Romantic Times? Nationality and European Citizenship

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ABSTRACT

There is nothing in the Treaties that directly empowers the European Union (EU) institutions to define the rules of an "EU law on nationality". The only provision is that EU citizenship derives from, but does not replace, the nationality of the Member States. For just over a decade, the EU institutions have nevertheless been consolidating criteria and policies designed to provide a framework for what Member States can and cannot do in determining their own nationals. This new EU law on nationality is the expression of a "romantic" turn in which the institutions seek to densify and consolidate EU citizenship. This article first extensively shows the empirical shape of this EU law on nationality, as formed by the case law of the Court of Justice and the actions of the European Commission, especially with regard to citizenship by investment ('golden passports' schemes). The contribution then carefully examines the legal foundations on which this EU law on nationality is built, in particular the constitutional architecture of the Treaties, international law, the doctrine of the genuine link and the duty of sincere cooperation.

1. Introduction: Unexpected Romance

What does it mean to be a European citizen? This question is easy to answer from the Treaties: To be a European citizen means to be a citizen of a Member State of the European Union (EU). Outside the Treaties,

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however, the question is at the centre of a major (r)evolution. In recent years, the European Parliament, the European Commission and the European Court of Justice have all paid new and increasing attention to the substance of the legal link between the Union and its own citizens. This dynamic is not entirely new. Indeed, Member States have been required to have "due regard to Community law"[1] when determining the conditions for the acquisition and loss of nationality since the famous *Micheletti* case, more than twenty-five years ago. The equally famous *Rottmann* case, decided in 2010, was the first to give content to this "due regard", when the European Court of Justice held that the loss of European citizenship resulting from the loss of a Member State's nationality must be not only legitimate in principle, but also proportionate.[2] In all respects, these two cases can now be regarded as the prehistory of EU nationality law. Something profound has changed: The EU institutions are now taking the liberty of examining what it should be to be called a citizen. This could be the romantic turn of European citizenship.

This 'romantic' turn is based on the words of advocate general Guiseppe Tesauro in his opinion on the *Micheletti* case, in 1992. When he had to describe his feelings about the 'genuine link' or the 'effective nationality' doctrine, he wrote that this doctrine, and the *Nottebohm*[3] case consecrating it, lye in a "romantic period of international relations."[4] It was meant to be irreverent, maybe even disrespectful for the *Nottebohm* ruling – which traditionally attracts a lot of critiques.[5] In this case, ruled in 1955, the International Court of Justice refused to allow a State (Liechtenstein) to provide diplomatic protection for one of its nationals with whom it had no genuine link. For the international judges, only an individual possessing an effective nationality, i.e., socially attached to his

1 Case C-369/90 *Mario Vicente Micheletti e.a. v. Delegación del Gobierno en Cantabria* [1992] ECR I–4261, para 10.

2 Case C-135/08 *Janko Rottman v. Freistaat Bayern* [2010] ECJ I-01449.

3 *Nottebohm case (Liechtenstein v. Guatemala) (second phase)* [1955] ICJ Report 4.

4 Case C-369/90 *Mario Vicente Micheletti e.a. v. Delegación del Gobierno en Cantabria* [1992] ECR I–4261, Opinion of AG Tesauro, para 5.

5 For an overview of the critics at the time, see Federico Castro, 'La nationalité, la double nationalité et la supranationalité' (1961) 102 Collected Courses of the Hague Academy of International Law 515, 582 sq; Joseph L. Kunz, 'The Nottebohm Judgement (Second Phase)' (1960) 54(3) American Journal of International Law 552.

State (for example through residence), could benefit from its protection. Nottebohm never set foot in Liechtenstein, except for a few weeks in order to acquire naturalisation there, which was not enough to secure international protection from that State in the eyes of the international judges. It was later considered "romantic" by Tesauro, not to say outdated, to require a genuine link between a state and its citizens in order for the nationality to have legal effects.

This idea of a romantic period in the nationality law is interesting, and fertile, to identify a new direction of the EU law on nationality. There is, traditionally, a philosophical distinction between "romanticism" on the one hand and "classicism" on the other hand.[6] Chaïm Perelman and Lucie Olbrechts-Tyteca theorised this opposition in an article published in 1958.[7] For those philosophers, the classicists pursue a rational and formal vision of the world, on the other side the romanticists pursue an emotional and substantial vision of the world. In particular, for Perelman and Olbrechts, the classicists follow abstract values such as the "truth", the "fair", the romanticists cherish practical values and concepts such as "the people" or "the homeland", sometimes the "race".[8]

The *Micheletti* case was exactly about this tension between a romantic and a classical approach of nationality. Micheletti was an Italian national, by descent, using his status to settle directly from Argentina to Spain, without putting a single foot in Italy. Spain then refused to recognize his Italian nationality, considering the lack of a genuine connection with his Member State of nationality (in line with the *Nottebohm* case) and, as a consequence, refused to guarantee to Micheletti the benefit of freedom of circulation and residence enshrined in EU treaties. The Court finally decided that the Spanish authorities could not "restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality."[9]

6 For a critique of this distinction based on its relativity, see Carl Schmitt, *Political Romanticism* (first published 1945, translated by Guy Oakes, MIT Press 1986) 5 sq.

7 Chaïm Perelman and Lucie Olbrechts-Tyteca, 'Classicisme et romantisme dans l'argumentation' (1958) 12 Revue Internationale de Philosophie 43 (1) 47.

8 *Ibid.*

9 Case C-369/90 *Mario Vicente Micheletti e.a. v. Delegación del Gobierno en Cantabria* [1992] ECR I–4261, para 10.

As a result, one Member State cannot require EU nationals to have a 'genuine connection' (or an 'effective nationality') with their Member States of nationality. Nationality, as perceived by EU institutions and officials at that time, should be a tool in the service of the freedom of circulations. Any other action of a Member State trying to question the reality of the nationality of another Member State is not only romantic in the view of international law, but also a clear obstacle to the functioning of the single market.

If one follows the vision expressed by Guiseppe Tesauro in the *Micheletti* case, the EU should be attached to the classical, formal and instrumental vision of nationality. The rational of the single market and the economic purpose of the freedom of circulations are quite opposed to any romantic approach. Looking for substance and emotion behind the law seems, at first sight, alien to (and dangerous for) any economic efficiency. However, there is now evidence of a romantic turn regarding the attitude of the EU towards nationality and Union citizenship.

