) Council of Europe, Explanatory report. European Convention on nationality (ETS no. 166), para 40.

\(^{172}\) Bernitz, supra note 73, p. 195.

\(^{173}\) Kruma, supra note 168, p. 75 with further references.

\(^{174}\) Murphy, supra note 105, p. 241.
directly or indirectly discriminates on the ground of race, ethnic origin or nationality of the individual. Though the state discretion still seems to be large, the new policy risks creating an opening for laws on acquisition of nationality that go beyond what can be proportionate, thereby declared discriminatory.\(^{175}\) There seems to be a fine line between maintaining a bond between the citizens and the state, e.g. through integration tests preceding a naturalisation, and the exclusion of undesired groups because of their ethnical backgrounds. Furthermore, the Commission’s response seems to go against the evolution that was expressed above. Human rights have generally limited the state’s discretion regarding nationality matters, an evolution that also concerns discrimination. Fortunately for Malta, the result of the genuine link-condition was a residency condition difficult to find discriminatory.

\(^{175}\) See Carerra, supra note 12, p. 28.
5 A different approach to the Maltese affair

5.1 The basis for coming to an answer

Before continuing it is suitable to give a résumé of the hitherto conclusions. Although the determining of nationality is still in the hands of the member states, they must have due regard to, i.e. respect, primary EU-law. In addition, the EU and its member states should also respect international law. Regarding the IIP, Malta should have had regard to the principle of sincere cooperation in conjunction with the EU-citizenship, a concept and object with great importance and clarity in the treaties. Malta did not pay sufficient attention in this context. The EU-institutions reasoned in a fair way until this point. From my point of view, the problem was in what way the Commission considered that an acquisition of nationality should be constructed to be in conformity with the principle of sincere cooperation.

The primary law does not appear to attach great importance to its non-discrimination provisions concerning the attribution of nationality to third country nationals (above 3.2.5). Although international law serves as a part of EU-law, the primary law, in which the exclusive competence of the member states has its origin, seems to have greater importance than the international law (above 2.2). The international law’s status appears to be rather unclear and, therefore, it may not be regarded as a part of EU primary law. Hence, it should neither influence the attribution of nationality by a member state. The EU-law of today is hardly capable of preventing a discriminatory acquisition of nationality. There are, however, legally systematic reasons for demanding the EU-law to be in accordance with international law. A difference between these systems risks forcing a state to comply with two systems while demanding different conducts. Besides, the EU-institutions referred to international law and, when doing this, it can be expected that the reference is correct.

Contrarily to the EU-institutions’ view, international law offers a great discretion for the state and the referred Nottebohm-precedent is nowadays, at least, judicially questionable (above 4.2). Furthermore, nationalistic laws risk constituting breaches of the anti-discrimination provisions, a fact that renders the obsolete Nottebohm-precedent inconvenient (above 4.3). It may be observed that the EU-institutions gave in for political
reasons and intervened under the cover of a legal reasoning (above 4.2.4) that was easily accessible.

The Commission, nevertheless, used the genuine link-test as the guiding principle. Furthermore, the EU-institutions pronounced themselves in a general mode, thereby addressing all of the member states. The importance of the affair should not be underestimated. Such a conclusion renders the Nottebohm-precedent’s lack of appropriateness in the Maltese affair even more worthy to question.

The hesitance concerning the Nottebohm-case’s importance intensifies when considering the contemporary situation of the EU. Around Europe there is an anti-EU trend, either having its basis in a desire that emphasises sovereignty or, what gently could be called, nationalistic impulses. In this context, the increasing influence from parties such as the United Kingdom Independence Party (UKIP), the Swedish Democrats (Sverigedemokraterna), the Hungarian Jobbik and the French Front National can be mentioned.

In reference to these movements, the determination of nationality is controversial because of this competence’s connection to matters of sovereignty. Given the concept of sovereignty in international law, comprising a territory, a functioning governance and a group of individuals, the determining of who should be the nationals of the state is of course safeguarded by the states against a supranational intrusion. Indeed, the attribution of nationality can be marked as the paradigm expression of national sovereignty.

The conclusion that the peoples of the EU seem to lack a common identity (above 3.1.3), on the one hand, could potentially be added to this sovereignty argument. On the other hand, nationality of today is not easy to determine. It is difficult to state that something is, e.g., clearly Danish, British or French. The globalisation calls into question the view comprehending a nation state with its nationals that possess a distinguished character. The present situation with nationalistic impulses could possibly contradict these points, but, on the contrary, history confide to us that when we appear to be the same, we often fight each other to show how different we are and to state our genuine identities.

