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WORKING DOCUMENT

on the legislative own-initiative report on citizenship and residence by investment schemes (2021/2026(INL))

Committee on Civil Liberties, Justice and Home Affairs

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Sincere cooperation and the limits of national competences in the field of residence by investment (RBI) and citizenship by investment (CBI)

1. General Overview

In accordance with the Treaties, in particular Article 20(1) of the Treaty on the Functioning of the European Union (TFEU), when a person becomes a national of a Member State, that person automatically becomes a citizen of the Union. Citizenship of the Union is destined to be the fundamental status of nationals of the Member States. Thus, a decision by a Member State to grant citizenship, including based on investment, automatically confers rights under the Union *acquis*, including vis-à-vis other Member States, in particular free movement rights, the right to vote and stand as a candidate in local and Union elections, the right to consular protection outside the Union, as applicable, and the right to access the internal market to exercise economic activities. It is precisely the benefits of Union citizenship, notably free movement rights, that are often advertised as the main attractive feature of schemes whereby investment gives the right to nationality.

It is settled case law of the Court of Justice of the European Union that, while it is for each Member State to lay down the conditions for the acquisition and loss of nationality, the Member States must do so having due regard to Union law. That means taking into account all rules forming part of the Union *acquis* and having due regard to norms and customs under international law as such norms and customs form part of U law.

Union law regulates the entry conditions for specific categories of third-country nationals. The granting of a residence permit to third-country investors is currently not regulated at Union level and remains governed by national law. However, a residence permit granted on the basis of an investor residence scheme set up in one Member State also impacts on other Member States.

2. Whether CBI schemes violate the principle of sincere cooperation:

Several academics consider that investment citizenship schemes may harm the principle of sincere cooperation enshrined in art 4(3) of the Treaty on European Union (TEU) according to which “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”. Advocate General Poiares Maduro considers in his opinion in case C-135/08¹, making reference to academic writing, that the principle of sincere cooperation ‘could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalisation of nationals of non-member States’. Jessurun d’Oliveira² considers that such a lack of notification would not violate the principle of sincere cooperation. Shaw³ has argued that the ‘mass naturalisation case’ would not apply to CBIs since it concerns a limited number

¹ Opinion of Advocate General Poiares Maduro of 30 September 2009, Case C-135/08, *Janko Rottmann v Freistaat Bayern*, ECLI:EU:C:2009:588, paragraph 30.

² H.U. Jessurun d’Oliveira (2020), [‘Chapter 3 Union Citizenship and Beyond’](#) in: N. Cambien, D. Kochenov, and E. Muir, *European Citizenship under Stress: social justice, Brexit, and other challenges*, Brill: Leiden/Boston, 28–43.

³ J. Shaw (2018), [‘Citizenship for Sale: Could and Should the EU Intervene?’](#) in: R. Bauböck, *Debating Transformations of National Citizenship*, Springer: Cham, 61-64.

of persons. Carrera⁴ considers on the contrary that to be less of a quantitative issues and rather a qualitative issue.

On 20 October 2020, the Commission issued letters of formal notice regarding the investor citizenship schemes of Cyprus and Malta, thus launching infringement procedures against those two Member States. The Commission considers that the schemes of those Member States, which grant high-net worth individuals the possibility to obtain the nationality of those Member States and thereby automatically Union citizenship with all the rights attached thereto, are contrary to the principle of ‘sincere cooperation’ enshrined in article 4(3) TEU and that they undermine the integrity of the status of Union citizenship provided for in article 20 TFEU.

Those infringement procedures reveal the complex relationship between the regulation of national citizenship, which is still an exclusive domain of the Member States, and the automatic attribution of the Union citizenship rights that enforceable across the Union. The Commission maintains that ‘the effects of investor citizenship schemes are neither limited to the Member States operating them, nor are they neutral with regard to other Member States and the EU as a whole’, and that the grant ‘of EU citizenship for pre-determined payments or investments without any genuine link with the Member States concerned, undermines the essence of EU citizenship’.

The Commission believes that investor citizenship schemes are intrinsically problematic, for which it puts forward two arguments: investor citizenship is incompatible with the very essence of EU citizenship and with the principle of sincere cooperation.

According to established case law, ‘Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law’⁵.

The principle of sincere cooperation has been interpreted in different ways, but generally includes an obligation for Member States to actively contribute to compliance with Union law and to abstain from any action contravening the objectives of the Union⁶.

3. Article 352 TFEU as legal basis for the Union to intervene with respect to BI schemes:

The Union could find a way forward to enact measures to introduce more uniform criteria among the Member States with respect to CBI schemes by using Article 352 TFEU according to which action can be taken if ‘*necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers*’.

Article 352 TFEU may only be used as a legal basis, where:

- the action envisaged is necessary to attain, in the context of the policies defined by the treaties (except for the common foreign and security policy), one of the objectives of the Union;

⁴ S. Carrera (2014), [How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the union?](#), CEPS Papers in Liberty and Security in Europe No. 64/April 2014.

⁵ Judgment of the Court of 2 March 2010, Case C-135/08, *Janko Rottmann v Freistaat Bayern*, ECLI:EU:C:2010:104, paragraph 45

⁶ <https://globalcit.eu/investor-citizenship-and-eu-law-much-to-do-about-nothing/>

- no provision in the Treaties provides the necessary powers to attain that objective;
- the envisaged action does not extend the Union's powers beyond those provided for by the Treaties.

On a proposal from the Commission, the Council adopts acts based on Article 352 TFEU unanimously after having obtained the consent of Parliament.

The Commission, using the procedure for monitoring the subsidiarity principle provided by Article 5 TEU and made operational by the provisions of Protocol No 2 to the TFEU and the TFEU, shall draw national parliaments' attention to proposals based on Article 352 TFEU

The setting of basic common rules at the Union level on the acquisition and/or loss of nationality could fulfil the conditions required by Article 352 TFEU if it is proven that differentiation and fragmentation poses a risk for the proper enforcement of rights under Union law and Union immigration policy. However, measures taken under Article 352 TFEU require unanimous voting in the Council and the approval of Parliament, meaning that the Member States which have currently enacted foreign investor schemes is required.

4. Conclusions

Unlike national citizenships, Union citizenship is a status that gives a specific array of rights set out in the Treaties. Many of these rights are de facto activated only when individuals cross the borders of the Member State where they are a citizen. Those two aspects of the relationship between national and Union citizenship are very much entangled and are of particular relevance for understanding how access to national citizenship through investment can be seen as a challenge to the symbolic and democratic values underpinning Union citizenship.⁷

Unlike what is the case for citizenship, the Union enjoys the competence to adopt legal acts that restricts Member States' powers to enact investor residence schemes. The legal basis for the Union to intervene is Articles 77 to 80 TFEU that give the Union the power to create common policies on asylum, immigration and external border control as part of an area of freedom, security and justice as referred to in Article 3(2) TEU.

The Union cannot be selling Union citizenship to the rich without any respect for the values enshrined in Art. 2 TEU and without any transparency.

⁷ J. Džankić (2019), *The Global Market for Investor Citizenship*, London : Palgrave Macmillan, 2019.