Situation has changed. Member States have started to sell their nationality to give access to Union citizenship. Others have revoked or refused nationality, resulting in the loss of Union citizenship. Institutions like the European Commission and the European Court of Justice have then developed a new approach regarding the nationality of Member States. New principles, conditions and criteria determined by EU institutions are gradually establishing an EU law on nationality. Institutions are now looking for substance when it comes to acquisition and loss of a Member State nationality. In a sense, there is a romantic trend in the EU which makes the institutions eager to have a say on nationality questions. This contribution intends to engage the case-law, the regulations and the soft-law articulating this EU law on nationality. The purpose here is to fully embrace the manifestations of this new 'legislation'. This article is then part of the legal literature on Union citizenship. Particularly abundant and enthusiastic in the 1990s and 2000s[10], it has regained new

10 See, among many sources, Carlos Closa, 'The Concept of Citizenship in the Treaty of European Union' (1992) 29 Common Market Law Review 1137; Massimo La Torre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer, 1998); Theodora Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4(4) Journal of Political Philosophy 337; Jo Shaw, 'The Many Pasts and Futures of

perspectives following the Brexit[11] and the phenomenon of the sale of nationality[12], whether it concerns the status of citizen[13], the relationship between the Union and the Member States[14], or the criteria for accessing and losing this citizenship[15].

How can we analyse this romantic turn in the Union's perception of its own citizenship? The idea is to place current developments in EU law and policy-making in a broader historical, philosophical and international context in order to gain a deeper understanding of the ongoing changes and recent developments. This article begins by examining the legal reality of a Union law of nationality. Indeed, there are an ever-increasing number of manifestations, through case law and institutional practice, of the constraints placed on Member States in terms of acquiring and losing their nationality. The aim is then to examine the legal rationality of the Union's claims to control the rights of Member States. Nationality is an important bastion of sovereignty, and constraint in this area is not self-evident. The main arguments put forward by the institutions will be investigated and discussed. The conclusion will show both the benefits and the risks of this new "romance" between the Union and its citizenship.

Citizenship in the EU' (1997) 22 European Law Review 554; Gérard-René de Groot, 'Towards a European nationality law' (2004) 8(3) Electronic Journal of Comparative Law 1.

11 See, for instance, Patricia Mindus, European Citizenship after Brexit (Palgrave Macmillan, 2017).

12 See, for instance, Ayelet Shachar and Rainer Bauböck (eds.), Should citizenship be for sale? (Florence: European University Institute, 2014 EUI RSCAS).

13 See, for instance, Oliver Garner, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status' (2018) 20 Cambridge Yearbook of European Legal Studies 116; Liav Orgad and Jules Lepoutre, 'Should EU Citizenship Be Disentangled from Member State Nationality?' (2019) 24 Robert Schuman Centre for Advanced Studies Research Paper.

14 See, for instance, Martijn van den Brink, 'A Qualified Defence of the Primacy of Nationality Over European Union Citizenship', (2020) 69 International Law & Comparative Law Quarterly 177.

15 See, for instance, Ashley Mantha-Hollands and Jelena Dzankic 'Ties that bind and unbind: charting the boundaries of European Union citizenship' (2023) 49(9) Journal of Ethnic and Migration Studies 2091.

2. Empirical Evidence of an EU law on Nationality

Over the past three decades, and particularly since the last one, a number of European institutions have not only asserted the superiority of Union law over the nationality rights of the Member States, but have also directly or indirectly laid down the legitimate or illegitimate criteria for acquiring or losing Union citizenship.

2.1 *European Court of Justice Case-Law*

In its case law, the Court of Justice has been laying the foundations of EU nationality law. The *Micheletti* judgment actually "paved the way"[16] in 1992 with its well-known formula: "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."[17] Since then, the Court has issued three more decisions – *Rottmann*[18] (2010), *Tjebbes*[19] (2019), *JY*[20] (2022) and *X*[21] (2023) – establishing important constraints on Member States' nationality laws. This line of case law is characterised by two dynamics: a continuous extension of its scope; an intensification of its concrete control based on proportionality.

Firstly, the Court of Justice's review is constantly expanding. The *Rottmann* case concerned the withdrawal of nationality on the grounds of fraud. In this case, the applicant, Janko Rottmann, had obtained German nationality by fraud by failing to declare offences he had committed in his country of origin, Austria. When the German authorities discovered the fraud, his citizenship was withdrawn. In the meantime, he had lost his Austrian nationality – that country traditionally rejects dual citizenship. The withdrawal of his German nationality therefore left him stateless

16 Síofra O'Leary, 'Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows' (1992) 12(1) Yearbook of European Law 353, 369.

17 Case C-369/90 *Mario Vicente Micheletti e.a. v. Delegación del Gobierno en Cantabria* [1992] ECR I–4261, para 10.

18 Case C-135/08 *Janko Rottman v. Freistaat Bayern* [2010] ECJ I-01449.

19 Case C-221/17 *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* [2019] ECR I–189.

20 Case C-118/20 *JY v. Wiener Landesregierung* [2022] ECR I–34.

21 Case C-689/21 *X v. Udlændinge- og Integrationsministeriet* [2023] ECJ I-626.

and, as far as we are concerned, without EU citizenship. The *Tjebbes* case concerned the loss of nationality on the grounds of obsolescence. In this case, four female applicants had lost their Dutch nationality after emigrating outside the territory of the European Union. Dutch legislation, which is particularly severe in this area, makes expatriation a cause for loss of nationality[22], provided that it does not result in statelessness and that the break with the Netherlands is definitive (in particular through the absence of any application for passport renewal). Once again, this loss through obsolescence led to the loss of Union citizenship – none of the applicants having the nationality of another Member State[23]. These first two cases – *Rottmann* and *Tjebbes* – therefore concern measures regarding the loss of Union citizenship. This is the basis of the Court's jurisdiction, as we shall come back to later. But the Court's jurisdiction has recently been extended.

