

# The discretionary power of EU member states and national public administrations in according their citizenship (*ius pecuniae*)

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## **Abstract**

*The exercise of discretionary power by the administration when it performs regulatory or implementation tasks may be necessary, and sometimes politically expedient. It may, however, undermine business confidence and, more generally, citizens' allegiance to the political system. It is not therefore surprising that many governments are implementing policies for reducing or eliminating administrative discretion<sup>3</sup>. Access to citizenship status is an important prerequisite for enjoying rights and privileges, such as migration and political rights, as well as for developing a sense of identity and belonging. Since the establishment of Union citizenship, all persons who are nationals or citizens of an EU Member State enjoy the status of EU citizenship, which confers on them a number of additional rights and privileges. However, Member States retain full control over who can be recognized as a citizen. In the last years is also a phenomenon in which member states have proposed more liberal policies related to European citizenship acquisition based on the need to revive their economies and finances or also in order to attract more working forces due to their population which is aging quite fast. The objective of this study is to analyze the discretionary power of the administrative institutions and internal policies of member states in according their citizenship in relation to their obligations toward European Union mainly after February 2022.*

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**JEL Classification:** K23, K33

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## **1. Introduction**

The concept of citizenship first arose in towns and city-states of ancient Greece, where it generally applied to property owners but not to women, slaves, or the poorer members of the community. A citizen in a Greek city-state was entitled to vote and was liable to taxation and military service. The Romans first used citizenship as a device to distinguish the residents of the city of Rome from those peoples whose territories Rome had conquered and incorporated. As their empire continued to grow, the Romans granted citizenship to their allies throughout Italy proper and then to peoples in other Roman provinces, until in 212 CE citizenship

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<sup>3</sup> Constantine Stephanou, *Good Governance and Administrative Discretion*, Jean Monnet Professor of European Institutions, Panation University, Athens, [https://unece.org/fileadmin/DAM/trade/workshop/OSCE\\_0304/presentations/Stephanou.doc](https://unece.org/fileadmin/DAM/trade/workshop/OSCE_0304/presentations/Stephanou.doc), consulted on 15.04. 2023.

was extended to all free inhabitants of the empire. Roman citizenship conferred important legal privileges within the empire.

The concept of national citizenship virtually disappeared in Europe during the Middle Ages, replaced as it was by a system of feudal rights and obligations. In the late Middle Ages and the Renaissance, the holding of citizenship in various cities and towns of Italy and Germany became a guarantee of immunity for merchants and other privileged persons from the claims and prerogatives of feudal overlords. Modern concepts of citizenship crystallized in the 18<sup>th</sup> century during the American and French Revolutions, when the term *citizen* came to suggest the possession of certain liberties in the face of the coercive powers of absolutist monarchs.

But is there an all accepted definition of citizenship, despite the different definitions given in European different state's doctrines? For illustration we believe that the definition given by the Britannica Encyclopedia<sup>4</sup> is the most appropriate, in conformity with it: "***citizenship*** is a relationship between an individual and a state to which the individual owes allegiance and in turn is entitled to its protection. *Citizenship implies the status of freedom with accompanying responsibilities. Citizens have certain rights, duties, and responsibilities that are denied or only partially extended to aliens and other noncitizens residing in a country. In general, full political rights, including the right to vote and to hold public office, are predicated upon citizenship. The usual responsibilities of citizenship are allegiance, taxation, and military service.*

*Citizenship is the most privileged form of nationality. This broader term denotes various relations between an individual and a state that do not necessarily confer political rights but do imply other privileges, particularly protection abroad. It is the term used in international law to denote all persons whom a state is entitled to protect. Nationality also serves to denote the relationship to a state of entities other than individuals; corporations, ships, and aircraft, for example, possess a nationality."*

Citizenship is a complex legal and socio-political concept with three major components: (1) legal status, (2) rights and obligations, and (3) national identity.<sup>5</sup>

In conformity with article 2 of Directive 2004/38/EC of the European Parliament and of the Council<sup>6</sup>, union citizen is any person "*having the nationality of a Member State*" by having guaranteed the rights of free movement and residence within the territory of the Member State by these Union citizens and their family members, and the right of permanent residence in the territory of the Member State for the Union citizens and their family members.