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176 D'Oliveira, supra note 88, p. 627. The author seemingly departs from the definition originating from the Montevideo Convention on the Rights and Duties of States.
177 Kochenov, supra note 86, p. 10.
178 Elsmore & Starup, supra note 45, p. 109.
Moreover, the EU is a cooperation between states desiring to integrate, instead of staying apart, in certain areas. Points having their origin in nationalistic views have a limited role to play in the following discussion, while the opposite can be hold about the sovereignty argument. The member states must be able to conserve their sovereign rights to decide on matters in areas not transferred to the governance of the EU. Certainly, the Union is a hybrid composed of intergovernmental and supranational elements, but the member states still have had a hesitant standing towards the Union’s asserted federalistic character. The Union continues to be a cooperation composed of sovereign states, which have the capacity of amending the treaties. The union has been provided with a necessary tool through the principle of subsidiary (above 2.1). This principle conduces to restriction in the area of attribution of nationality, otherwise risking not taking the states’ legitimate claims of sovereignty into due consideration.

5.2 The role of the EU-citizenship

As was observed above (3.3.4), Malta failed to duly regard the principle of sincere cooperation in relation to the EU-citizenship. The answer to the Maltese affair and the selling of member state nationality, should consequently be to protect the EU-citizenship. There is a connection between stressing to regulate the attribution of nationality and the importance of the EU-citizenship, which at the present time has grown to such an importance that it must not be exposed to whatever sort of acquisition. The current and future importance and role of the EU-citizenship is therefore valid points in this discussion.

The EU-citizenship constitutes a quite controversial concept. This is not very surprising taking into consideration that it uses a constitutional language, that it is not based on economic contribution and the lack of a common identity (above 3.1.3). The enlarging EU-citizenship has, moreover, been met with scepticism from the member states, e.g. in connection to some of the ground-breaking judgements that have evolved it. A CJEU acting too extensively in this area can be seen as governing the member states, which are

179 See above, 2.1 and the principle of conferral.
180 E.g., the so called Laeken-agreement, a draft preceding the final Lisbon treaty, aimed to establish a ‘Constitution for Europe’s citizens, but was met with several negative referendums among the member states, see Shaw, J, supra note 43, pp. 7-8.
181 D’Oliveira, supra note 88, p. 639.
182 Kochenov, supra note 86, pp. 28-29. See also above, 3.2.3
183 Shaw, J, supra note 43, p. 18.
dedicated to legitimately guard their positions as the masters of the treaties, i.e. their sovereignties. The EU, and the CJEU, might have to abstain from having a too bold attitude dealing with the EU-citizenship. This symbolic and truly impacting concept has, at its worse, a capacity of risking the cooperation the EU stands for.\textsuperscript{184} Such a consequence would of course be very unfortunate seeing that the EU is much more than its EU-citizenship. The more economically concentrated cooperation has indeed yield a good return in the past.

The EU-citizenship is not as demanding for the individual as it is for the member states. It is a distant scenario that the EU-citizenship one day will entail obligations also for the citizens.\textsuperscript{185} The EU-law does not directly demand anything in favour of the rights it furnishes the citizens with. A typical example is that the principle of sincere cooperation does not demand any loyalty from the citizens.\textsuperscript{186} The EU is not in such a phase where it can demand this. A lack of identity and commitment to the EU is also hard to accomplish by enacting law, i.e. forcing the citizens to integrate with nationals of fellow member states and to commit to the EU.\textsuperscript{187} It is undeniably difficult to integrate over 500 million people.\textsuperscript{188}

On the contrary, perhaps it is not necessary to integrate the citizens. A continuing globalisation interact well with the EU-citizenship that effaces nationalism by offering a new sort of citizenship.\textsuperscript{189} It invites us to go beyond the limits of the nation state and its connection to the nationals.\textsuperscript{190} Moreover, as EU-citizenship offers constitutional rights for the citizens without demanding corresponding obligations, it is neutral to the history and culture of the individual and it can therefore offer a different form of belonging, a constitutional one.\textsuperscript{191} Possibly, belonging do not necessarily concern history or culture. The EU-citizenship should, henceforth, have an important role to play.