The most recent *JY* decision extends the Court's review to a refusal to acquire Austrian nationality. In this case, the applicant had applied for naturalization in Austria. However, Austria does not grant naturalization as long as a person retains his or her nationality of origin. Following the issuance of a "assurance of naturalization"[24] by the Austrian government, the applicant had therefore applied to her State of origin, Estonia, to renounce her nationality – which was granted. Having returned to Austria without her nationality of origin, the applicant's assurance of naturalization was revoked by the Austrian government because of minor offences committed before and after her application for naturalization. The appellant was accordingly left without any nationality and, consequently, without Union citizenship. Admittedly, the Court is reviewing

22 On this mode of loss of nationality, see Jules Lepoutre, 'When losing citizenship is fine: denationalisation and permanent expatriation' (2020) Citizenship Studies 24(3) 339.

23 The decision has been recently confirmed in Case C-689/21, *X v. Udlændinge- og Integrationsministeriet* [2023] ECJ I-626.

24 On this mechanism, see Rainer Bauböck and Gerd Valchars, 'Non-Toleration of Dual Citizenship in Austria', in Rainer Bauböck and Max Haller (eds.), *Dual Citizenship and Naturalisation. Global, Comparative and Austrian Perspectives* (Austrian Academy of Sciences Press).

what I have called a "complex transnational operation"[25], combining the Estonian decision to grant the release of nationality and then the Austrian refusal to grant naturalisation. The Court is thus attempting to see the Austrian decision as a measure leading to the definitive loss of European citizenship – rather than a refusal to acquire it – in order to better fit in with the *Rottmann* and *Tjebbes* precedents. In short, the Court is trying to portray a refusal to acquire as a measure of loss. But the fact remains that in this *JY* decision the Court is reviewing for the first time a refusal to naturalise. There can be little doubt that, in the long term, all national rules on nationality are destined to become part of the material scope of Union law.

Secondly, the Court has continued to strengthen its control based on the principle of proportionality. In the *Rottmann* case, the Grand Chamber laid down the basis for a proportionality test which weighs up the personal and family situation of the person who has lost his or her European citizenship against the seriousness of the alleged offence, the time elapsed since the deprivation of nationality and the possibility of recovering the original nationality.[26] However, it was for the national judge to assess the proportionality of the measure. The same thing happened in the *Tjebbes* case, with new developments based on the Charter of Fundamental Rights (the right to respect for family life and the best interests of the child) and procedural obligations (individual assessment of the situation).[27] But in the *JY* case, the Court went so far as to rule that the Austrian authorities had not respected the principle of proportionality in this case, leaving the national judge no room for interpretation of the Court's opinion. It should be noted, of course, that the Court was encouraged in this by the particularly shocking attitude of Austria and its legislation, which left the applicant stateless after she had been promised naturalisation, for the simple reason that she had committed

25 Jules Lepoutre, 'Promesse oblige? Révocation par un État membre de l'Union de l'assurance de naturaliser' (2022) 18 Recueil Dalloz 933.

26 Case C-135/08 *Janko Rottman v. Freistaat Bayern* [2010] ECJ I-01449, paras 55–58.

27 Case C-221/17 *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* [2019] ECR I–189, paras 40–47.

minor traffic offences.[28] Accordingly, there is a clear intensification of the Court's control, based on the principle of proportionality.

On the basis of this case law, the Court is helping to draw the line between permissible and impermissible criteria for obtaining and losing nationality. This review is both extensive and robust, and places significant constraints on Member States.

2.2 *European Commission Actions*

The review of the legitimacy of national legislation is in full development before other European institutions, in the context of citizenship by investment. This is a rather recent phenomenon in the Union, and the Parliament and the Commission have been dealing with it since 2013–14.[29]

In 2013, the Maltese Government decided to introduce a programme for the sale of nationality called the "Individual Investor Programme", amending the provisions of the Maltese Citizenship Act. The project provides for a nationality sale price set at €1.15 million (mainly divided between a donation to the State and a property investment), and does not include any residence requirement prior to naturalisation, nor any residence requirement at the time of or after naturalisation. This programme quickly attracted the attention of the European institutions. Several European parliamentary groups (from all sides of the political divide) then tabled a joint draft resolution condemning this practice. On 15 January 2014, during discussions on this draft resolution, Viviane Reding, Vice-President of the European Commission, made the Commission's position known and famously stated that "[Citizenship] is a fundamental element of our Union and one cannot put a price tag on it."[30] The following day, the Parliament adopted a resolution on "EU

28 Case C-118/20 *JY v. Wiener Landesregierung* [2022] ECR I–34, paras 58–74.

29 See, for a clear overview, Jelena Džankić, 'Immigrant investor programmes in the European Union' (2018) 26(1) Journal of Contemporary European Studies 478; *The global market for investor citizenship* (Palgrave Macmillan 2019).

30 European Parliament debates, 15 January 2014, CRE 17.

citizenship for sale" in which it "[c]alls on Malta to bring its current citizenship scheme into line with the EU's values."[31]

Faced with the risk of initiating infringement procedure for failure to fulfil obligations, which the European Commission had once mooted, Malta took part in a negotiating session on its nationality sales programme. The outcome was a joint communiqué adopted on 29 January 2014 in which Malta agreed to introduce a twelve-month residence requirement prior to naturalisation to ensure "genuine links"[32] between the applicant and the State. However, this compromise was called into question by two discreet reinterpretations in Malta. Firstly, the Maltese authorities established that the twelve-month residence rule should be interpreted on the model of domiciliation for tax purposes, i.e., a physical presence of at least 183 days over a twelve-month period. Secondly, and more importantly, in 2015, the same authorities officially established that the concept of residence "do not include the requirement of physical presence".[33]

The Commission published on 23 January 2019 a report dedicated to access to European citizenship through investment in which it states, *inter alia*, that such a mode of acquisition is contrary to the very concept of European citizenship as provided for in Article 20 TFEU, but also to the principle of sincere (or loyal) cooperation provided for by Article 4(3) TEU (see below).[34] Finally, the Commission opened a formal infringement procedure on 20 October 2020 with the issuance of a letter of formal notice against Malta and Cyprus under Article 258 TFEU.[35]

31 European Parliament Resolution 2013/2995(RSP) on EU citizenship for sale [2014].

32 European Commission Statement, 'Joint Press Statement by the European Commission and the Maltese Authorities on Malta's Individual Investor Programme (IIP)' (2014), MEMO/14/70.