<sup>4</sup> <https://www.britannica.com/topic/citizenship>, consulted on 15.04.2023.

<sup>5</sup> Bosniak, L., *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Princeton, 2006, p. 78.

<sup>6</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (text with EEA relevance),

## 2. Discretion of the member states on citizenship acquisition

According to Rosenberg, who tried to clarify the meaning of discretion in terms of the judicial power “to speak of discretion in relation to law is to open a thousand doorways to discussion”<sup>7</sup>. We intend to highlight certain aspects of two highly debated legal terms: “discretionary power” and “public policy” as alternative means of escape from the obligations under European Union (EU) law.

According to Dr. Alexander Fritzsche “the power and competence of a decision-maker (legislator or administrator) to decide, with highest authority, about (1) the compliance of legal rules with norms of a higher hierarchy level.”<sup>8</sup> Another important element that needs to be defined, to set the foundation is the supremacy of the EU law.

In international private law the public policy clause and its use is quite clear, it serves as a ground for the non-application of a foreign law, and the non-recognition of a foreign judgment, and it is used as an instrument to enforce the law of the forum. Gives priority and precedent to the basic political, social and economic values of the legal system, in cases where a foreign law or judgment would be in a manifest contradiction to the fundamental values of the state.<sup>9</sup>

Having in attention the binom “public policy” versus “discretionary power” we believe that in many cases the public policy exceptions provide discretionary powers for the Member States, but these cases are mentioned clearly in exhaustive way in EU legal acts. For example, in case of the Directive 2004/38/EC on the right of EU citizens and their families to move and reside freely within the EU. These competences give extra discretionary powers, because it is up to the national courts and authorities to conduct a case-by-case assessment of the situations. But still with a very clear control: the judicial overview, as a protection mechanism from unauthorized or abusive use.

The citizenship of the EU and the nationality of the Member States are two independent legal concepts, yet they are closely connected.<sup>10</sup> Article 20 TFEU provides that: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the

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<sup>7</sup> Rosenberg, M., *Judicial Discretion of the Trial Court*, Viewed from Above, 22/3 Syracuse Law Review, 1971, p. 635, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/syrlr22&div=39&id=&page>, consulted on 15.04.2023.

<sup>8</sup> A. Fritzsche, *Discretion of Member States in the Application of Derogations from Free Movement Rights vis-à-vis the European Court of Justice*, [https://www.jus.uio.no/ifp/forskning/prosjekter/markedssaten/arrangementer/2011/free-movement-oslo/speakers-papers/fritzsche\\_outline.pdf](https://www.jus.uio.no/ifp/forskning/prosjekter/markedssaten/arrangementer/2011/free-movement-oslo/speakers-papers/fritzsche_outline.pdf), consulted on 15.04.2023.

<sup>9</sup> Marton, Monika, *European Legal Tradition and the (Hidden) Discretionary Powers of Member States* (October 14, 2020). Available at SSRN: <https://ssrn.com/abstract=3767055> or <http://dx.doi.org/10.2139/ssrn.3767055>, consulted on 15.04.2023.

<sup>10</sup> Cf. the Opinion of AG Poiares Maduro in the Rottmann case, ECLI:EU:C:2009:588, para 23. For early accounts, see Closa, 1992. EU citizenship could be described as a bundle of rights that should not be compared to national citizenship. National citizenship, as argued by Bauböck (2014), is a constitutive element or a prerequisite of EU citizenship and therefore cannot serve as an external standard of comparison.

Union shall be additional to and not replace national citizenship.” Thus, the EU does not provide for its own rules on the acquisition and loss of Union citizenship. Rather, it is “dependent” on the national laws of the Member States.