The neutrality of the EU-citizenship, going against nationalism, render the genuine link-test even more misplaced. Asserting to protect the neutral EU-citizenship with the genuine link-test, which emphasises the nation state’s connection to its nationals,
constitutes an illogical reasoning. Not only is the genuine link-test inconsistent with the contemporary and general situation within the EU, it also corresponds poorly with the role of the EU-citizenship. The EU-citizenship is worth protecting, though in another way. It is quite clear that such a protection must come from the EU. Although sovereignty arguments and the principle of subsidiarity could be presented in favour of leaving it to the member states to solve the problem, it is evidently not something that has been solved in an appropriate way previously.

5.3 A balanced and flexible principle of proportionality

It is first of all appropriate to state that the answer should not be the introducing of a residency requirement that falsely legitimates the selling of nationality. As we have seen, the Commission referred to the genuine link-test. The result for Malta was however a residency requirement prior to the naturalisation through financial investment. Even though the residency condition would constitute some sort of prior connection to the Union, it would not prevent a buying into a unity with democratic rights and expectation to profit from the right to the other member states’ benefits through the prohibition against discrimination in connection to the free movement. Since such a residency requirement would still be attached to a possibility to sell the nationality, it would probably still provoke the EU-citizens to question their special statutes. Hence, the selling of nationality should overall be restrained in EU-law. Such a conclusion concerns whatever sort of investment, property included, that lets the financial capacity of the individual result in an admission in the unity and privilege the EU-citizenship constitutes.

The sole condition of residency would, for all that, potentially have been an appropriate harmonisation of the attribution of member state nationality in a globalised world. Yet, such a requirement would not sufficiently have regard to the legit claim of sovereignty of every member state, and that the determination of nationality represents its paradigm. As long as the Union is a cooperation of several states, the attribution of nationality will probably be a sensitive area for the member states. The clash between the member state nationality and the EU-citizenship is indeed a difficult question. Through the EU-citizenship the individuals now possess two different belongings, composite and complex instead of different in character (above 3.1.2). Logically, if one intrudes on the other one’s discretion to decide who is to be covered by it, it entails a controversy. A consequence of the two concepts’ similar importance is that the sovereignty argument of the state cannot
be pushed to extremes, permitting the states to attribute nationality in total discretion. The EU lacks, however, competence on nationality issues. A new and clear policy, aiming at enforcing only the EU-citizenship would, thus, demand a unanimous measure from the member states (above 4.2.4), which of course would be hard to accomplish. The reaction from the EU, therefore, must not go beyond what it is necessary to protect the EU-citizenship. The answer to arrangements such as the Maltese IIP should hence be a cautious one, a safety valve, that all-embraces the interests at hand in a balanced way.

Such an all-embracing method is necessarily flexible, otherwise risking continuously modification, thereby giving rise to incertitude. The EU-citizenship has much developed since it was established. This evolution will also continue according to the CJEU (above 3.1.2). Moreover, the determining of nationality has developed in a way that reduces the discretion of the member state: From an *obiter dictum* in Micheletti, to *Rottmann* where the loss of nationality and EU-citizenship was disallowed, and lastly the calling into question of the acquisition of nationality in the Maltese affair. Since the EU-law on nationality undeniably develops, a flexibility is desirable, a point which is strengthened by the fact that the modes for acquisition of nationality vary a lot (above 4.2.4). Such a variation might give rise to new concepts that rigid rules will not be able to, properly, deal with.

The CJEU made in *Rottmann* use of the principle of proportionality regarding the loss of nationality and EU-citizenship, which was an appropriate solution to a particular and complex situation (above 3.2.4). In relation to *Rottmann*, the Kahr-case, which instead concerned the acquisition of nationality, implied a wider member state discretion. Still, in EU-law there should be a possibility to restrict the discretion of the member state concerning the acquisition of nationality (above 3.2.5). The scrutiny that would be achieved through the principle of proportionality could be considered as far-reaching by the member states. It is, yet, necessary to discourage arrangements such as the selling of nationality and, consequently, the EU-citizenship. On the one hand, it is true that the EU-law and the international law accord a great discretion to the states in the attribution of nationality. On the other hand, the principle of proportionality would in this context constitute the least intruding measure. It would subsequently be up to the EU and the member states to weigh the interests at hand, mainly the sovereignty of the member states

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192 Shaw, J, supra note 43, p. 17.
and the EU-citizenship. Ultimately, this hard judgement would be in the hands of the CJEU. Regardless of how difficult this would be, the EU is ready to become firmer with a necessarily vague principle.
6 Summary

The Maltese affair, which concerned the selling of nationality, has been discussed in this thesis. Though Malta’s arrangement has served as an example for evaluation, the thesis has not been limited to it. The conclusions should also be relevant for similar arrangements.