33 Office of the Regulator (Individual Investor Programme), *Fourth Annual Report on the Individual Investor Programme of the Government of Malta* (2017 Valletta), 30–32, citing an ad-hoc consultation of Dimitry Kochenov.

34 European Commission Report COM(2019) 12 final on Investor Citizenship and Residence Schemes in the EU [2019].

35 European Commission Press Statement, 'Investor citizenship schemes: European Commission opens infringements against Cyprus and Malta for "selling" EU citizenship' (2020) IP/20/1925.

After an additional letter of formal notice[36], and in view of Malta's refusal to stop selling its nationality (unlike Cyprus), the Commission sent Malta a reasoned opinion on 6 April 2022, and finally referred Malta to the Court of Justice on 29 September 2022.[37]

The Commission's action is further reinforced by the war in Ukraine. Indeed, several Russian oligarchs 'bought' European citizenship before the conflict, which allowed them to escape some of the restrictive measures ('sanctions') directed against individuals threatening the territorial integrity of Ukraine, in particular the territorial bans organised since 2014. The Commission took this opportunity to strengthen its challenge of the citizenship by investment programmes, even going so far as to include this objective in the joint communiqué issued with the United States in the context of the war[38]. Most importantly, the Commission issued a formal 'recommendation' on 28 March 2022, calling on states to "repeal immediately" any citizenship by investment programme for the benefit of individuals "without a genuine link with a Member State."[39] The same recommendation encourages Member States that have naturalized Russian or Belarusian nationals as a result of their investment to withdraw their citizenship if they are subject to restrictive measures imposed by the EU, or more generally if they support the war in Ukraine. The recommendation shyly uses the term "withdrawal of nationality", but the notion is not legally correct as it refers to the *revocation* of nationality (as a sanction). Applying these principles, Malta and Cyprus are reported to have revoked the citizenship of "dozens"[40] of their citizens

36 European Commission Press Statement, 'Investor citizenship schemes: European Commission urges Cyprus and Malta to stop "selling" EU citizenship' (2021).

37 European Commission Press Statement, '"Golden passport" schemes: Commission proceeds with infringement case against Malta' (2022) (INFR(2020)2301).

38 The White House, 'Joint Statement on Further Restrictive Economic Measures' (2022): "we commit to taking measures to limit the sale of citizenship—so called golden passports—that let wealthy Russians connected to the Russian government become citizens of our countries and gain access to our financial systems."

39 European Commission Recommendation C(2022) 2028 final on immediate steps in the context of the Russian invasion of Ukraine in relation to investor citizenship schemes and investor residence schemes (2022) 7916/22.

40 'Dutzende Russen verlieren "goldene Pässe"' (2023) Der Spiegel.

of Russian origin, naturalised through investment, who, for instance, allegedly had links with Russian intelligence services.[41]

There is then empirical evidence that European institutions are framing an EU law on nationality that covers both acquisition and loss of citizenship, with a consistent legal policy of the European Court of Justice and the European Commission – and the clear support of the European Parliament.[42]

3. Legal Justifications for an EU law on Nationality

The fact that the European institutions can participate in the definition of what is legitimate and what is not in nationality law seems odd. Traditionally defined as a bastion of sovereignty, nationality is normally resistant to constraint. Yet both the Court of Justice and the Commission use a number of legal bases to justify their intervention in this area. What is their relevance?

3.1 Union citizenship and its constitutional dimension

Both the Court of Justice of the European Union and the European Commission base their actions on the very existence of the Union citizenship. Article 20 TFEU on the Citizenship of the Union alone justifies the intervention of the Court of Justice in its litigation concerning the loss or acquisition of Union citizenship. The same article saturates the Commission's arguments when it questions citizenship by investment. It makes sense. This new European citizenship, born in the 1990s, has a constitutional dimension[43] that legitimises the actions of the European institutions.

41 Bertrand Borg and Ivan Martin, 'Russian stripped of Maltese citizenship after being named on US sanctions list' (2022) Times of Malta.

42 See, recently, European Parliament Resolution 2021/2026(INL) with proposals to the Commission on citizenship and residence by investment schemes [2022] OJ C 347/97.

43 See, *inter alia*, Massimo La Torre, 'Citizenship, Constitution and the European Union', in Massimo La Torre (ed.), *European Citizenship. An institutional challenge* (Kluwer 1998); Anne Wesemann, 'The power of the norm: EU citizenship as constitutional right' and Daniel Thym, 'The evolution of citizens' rights in light of the EU's constitutional development' in Dora Kostakopoulou and Daniel Thym (eds.), *Research*

Since the Maastricht Treaty, indeed, (art. 8), "[e]very person holding the nationality of a Member State shall be a citizen of the Union."[44] This automatic link between European citizenship and State nationality has been largely confirmed by subsequent treaties, the last of which stipulates in Articles 9 TEU and 20 TFEU that "Citizenship of the Union shall be additional to and not replace national citizenship."[45] This citizenship is therefore derivative in nature, with a *primat* of Member States nationalities.[46] It is further confirmed by the Declaration no. 2 annexed to the Maastricht Treaty which states 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."[47] The automatic nature of the relationship between nationality of the Member States and citizenship of the Union was recently confirmed by the Court of Justice in *EP v. Préfet du Gers*.[48] In the post-Brexit context, the British applicants asserted that they still enjoyed EU citizenship despite the withdrawal agreement. The Court ruled, unsurprisingly, that the Treaties establish "an inseparable and exclusive link between possession of the nationality of a Member State and not only the acquisition, but also the retention, of the status of citizen of the Union."[49]

However, this articulation says little about the real place occupied by Union citizenship in the claims of the institutions. The clearest signal of

Handbook on European Union Citizenship Law and Policy. Navigating Challenges and Crises (Elgar 2022).

44 Treaty on European Union [1992] OJ C 191.

45 Consolidated version of the Treaty on European Union [2012] OJ C 326; Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326.

46 Rainer Bauböck, 'The Three Levels of Citizenship within the European Union' (2014) 15(5) German Law Journal 751; Lorin Johannes Wagner, 'Member State nationality under EU law. To be or not to be a Union Citizen?' (2021) 28(3) Maastricht Journal of European and Comparative Law 304.

47 Treaty on European Union [1992] OJ C 191, 98.

48 Case C-673/20 *EP v. Préfet du Gers, Institut national de la statistique et des études économiques (INSEE)* [2022] ECR I–449.