Against this background, it is the Member States that indirectly, through the application of their own citizenship rules, decide about the acquisition and loss of EU citizenship. Consequently, the Member States by their national rules on nationality do not only decide to whom they will grant the rights attached to the nationality in their internal legal systems, but also who will enjoy the rights under EU law, attached to the possession of the EU citizenship. This is a significant difference as compared to national citizenship rules in international law. The citizenship of the Union was first introduced in the Maastricht Treaty concluded in 1992,<sup>11</sup> though the Treaty was the culmination of a longer process embedded in the history of free movement of workers. The “codification” of the EU citizenship in the Treaty raised concerns in several Member States that the EU citizenship would encroach upon their national autonomy in matters of citizenship. Therefore, a Declaration on Nationality of a Member State was attached to the Maastricht Treaty that read: “... *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.*”<sup>12</sup>

In this regard a lot of Member States had their concerns about the EU Citizenship, this way, in order to ensure the discretionary power of Member States have been done several changes in the respective articles passing from the notion of “complementary nature” to “being additional”, stressing that the EU citizenship shall not be understood as a concept which is independent of national citizenship<sup>13</sup>.

Member States reserve the right to regulate the acquisition and loss of national citizenship in ways that reflect their interests and identities. However, although the EU has no legal competences in the area of acquisition or loss of national (and thus EU) citizenship, the European Court of Justice (ECJ) has gradually broadened the scope of EU citizenship in relation to national citizenship by imposing certain limits to the power of Member States to regulate national citizenship.<sup>14</sup> In the *Zhu and Chen* case, the ECJ underlined circumstances in which the basic rights of EU citizenship need to be asserted against, or independently to, the status of national citizenship. In this case, the ECJ granted a non-EU citizen the right to stay on the territory of a Member State in order to provide care for a minor EU citizen. In the *Rottman* case, the ECJ maintained that EU Member States should exercise their right to regulate their national citizenship having due regard to Community law. The Court stated that the loss of EU citizenship falls “by reason of

<sup>11</sup> Treaty on the European Union, OJ EU C 191, 29. 7. 1992, p. 1.

<sup>12</sup> Declaration (No. 2) on Nationality of a Member State, annexed to the Treaty on European Union, [1992] OJ C191/98.

<sup>13</sup> P. Weingerl & M. Tratnik: *Citizenship by Investment Programms from the Perspective of International and EU Law*, „LeXonomica”, 11(2), 95-126. <https://doi.org/10.18690/lexonomica.11.2.95-126.2019>.

<sup>14</sup> Shaw J. (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*. San Domenico di Fiesole: European University Institute, 2011.

its nature and its consequences, within the ambit of European Union law” and thus invited national courts to apply a proportionality test to establish whether that loss of citizenship was justified. In its Opinion on *the Rottman* case, Advocate General Maduro argued that national citizenship rules can, in certain circumstances, breach the Member States' duty of loyal and sincere cooperation. Many citizenship laws in the EU have provisions for the exceptional naturalisation of persons with special talents, extraordinary achievements, or who bring significant contributions to the state. This channel is often used to naturalise sportspersons or artists, and occasionally, investors and the wealthy. Bulgaria, Cyprus, Malta and Romania have developed specific investor citizenship programmes, comparable to those of the island states of Antigua and Bermuda, Saint Kitts and Nevis, and the Commonwealth of Dominica.<sup>15</sup> Cyprus introduced its investor citizenship scheme in May 2013 in the context of a severe economic crisis that prompted its international bailout. The scheme aimed, on the one hand, to attract much needed capital – it offered citizenship in exchange of an investment of at least €5 million in the country – and, on the other hand, to compensate foreign investors who lost their investments (at least €3 million) due to governmental measures targeting the crisis. Apart from these financial contributions, the applicants were required to have a clean criminal record and to have visited Cyprus at least once.

While the Member States may still understand their citizenship law as discretionary, that discretion is limited. Saint Kitts and Nevis may legitimately decide to grant citizenship to everyone who can invest a certain amount of money without ever setting foot on the islands, but this choice should not be available to Malta, Cyprus or other Member States of the Union. A much stronger specific protection against deprivation would emerge if the EU started to apply a genuine link constraint on deprivation of EU citizenship. The genuine link criterion has generally been applied negatively: The lack of a genuine link has been invoked as a reason against the granting of citizenship status (or against invoking citizenship status as a reason for immunity and diplomatic protection, as in *the Nottebohm* case) and as a justification for deprivation. However, genuine links can also be invoked positively as a reason for awarding citizenship or as a reason against deprivation.