The Maltese affair got a rigid response from certain EU-institutions. Since the EU-citizenship is derivate from member state nationality, the investing third country individual would automatically become an EU-citizen, with all what that entails in EU-law. The EU-institutions stated that Malta’s actions breached the principle of sincere cooperation. Nationality should instead be rewarded if a genuine link exists between the state and the individual, a condition originating from the ICJ-ruling Nottebohm.

It is possible to understand the EU’s concern. The EU-citizenship is dynamically developing. Not only does it today grant democratic rights to EU-citizens, it also provides benefits to citizens that previously would not have been covered by EU-law. This development of the EU-citizenship calls for a revaluation of its position. Today it deserves to be regarded differently than subordinate to the member state nationality. In contrast, the widening and dynamic character of the EU-citizenship has been met with scepticism by the member states, inter alia because of the EU-citizenship’s intrusion in, according to the member states, sovereign affairs and the stretching of the treaty-wording in the CJEU’s jurisprudence (3.1).

This was not, however, the only problematic part of the EU-citizenship in Malta’s, and potentially other member states’, view. Since the EU-citizenship is derivate from nationality of a member state, nationality is also an exclusive competence of the member state. Interestingly, the CJEU has in different domains distinguished between the narrower EU-competence and the wider EU-law ambit. Nationality is, according to case-law, a matter within the EU-law and a member state must have due regard to EU-law when exercising its competence. On the contrary, the member states have unanimously adopted two texts that declare nationality a matter outside of EU-law. Deciding of nationality has indeed been seen as a special subject in EU-law, representing the paradigm of the member state’s sovereignty. Nevertheless, besides the mentioned adopted texts limited legal value, the evolution of the EU-citizenship entails the conclusion that the EU-
citizenship no longer can be left out to whatever sort of acquisition of member state nationality (3.2).

Which EU-law that should have been taken into consideration by Malta depended much on what sort of relationship that was of relevance. The third country individual has not got much attention from the CJEU concerning acquisition of nationality. The relevant relationship has instead been the member state’s towards the Union and the other member states. Of particular interest is the principle of sincere cooperation, which would have demanded a closer cooperation from Malta in connection to the EU-citizenship, a clear and important concept in the treaties and in the case-law of the CJEU. The selling of nationality to a third country individual most certainly makes the EU-citizen question her special status. Moreover, it diminishes its democratic value. Such consequences are entailed regardless of the quantity. The qualitatively offensive act of selling a member state nationality sends a clear message (3.3).

The EU-institutions considered that a genuine link-test, deriving from international law, would have constituted a sincere cooperation. If one have regard to international law, the main rule seems to be state discretion in acquisition of nationality (4.1). Furthermore, the Nottebohm-case, which was a restriction of this discretion on the international level, has rendered well deserved criticism. This obsolete case also fits poorly in the EU’s legal order (4.2). If there is a contemporary international concept of nationality, it is instead within the sphere of human rights, particularly the demand for non-discriminatory conditions for acquisition of nationality. The financial capacity is not a prohibited ground for discrimination. The Maltese arrangement was, after all, most likely in accordance with international law. Unfortunately, it was instead the EU-institutions that should have paid greater attention to the prohibition of discrimination. The genuine link-test has got a nationalistic undertone and risks giving rise to nationalistic and discriminatory arrangements in the acquisition of nationality (4.3).

The inconvenient nationalistic imprint of the genuine link-test does not fit well in the present situation within the member states, which includes increasing nationalistic impulses that should be combatted. However, state sovereignty is indeed an argument that still deserves attention in the discussion concerning the ways of acquisition of nationality (5.1). This sovereignty should be weighed against the importance and role of the EU-citizenship, which has the capacity of serving as a necessary and uniting concept,
combatting nationalism, without emphasising some sort of commitment or particular culture (5.2).

The answer to arrangements such as the Maltese, should, in the present state of affairs, be flexible and all-embracing. The crucial interests for the Union and the member states are hardly satisfied with one rigid answer. A situation is rarely another alike. Furthermore, nationality has proved worthy of rapid development within EU-law. The principle of proportionality constitutes the best answer to this complex situation (5.3).
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