49 *Ibid*, para 31.

the importance of citizenship is the Court's famous dictum in the *Grzelczyk* case in 2001: "Union citizenship is destined to be the fundamental status of nationals of the Member States,"[50] considered to be "settled case-law."[51] This fundamental nature, combined with the "due regard" of the *Micheletti* case (see above), shapes the principle of action of the Union's institutions. The establishment of a common citizenship creates a kind of entitlement for the institutions to review the policies of the Member States in the light of Union law and its constraints.

Federal regulations governing acquisition and loss of nationality is a well-documented feature of many associations of states. As Madison wrote in the Federalist in 1788: "The dissimilarity in the rules of naturalization, has long been remarked as a fault in our system."[52] When the United States adopted its Constitution in 1787, it provided a basis for Congress to make rules on naturalization, quickly implemented in the "Naturalization Act" (26 March 1790)[53]. Previously, each state had the right to naturalise without regard to other members of the association, even as a result of colonial naturalisation which seems to have developed outside Westminster. Following the American Civil War, the 14th Amendment sealed the capture by federal institutions of the right to lay down the rules for obtaining nationality.[54] From the earliest days of the German Empire (1867–1871)[55], the various Constitutions[56] empowered Parliament to lay down the principles governing the acquisition of nationality in the States. This was the case with the adoption of the

50 Case C-184/99 *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I–458, para 31.

51 Case C-118/20 *JY v. Wiener Landesregierung* [2022] ECR I–34, para 49.

52 James Madison, 'XLII. General view of the powers proposed to be vested in the union. The same view continued', in James Madison, Alexander Hamilton and John Jay, *The Federalist* (first published 1788, Benjamin Warner 1818).

53 Act to establish an uniform Rule of Naturalization 1790, 1 Stat. 103, chap. 3.

54 See James H. Kettner, *The Development of American Citizenship (1608-1870)* (University of North Carolina Press 1978).

55 See Christoph Schönberger, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht* (Mohr Siebeck 2005).

56 Verfassung des Norddeutschen Bundes, Bundes-Gesetzblatt des Norddeutschen Bundes 1867, S. 1: art. 4(1); Gesetz betreffend die Verfassung des Deutschen Reiches, Reichsgesetzblatt 1871, S. 63: art. 4(1).

Law on the Acquisition and Loss of Federal and National Citizenship (1 June 1870)[57], which specified all the criteria for acquiring German citizenship. In the same way, within the Swiss Confederation, the Constitution of 1874 (art. 44) established for the first time that "Federal legislation shall determine the conditions under which foreigners may be naturalised"[58], in the wake of various scandals involving Cantons "selling" their nationality abroad to individuals wishing to avoid military service.[59] For the first time, the Federal Law on Swiss naturalisation and renunciation of Swiss nationality (3 July 1876)[60] requires all cantonal naturalisations to be authorised by the Federal Council, which can only issue an authorisation if the person has lived in Switzerland for two years and if the naturalisation is not "detrimental" to the Confederation. There is thus a certain trend regarding federal construction, an historical and comparative movement, which leads the federal level to take up the issue of nationality.

This means that since the common status is a predominant element in the federal construction of a political entity – as an essential vector of freedom of movement (economic construction) and political participation (constitutional construction)[61] – the common institutions are always tempted, in the short, medium or long term, to take over all or part of the legislation previously held by the member states of the association. However, unlike the United States, Germany and Switzerland, the European Union has no explicit competence to legislate on nationality.[62]

57 Gesetz über den Erwerb und den Verlust der Bundes- und Staatsangehörigkeit 1870, Bundes-Gesetzblatt des Norddeutschen Bundes 1870, S. 355.

58 Constitution fédérale de la Confédération suisse du 29 mai 1874, RO 1 1.

59 Message du Conseil fédéral à l'Assemblée fédérale touchant la révision de la Constitution fédérale du 17 juin 1870, FF 1870 II. 794.

60 Loi fédérale sur la naturalisation suisse et la renonciation à la nationalité suisse du 3 juillet 1876, FF 1876 III 465.

61 In line with the aims of a Federation, see Olivier Beaud, *Théorie de la Fédération* (PUF 2009), 261 sq.

62 See Martijn van den Brink, 'Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?' (2022) 23 German Law Journal 79. Sometimes cited (see European Parliament Resolution 2021/2026(INL) with proposals to the Commission on citizenship and residence by investment schemes [2022] OJ C-347/97), Article 21(1) and (2) TFEU does not confer competence to lay down by ordinary legislative procedure the conditions for acquiring and losing citizenship, but

Nevertheless, the gradual adoption by the institutions of criteria for an EU law on nationality is part of this constitutional movement based on the simple existence of a common citizenship. This movement will ultimately be accepted (implicitly or explicitly) or rejected by the Member States, which are currently adopting a wait-and-see attitude – at the exception of Malta, for obvious reasons.[63]

3.2 Conventional international law

The European Court of Justice examines the legitimacy of Member States' measures on acquisition and loss of nationality, prior to the proportionality test (see above). In doing so, it takes as its point of reference conventional international law, through the main international and European treaties governing nationality.

The Court's reasoning is often mixed, consisting of important principles structuring the matter and standards of international law, mainly the two flagship conventions, the 1961 Convention on the Reduction of Statelessness[64] and the 1997 European Convention on Nationality.[65] In other words, if one reads the Court's jurisprudence, the legitimacy of Member State legislation often merges with international legality. The Court's limited self-restraint seems to be based on the idea that it only controls general principles and that states remain free to determine the rules of acquisition and loss. This is the rationale of the *Michelletti* case, which held that Member States have exclusive competence to determine "the conditions for the acquisition and loss of nationality", but with "due

only to facilitate the exercise of the right to move and reside freely within the territory of the Member States.

63 The European Commission have reactivated the Group of Member State experts on investor citizenship and residence schemes which lastly met on 23 June 2022. The issue of conformity of citizenship by investment to European standards was not discussed. See European Commission, Meeting of the Group of Member State experts on investor citizenship and residence schemes (2022) Minutes of the Meeting, Ares(2022)7878747.