### 3. Case studies in this area

The ICJ gave special relevance to the existence of an “effective link” between the person and the state for determining that genuine connection and ruled in favour of Guatemala not to recognize the nationality of Mr. Nottebohm as he lacked any prior “bond of attachment” or had very marginal links with Liechtenstein. Amongst the factors playing a role in determining the existence of “the link”, the ICJ highlighted the need to take into consideration, amongst others, issues such as the habitual residence of the individual concerned, which in the case of Mr. Nottebohm

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<sup>15</sup> Dzankic, J., *Investment-based citizenship and residence programmes in the EU*. San Domenico di Fiesole: European University Institute, 2015.; Prpic, M., *Golden visas, EU values, corruption and crime*, European Parliament, May 2018.

was not met either as he had no prolonged residence in that country at the time of his application for naturalisation in Liechtenstein, and no intention of remaining in the country. However, current interpretations of *the Nottebohm* decision consider that conferral of Liechtenstein nationality did not entitle Liechtenstein to give diplomatic protection; the conferral of nationality was in fact valid in spite of lacking a genuine link. Moving now to the European Union, the Court of Justice of the European Union (CJEU) has controversially constrained itself from looking at issues related to the choices of member states in deciding who has or does not have ‘the closest connection’ or link with their country, and consequently who is entitled to the right of residence there and can be considered a European citizen for the purposes of Union law.<sup>16</sup> The CJEU has nevertheless reiterated in several rulings that member states’ decisions laying down the grounds of acquisition and loss of nationality must be exercised in “due regard of [Union] law”.<sup>17</sup> As the 2010 *Rottmann case* demonstrated,<sup>18</sup> even though the acquisition and loss of nationality remains regulated under the exclusive remits of member states’ legal systems, the fact that the case at hand presented a foreign element or a “cross-border dimension” brought it within the scope of European law, and hence could not be considered as a purely internal situation.<sup>19</sup> This judgement constituted one of the legal grounds used by DG Justice in its negotiations with Malta over the IIP.<sup>20</sup> The Luxembourg Court also reiterated that the obligation for member states to have due regard to Union law in the exercise of the member states’ competence, which encompasses the obligation for national regulations setting the conditions for the acquisition and loss of nationality to be compatible with the EU rules and respect the rights of Union citizens.<sup>21</sup> As introduced above, one of the central aspects of the Advocate General Opinion in *the Rottmann* ruling was the relevance of the general principles of EU law in restricting the legislative power of member states in nationality matters, in particular the EU

<sup>16</sup> C-192/99 *Kaur*, 20 February 2001. See P. Shah (2001), *Case note on Kaur*, European Journal of Migration and Law, Vol. 3, No. 2, pp. 271-278. For a critique refer to E. Guild (2004), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International, Chapter 4 (The Residence/Citizenship Nexus). Guild argues that “The hands-off approach of the ECJ is in sharp contrast to that of the European Commission of Human Rights (ECmHR)...when faced with a politically sensitive case but one where the ECmHR had already found a breach of article 3, inhuman and degrading treatment, instead of taking up the challenge of European Civil Rights, the ECJ backed off with the implicit argument of lack of jurisdiction”, p. 76.

<sup>17</sup> Refer for instance to Case C-369/90, *M. V. Micheletti and others v. Delegacion del Gobierno en Cantabria* [1992] ECR I-4239, paragraph 10; See also Case C-192/99, *The Queen v. Kaur*, [2001] ECR I-1237 and Case C-200/02, [2004] ECR I-9925 – *Zhu and Chen v Secretary of the State for the Home Department*; and Case C-148/02 *Garcia Avello* [2003] ECR I-1163. Refer to S. Carrera and M. Merlino (2009), *State of the Art on the European Court of Justice and Enacting Citizenship*, CEPS Special Report, Centre for European Policy Studies, Brussels, April.

<sup>18</sup> Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, 2 March 2010.

<sup>19</sup> Refer to paragraph 10 of the AG Maduro Opinion.

<sup>20</sup> “EU Commission prepares legal challenge on Malta passport sales”, EUobserver (<http://euobserver.com/justice/122843>).