64 Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

65 European Convention on Nationality (adopted 6 November 1997, entered into force 1st March 2000) 166 ETS.

regard for Community law."[66] *A contrario*, this due regard should be a matter of general principles and not the definition of a particular rule. Nevertheless, it has to be said that the review of legitimacy, by definition, and the assessment of proportionality, by systematisation, have come to constitute a corpus of European standards on the acquisition and loss of nationality. But the Court has been cautious. The acceptability of such case law to the Member States rests on its fairly well-established international basis. The Court's case law, to date, captures and follow international norms on nationality (even if these have not always been ratified by all EU Member States, they easily crystallise a minimum accepted by States). In both *Rottmann* and *Tjebbes*, the Court concluded that the Member States' actions were legitimate because of the existence of international provisions explicitly authorising withdrawal on grounds of fraud[67] or the loss of an obsolete nationality[68].

And finally, as the *JY* case shows, the Court is reluctant to intervene when legitimacy is not firmly established by international law.[69] This case reveals the Court's hesitation to rule that a Member State's legislation is not legitimate, even if the conditions appear to be met. In *JY*, the Court did not question the compatibility with EU law of the revocation of the naturalisation assurance mechanism. However, this legislation has the effect of rendering European citizens stateless while waiting for their Austrian naturalisation to be pronounced. This Member State requires naturalisation applicants to renounce their original nationality before acquiring Austrian citizenship, while giving a relative and revocable assurance that naturalisation will be granted. While the Court sanctioned Austria on the grounds of proportionality (see above), international law opened the door to illegitimacy under EU law. Indeed, Article 7(2) of the 1961 Convention on the Reduction of Statelessness provides that "[a] national of a Contracting State who seeks naturalization in a foreign country shall not lose his nationality unless he acquires or has been accorded assurance

66 Case C-369/90 *Mario Vicente Micheletti e.a. v. Delegación del Gobierno en Cantabria* [1992] ECR I–4261, para 10.

67 Case C-135/08 *Janko Rottman v. Freistaat Bayern* [2010] ECJ I-01449, paras 51–54.

68 Case C-221/17 *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* [2019] ECR I–189, paras 33–39.

69 Case C-118/20 *JY v. Wiener Landesregierung* [2022] ECR I–34, paras 52–55.

of acquiring the nationality of that foreign country." The Convention is, however, silent on whether this assurance is revocable or not. Help can be found in the 'Tunis Conclusions', drawn up by a high-level meeting of experts charged with interpreting this instrument. On this specific point, the experts were of the opinion that "it is only acceptable to allow for loss of nationality if the assurance is unconditional."[70] The Court then had room to rule that the Austrian mechanism was illegitimate, due to its doubtful conformity to international standards[71].

The most convincing explanation for this renunciation is certainly the possibility of penalising Austria on the grounds of proportionality, which is by definition more casuistic, whereas recognising the illegality of general provisions on access to nationality would have brought the Court squarely within the explicit definition of an EU law on nationality. International law therefore supports the Court's review of national measures on access to and loss of nationality. However, in the light of recent developments in case law, this movement is cautious and does not call into question national legislation.

3.3 Genuine link doctrine

The genuine link doctrine is at the very core of the European Commission efforts to constraint Member States when it comes to selling nationality. Lately, in its letter of formal notice in 2020 as well as in its decision to refer the Maltese case to the European Court of Justice in 2022 (see above), the European Commission "considers that the granting of EU citizenship in return for pre-determined payments or investments, without any genuine link to the Member State concerned,

70 UNHCR, *Expert Meeting. Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality. Summary Conclusions* (UNHCR Press 2013), 10, para 44.

71 From the very words of the advocate general Szpunar in this case, see Case C-118/20 *JY v. Wiener Landesregierung* [2022] ECR I–34, opinion of AG Szpunar, para 95: "I therefore have doubts as to the legitimacy, in the light of international law, of [the Austrian] legislation."

is in breach of EU law."[72] Prior to that, in its 2019 report on Citizenship by Investment, the Commission articulated an extended definition of the "genuine link" doctrine:

> "The 'bond of nationality' is traditionally based either on a genuine connection with the people of the country (by descent, origin or marriage) or on a genuine connection with the country, established either by birth in the country or by effective prior residence in the country for a meaningful duration. Other elements may be required to attest to the existence of a genuine bond with the country, such as knowledge of a national language and/or of the culture of the country, links with the community. The existence of these requirements in Member State nationality regimes confirms that Member States generally regard the establishment of a genuine link as a necessary condition for accepting third-country nationals into their societies as citizens."[73]

The main critics of this "romantic" approach pointed out that the concept of "genuine links" had no legal reality[74], repeating the well-known criticisms of the *Nottebohm* judgment. According to these authors, the concept is both vague and legally non-existent. A new legal and historical examination of the concept convinces that it is, however, both clear and solid – without, however, prejudging the decisions that might be taken on its basis. It is indeed clear from the very origin and formulation of the concept that it provides a relevant basis for assessing the legitimacy of Member States' legislation.

72 See, lastly, European Commission Press Statement, '"Golden passport" schemes: Commission proceeds with infringement case against Malta' (2022) (INFR(2020)2301).

73 European Commission Report COM(2019) 12 final on Investor Citizenship and Residence Schemes in the EU [2019], 5.

74 See Dimitry Kochenov and Elena Basheska, 'It's All about Blood, Baby! The European Commission's Ongoing Attack against Investment Migration in the Context of EU Law and International Law' (2022) The Centre on Migration, Policy & Society (COMPAS) Working Paper no. 161; Dimitry Kochenov, 'Policing the Genuine Purity of Blood: The EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union' (2021) 25(1) Studia Europejskie-Studies in European Affairs, 33, 50–53.

Historically, the doctrine of the "genuine link" arose out of positive conflicts of nationality: If an individual's nationality is part of the solution to a legal conflict, how to proceed if the individual has multiple nationalities? The simplest doctrine is that a national cannot use a foreign nationality before the authorities of his own state – this is a matter of sovereignty. But what happens when neither of the two nationalities in dispute is the nationality of the state before which the individual is suing? Or when the state does not apply this doctrine? The genuine link doctrine was historically designed to resolve these situations: It helps to determine which of the conflicting nationalities should have legal consequences and which should be dismissed. In order to achieve this, the genuine link doctrine, from arbitral case-law[75], is based on factual circumstances, in particular domicile.[76]

Jules Basdevant, a French professor of international law, will generalize those judicial developments to link together nationality and residence. In a paper published in French in 1909, he was the first one to develop an objective theory of nationality based on the "social fact" that unites an individual and a State: "Nationality is the juridical expression of the fact that the individual is more closely connected with the population of a particular State than with that of any other State. The legal bond called nationality has as its basis a social link, a factual relationship. That means that this legal bond is not the arbitrary creation of the State conferring its nationality to an individual."[77] How should this link be appreciated? Basdevant gave the answer by writing in the same paper that the "effective nationality" is "revealed by questioning the factual circumstances, the most important of which is domicile."[78] One year later, in 1910, in a rather confidential publication (an introduction to a student paper of the Grenoble Law Faculty), he confirmed his approach: "then, no need to see a subjective right from nationality; one can see instead an objective legal situation, the juridical expression of the fact that the individual is more

75 See, inter alia, *Massiani Case* (1905) 10 RIAA 183.

76 See Jules Lepoutre, *Nationalité et Souveraineté* (Dalloz 2020), 324–328.

77 Jules Basdevant, 'Conflits de Nationalités Dans Les Arbitrages Vénézuéliens de 1903-1905' (1909) 5 Revue de Droit International Privé 61 (our translation).

78 *Ibid*, 60.

closely connected with the population of a particular State than with that of any other State."[79] This doctrinal movement was later supported by many other authors[80].

In fact, the *Nottebohm* case is nothing more than the judicial consecration of a theory that has been around for half a century. It is easy to recognise Basdevant's words, published as early as 1909–10. Since the Court's original judgment was written in French, with Basdevant being one of the judges, there is little doubt as to its author. The famous wording of the Court is indeed the following: "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, 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*."[81] The Court's words are a carbon copy of Basdevant's articles.[82]

With this genealogy now revealed, a fresh look can be taken at the critics of the genuine link doctrine. Of the various criticisms that have been levelled at the Nottebohm case since its adoption, the most prominent is probably the idea that the judges wrongly generalised the rule of 'dominant' or 'effective' nationality, which is only intended to resolve dual nationality disputes in (mainly) private international law cases. This criticism is based on the inability of judges to cite international law

79 Jules Basdevant, 'De La Nationalité Sous Condition Soit Suspensive, Soit Résolutoire Dans La Législation Française. Contribution à l'établissement d'une Théorie Juridique de La Nationalité' (1910) 22 *Annales de l'Université de Grenoble* 331.

80 See, inter alia, Charles de Visscher, 'Notes sur la responsabilité internationale des États et la protection diplomatique d'après quelques documents récents' (1927) 54(8) Revue de droit international et de législation comparée 270; Albert de Lapradelle, 'Le droit international de la nationalité' (1930) 2 Académie diplomatique internationale. Séances et travaux 95.

81 *Nottebohm case (Liechtenstein v. Guatemala) (second phase)* [1955] ICJ Report 23 (emphasis added).

82 The French versions are to be compared; French is the authoritative language of the case.

precedents that apply this doctrine in cases of single nationality.[83] But this criticism can now be answered by the clear affiliation of the case to the French international legal theory litterature. According to article 38 of the Statute of the International Court of Justice, "the most highly qualified publicists of the various nations" are a "subsidiary means for the determination of rules of law." Basdevant probably considered his theory, supported by other eminent professors of international law (see above), to be the locus of a rule assessing the opposability of a nationality in the international legal order. Modesty probably prevented him from citing his own work in the Opinion, as Jacques Maury, one of his contemporaries, put it.[84] If the arbitral case-law on dual nationality is indeed the origin of this reflection, the legal theory of these authors separated from international litigation and acquired autonomy.

Other criticisms relate to the lack of clarity about what is meant by "genuine link", "effective nationality", "social fact of attachment", etc. A retrospective look at the historical construction of the genuine link doctrine shows that it has never been anything other than a theory based on residence and territory. Like Jean Cocteau's famous quote – "there is no such thing as love, only proof of love" – the genuine link has no existence in itself and is merely about proof of residence. The inability to provide proof of habitual residence then necessarily leads to the impossibility of establishing a genuine link between a State and an individual. Attempts to see in the *Nottebohm* case a method for identifying what is a genuine connection are rather pointless; here the Court only offers a method for identifying what is not a genuine connection. Again, this retrospective look, based on the earlier work of Basdevant, highlights the importance of the genuine link and brings clarity to this 'vague' concept. By limiting itself to a negative approach, the definition of the absence of a genuine link in the case of lack of habitual residence makes it an operational

83 See Rayner Thwaites, 'The Life and Times of the Genuine Link' (2018) 49(4) Victoria University of Wellington Law Review 645; Audrey Macklin, 'Is it Time to Retire Nottebohm?' (2017) 111(1) American Journal of International Law 492; Robert Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 1.

84 Jacques Maury, 'L'arrêt Nottebohm et la condition de nationalité effective' (1958) 23(3/4) *Zeitschrift für ausländisches und internationales Privatrecht* 515, 520–521.

concept. It is therefore not surprising, and legitimate, that the European institutions can use it in the context of citizenship-for-sale programmes.

3.4 Duty of sincere cooperation

The basis of the European Commission's interpretations against citizenship by investment without residence condition is Article 20 TFEU (like the Court of Justice) and, furthermore, Article 4(3) TEU on sincere cooperation. This article states that "[p]ursuant to the principle of sincere cooperation", "[Member States] shall refrain from any measure which could jeopardise the attainment of the objectives of the Union." This is an explicit consecration of a prohibition on the use of competences outside the social purposes compatible with the Union's legal order. In other words, the theory of international law would recognise here, among other things, a prohibition of the abuse of rights, since by the effect of this article, the use of the competences of the State is confined to a purpose compatible with the 'objectives' of the Union.[85] Other authors see in this provision a variation of the principle of good faith in international law.[86] Its explicit consecration in primary law is due to the federal dimension of the European Union. Indeed, following the model of Germany, the principle of sincere cooperation also refers to the principle of 'federal loyalty' (*Bundestreue*). Thus, alongside good faith, federal loyalty is considered a "major reference" for the principle of sincere cooperation within the EU legal order.[87]

According to the Commission, sincere cooperation means that only those nationals who have a genuine link with the Union or its population should be allowed to acquire Union citizenship – these are the criteria set out in the report on citizenship sales programmes to be published in 2019 (see above). What is the value of this justification? First of all, it

85 See Hersch Lauterpacht, *The function of law in the international community* (Clarendon Press, 1933), 294 sq.

86 See Robert Kolb, *La bonne foi en droit international public* (Presses Universitaires de France 2000).

87 See Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014); John Temple Lang, "Community Constitutional Law: Article 5 EEC Treaty" (1990) 27 Common Market Law Review 645.

should be noted that the principle of sincere cooperation only appears as a footnote in the 2019 report, and that it appears as a combined basis with Article 20 TFEU since the formal opening of the infringement procedure against Malta last September. So, throughout the process, there have been hesitations when it comes to establishing the legal basis of the procedure. And in fact, the Commission has never really explained in detail how the Citizenship by Investment Programme jeopardises the objectives of the European Union.