<sup>21</sup> AG Maduro Opinion, paragraph 23. For an analysis, see J. Shaw (ed.) (2011), *Has the European Court of Justice Challenged Member State sovereignty in Nationality Law?*, EUI Working Papers, RSCAS 2011/62, EUDO Citizenship Observatory, Florence.

principle of sincere cooperation, which in his view “could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalization of nationals of non-member states”.<sup>22</sup>

*The Rottmann case*<sup>23</sup> was the subject of an earlier forum debate on the EUDO Citizenship website. Rottmann was a case of loss of citizenship conferred by naturalisation, after it came to light that the naturalisation had been obtained by fraud. In this case, Rottmann, an Austrian citizen, had failed to reveal that he had been the subject of unconcluded criminal proceedings in Austria when seeking naturalisation in Germany. Rottmann raised issues of EU law in his appeal against the deprivation decision before the German administrative courts, which led to a reference to the Court of Justice. He pointed out that having obtained German citizenship he lost Austrian citizenship, by operation of law. Thus, if he were deprived of German citizenship, he would be stateless, and – furthermore – he would have lost his EU citizenship. One issue that had been raised – and which caught the attention of Advocate General Maduro in his Opinion – was whether this was a ‘wholly internal situation’ – i.e. a German court reviewing a decision of a German public authority regarding a German citizen. In that sense, it could be said, EU citizenship was not engaged at all. In response, the Court repeated its standard formulation when dealing with matters which fall outside the competence of the EU and its legislature. It reminded us that EU cannot adopt measures with regard to national citizenship, but none the less while national competence remains intact, it must be exercised ‘with due regard’ to the requirements of EU law in situations covered by EU law. Specifically, in this case, said the Court: “*It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC [i.e. Union citizenship] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law*”.<sup>24</sup>

While some have suggested that the essence of *Rottmann* lay in the way that the claimant is strung across between the national citizenship laws of two EU Member States, one at least of which claims exclusivity and thus operates an automatic rule of withdrawal in the event that a citizen acquires the citizenship of another state, the point about loss of the benefits of EU citizenship as a freestanding principle of EU law without regard to prior movement from one Member State to another was given a further boost in the case of *Ruiz Zambrano*. In that case, the EU citizens threatened with losing their rights of citizenship were the children of the claimant, who were born in Belgium and who had acquired Belgian, and thus EU,

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<sup>22</sup> Paragraph 30 of the Opinion. The former AG also pointed out in paragraph 31 that another general principle of importance is the protection of legitimate expectations.

<sup>23</sup> Case C-135/08, *Janko Rottman vs. Freistaat Bayern*, link: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0135>.

<sup>24</sup> Case C-135/08, *Janko Rottman vs. Freistaat Bayern para. 42 of the judgment*.

citizenship at birth. Meanwhile, through a combination of circumstances their Colombian citizen father had not regularized his situation in Belgium (or had perhaps been prevented from doing so by a series of delays perpetrated by the Belgian authorities in relation to his case). Because the refusal of a residence permit for Ruiz Zambrano and his wife would, in effect, have meant that the EU citizen children would have been obliged to leave, with their parents, the territory of the EU and thus would not have been able to avail themselves of their rights as EU citizens (notably the right of free movement which they had not yet exercised, but which they might exercise in the future), the Court concluded that a Member State could not refuse to grant either a residence permit or indeed a work permit. The test that the Court articulated was whether the measure taken in relation to a third country national upon whom the EU citizen children were dependent was whether it would make them unable to exercise 'the substance of their rights' as citizens of the EU<sup>25</sup>.

#### 4. *Ius pecuniae* vs. migration policies

Recently, in order to address the relentless pressure relating to the economic and migration crisis, European countries revised several structural and ideological priorities in relation to their sovereign organization as nation-states<sup>26</sup>. Citizenship was not exempted. In many EU countries, the criterion of the "*ius pecuniae*"<sup>27</sup> has been integrated into citizenship access procedures, seemingly in accordance with the "unwritten" rules of neoliberal competition, that prioritize the award of freedoms and rights on the basis of material, possibly monetizable, "virtues", as sufficient evidence of the capability to contribute to the country's economic growth.

If this was the case only of those countries facing deep structural crises and thus constrained to sell their public assets to repay their debts, like for example Greece, then this choice could be coherent to the logic laying behind any other irresistible austerity measure. Instead, this seems to have become an established procedure, adopted as well by countries that still enjoy a certain economic wellbeing. The Aeolus bags of winds<sup>3</sup> then open, especially when reflecting on the dogmatic role that modern citizenship plays as the political tool for "social equalizing"<sup>28</sup>.

It is important to underline that citizenship is an issue of sovereignty and in the discretion of each state, even Member State in the framework of European Union, where despite the national laws and principles should also been fulfilled the

<sup>25</sup> Jo Shaw, *The return of Banishment: Do the New Denationalization Policies Weaken Citizenship?*, RSCAS 2015/14, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, p. 48, link: [https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCA\\_S\\_2015\\_14.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCA_S_2015_14.pdf?sequence=1&isAllowed=y), consulted on 15.04.2023.

<sup>26</sup> Athanasia Andriopoulou, *The "ius pecuniae": The Prize of Citizenship*, BRIDGE Network – Working Paper 4, June 2020, p. 1.

<sup>27</sup> J. Stern (2011). *Ius pecuniae. Staatsbürgerschaft zwischen ausreichendem Lebensunterhalt, Mindestsicherung und Menschenwürde*, in J. Dahlvik, H. Fassmann, W. Sievers (eds.), *Migration und Integration wissenschaftliche perspektiven aus Österreich*, Vienna University Press, Vienna, 1, pp. 55-74.

<sup>28</sup> Athanasia Andriopoulou, *op. cit.*, p. 2.



European legislation. But is necessary to emphasize that citizenship is a complex concept which includes constitutional, rule of law, social, economic dimension.

In the Europe post 2008 where the economic crisis is ongoing much or less in a lot of Member States some European countries, based on their sovereignty, are using mainly the citizenship investor schemes as a tool to attract investments in their countries, to boost the employment and raise the amount of liquidity (in Euro) in order to overpass or smooth the economic crises consequences.

Investor citizenship schemes have a high tendency to be created in the midst of a crisis. For instance, most of the schemes based in the European Union (EU) were created in the aftermath of the subprime crisis.<sup>29</sup>

In addition to the CBI schemes — that provide the so-called “golden passports” — a new kind of program was created: Residency-by-Investment (RBI). These schemes provide applicants with the right to reside in the country in which they invest, thus providing the applicant with a “golden visa”. Generally speaking, the “golden visas” are at the very least two or three times less expensive than “golden passports”. It has been established that Citizenship by Investment programs attract investors for their main reasons: increase their mobility, having some sort of an insurance policy, and accessing better business opportunities than in their home countries<sup>30</sup>.

## 5. Programs for attracting foreign investments in the Balkan countries

### 5.1 Bulgaria

In 2005, two years before becoming an EU Member State, Bulgaria launched the *Investor Program for Residence and Citizenship*.

Article 25(1), § 6 of the Foreigners Act was amended to allow the granting of permanent residency in Bulgaria to foreigners who invested more than 1 million Bulgarian leva (BGN) (about US\$561,000 in 2005) in the Bulgarian economy by purchasing Bulgarian government bonds or shares of a publicly traded company, or by investing in a government-owned company or in intellectual property. After holding the investment and permanent residency for a period of five years, the investor was eligible to apply for Bulgarian citizenship. In 2013, the rules for acquiring Bulgarian citizenship under the program were simplified and the so-called Fast Track Application Process was introduced.

In January 2019, the European Commission expressed its concern over investor citizenship and residence schemes in the European Union, citing the danger of money laundering and other illicit activities, and later launched infringement procedures against Malta and Cyprus for “selling EU citizenship.”

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<sup>29</sup> Brillaud, L. and Martini, M., 2018. *European Gateway: inside the murky world of golden visas*. Transparency International and Global Witness, [https://transparency.eu/wp-content/uploads/2018/10/REPORT-European-Getaway-Inside-the-Murky-World-of-Golden-Visas\\_web.pdf](https://transparency.eu/wp-content/uploads/2018/10/REPORT-European-Getaway-Inside-the-Murky-World-of-Golden-Visas_web.pdf), consulted on 15.04.2023.