From a legal point of view, however, several arguments suggest that the argument is not without merit. The loyalty implied by Article 4(3) TEU seems to be doubly undermined by the sale of Union citizenship without a residence requirement. Firstly, loyalty to the objectives of the Union, i.e., the creation of a political community organised through a real – or genuine – citizenship, in accordance with the principles laid down by *Nottebohm* (cited by the Commission, see above), which means that nationality is not a matter of sovereign discretion but a status which implies a certain reality when it comes to assessing the link between a citizen and his or her country. In other words, the constitutional will for a political construction of the Union and for citizenship implies the reasonableness and adequacy of the policies pursued by the Member States, which is allegedly not the case here because the naturalised persons, although citizens by investment, cannot demonstrate any social fact of attachment (in the sense of *Nottebohm*). This idea was defended, albeit theoretically, in the literature of the 1990s and early 2000s.[88] Secondly, loyalty between Member States is still undermined. This is not about the status itself, but about the rights it confers. Indeed, by opening up citizenship by investment without a residence requirement, Malta is primarily selling rights of access to public and private services of other Member States, which Malta neither owns nor organises. What Malta is selling is secure and unrestricted access to other Member States, especially the richer ones, with the benefit of the principle of non-discrimination. In other words, Malta is offering what it does not own in exchange for

88 See Stephen Hall, Nationality, Migration Rights and Citizenship of the Union (Martinus Nijhoff Publishers 1995), 64–73 and Gérard-René de Groot, 'Towards a European nationality law' (2004) 8(3) Electronic Journal of Comparative Law 1, 12–14.

financial gain. In private law, an analogy could be drawn with '*enrichissement sans cause*', i.e., unjust (or unfounded) enrichment.[89]

Nevertheless, the principle of sincere cooperation has never yet been used by the Court of Justice to attack prerogatives as reserved as nationality. Traditionally, sincere cooperation has merely reinforced obligations breached by States, for example in relation to the free movement of goods[90], helped to nullify the unlawful consequences of an infringement of EU law[91], or required respect and assistance in matter of judicial dialogue.[92] Is the principle of sincere cooperation strong enough to constrain the nationality law of the Member States, via Union citizenship? Once again, it is the appreciation of the fundamental character of citizenship that makes it possible to decide on this matter. The more fundamental citizenship is, the less Member States can act insincerely.

4. Conclusion: Ambiguous Romance

Romanticism in nationality or citizenship law consists in looking beyond the law, i.e., confronting legal statutes of individuals with their social reality. Within the European Union, this has two consequences. Firstly, the institutions of the Union that choose to reflect on who should or should not be a citizen of the Union are romantic in the sense that they go beyond the formalism that makes the Member States solely responsible for this issue. They engage in a constitutional reflection linked to the formation of the people and the boundaries of the community.[93] Secondly, by expressing the legitimate or illegitimate criteria for membership of the European community, the institutions still express a certain relation

89 See, more broadly, Sergio Carrera, 'How Much Does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union?' (2014) 64 Liberty and Security in Europe Paper 1, 22–29.

90 See, for instance, Case C-265/95 *Commission of the European Communities v French Republic* [1997] ECR I–06959.

91 See, for instance, Case C-677/19 *SC Valoris SRL v. Direcția Generală Regională a Finanțelor Publice Craiova* [2020] ECR I–825, para 21.

92 See, for instance, Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y* [2022] ECR I–100, para 48.

93 See lastly, among an immense literature, Paul Bowman (ed.), *Studies on the Democratic Boundary Problem* (Institute for Futures Studies 2022).

to social reality. They reflect a theory based primarily on human rights and territory, which shape a particular vision of citizenship. The outcome of this unspoken romanticism is the gradual formation of an EU law of nationality. I have examined, by means of an exhaustive analysis, all the manifestations of an EU law of nationality. Of course, this law does not really take the form of a formal legislation. Rather, it is a disparate whole, made up of the systematisation of the case law of the Court and the claims of the Commission, expressed in soft law, facing citizenship by investment practices. What are the legal bases of this Union law on nationality? I have reviewed all four justifications put forward by the European institutions (Union citizenship, international law, genuine link doctrine, and duty of sincere cooperation). Far from being isolated arguments, they are mutually reinforcing. They form a whole that combines constitutional and international grounds.

Why has the Union become romantic? Claiming to determine who should be a citizen of the Union is an affirmation of power. The danger of any romance lies in the balance it strikes between emotion and reason. What is the law that the Union's institutions are working to define when it comes to citizenship? The desire to protect a genuine link between the Union and its citizens is on the side of reason, as is the subjection of Member States action to the requirements of fundamental rights. But when this rather liberal tendency turns into a call for exclusion on the grounds of disloyalty – as the Commission has done by urging member states to revoke the citizenship of Russians who supported the war in Ukraine (see above) – the romanticism takes a less rational course, with emotion playing a greater role. Defining the borders of people means drawing the line between an 'us' and a 'them', since citizenship is as much a matter of inclusion as exclusion.[94] Great attention will therefore have to be paid to the criteria that the European institutions will no doubt continue to develop in order to define – and narrate[95] – the boundaries of the European people.

94 See Patricia Mindus, 'Dimensions of Citizenship' (2014) 15 German Law Journal 735.

95 See Johanna Hase, 'Two and a Half Tales of Europe: How the European Commission Narrates Peoplehood in Migration and Citizenship Policy' (2023) Journal of Common Market Studies *forthcoming*.