<sup>30</sup> Surak, K., 2020. *Millionaire mobility and the sale of citizenship*. „Journal of Ethnic and Migration Studies”, 47(1), pp. 166-189.

Following criticism from the EU, in March 2019, the Ministry of Justice of Bulgaria drafted updated regulations, suggesting that the direct provision of Bulgarian passports for short-term investments be replaced by investment projects envisaged by the Investment Promotion Act and approved by the government.

In the speech of President von der Leyen on the State of the Union on 16 September 2020, she stressed that European values are not for sale and announced that the COM is also writing again to Bulgaria to highlight its concerns regarding an investor citizenship scheme operated by Bulgaria. The Bulgarian government has one month to reply to the letter requesting further information, following which the Commission will decide on the next steps.

On 5 March 2021, the President of the Republic of Bulgaria signed the Law Decree No. 80 on amendments to the Law on Foreigners and Decree No 81 of the President of Republic of Bulgaria on the Amendments and Additions to the Law on Citizenship (Citizenship Act). The laws entered into force on 12 March 2021.

These amendments to the Citizenship Act and the Foreigners Act introduced new conditions and rules for investing in businesses in Bulgaria, offering non-EU citizens the opportunity to acquire Bulgarian citizenship by making investment arrangements. Potential applicants had the options of investing in Bulgarian businesses, the stock market, investment funds or restoration of state-owned real estate (Foreigners Act, Articles 24 and 25).

In March 2022, the Bulgarian Parliament has decided to abolish – with effect of 5 April 2022 - the provisions of both acts which have been adopted on 5 March 2021.

The Parliament reasoned these amendments of the Citizenship Act as follows:

In the Report of the COM, dated 23 January 2019, to the European Parliament referred to 3 Member States (Bulgaria, Cyprus and Malta) which apply a regime of granting the citizenship in exchange of investments. According to this Report the three Member States apply a regime which distinguishes itself mainly regarding the preconditions of effective residence for a long period of time. By taking into consideration this Report as well as an analysis on the implementation of this regime, the Parliament has concluded that the persons who have applied for this type of citizenship *de facto* reside in Bulgaria for a very short period of time which is insufficient for their integration. In addition, the Parliament justified the abolishment of Article 12a and 14a, Citizenship Act, with the fact that in many cases the foreigners who have invested in Bulgarian economy in compliance with the requirements of these provisions and based on that have received Bulgarian citizenship, have withdrawn their investments. Thus, the positive effect which were expected from this scheme did not materialize.

## 5.2 Montenegro

The economic citizenship project that started in January 2019 has brought in 310 million euros so far. Of the total amount, 188 million is in a special account

(ESCROW) where foreigners who wanted a Montenegrin passport had to pay money, while the rest was transferred to the accounts of the state and investors who build development projects in the field of tourism. The government's project to acquire Montenegrin citizenship in exchange for investments in some of the investment projects in the fields of tourism, processing industry and agriculture was scheduled to end at the beginning of 2022, but at the end of last year it was extended for another year. Investors are asking for its extension in the next year as well, but Prime Minister Dritan Abazović recently emphasized at one of the Government sessions that there is no extension. The plan was to distribute a total of 2,000 passports.

In the ESCROW account for the development of less developed municipalities, the municipality has 47.8 million euros and another 22.8 million that have been transferred to another special account for the development of less developed municipalities, and states that the money is still not directed to the financing of specific projects until determine the criteria for that. Montenegro still does not have criteria for the distribution of money from this project, which is intended for underdeveloped municipalities. The total sum deposited in ESCROW accounts for the purpose of investing in the Innovation Fund is 7.5 million euros, while 30.25 million was paid in fees. Since the beginning of the program, the total amount paid to investors is 62.40 million, while a total of 140 million has been deposited in ESCROW accounts for that purpose.

Due to the mentioned problems, as well as due to poor promotion, there was little interest in the program, which could lead to the suspension of investment projects in the north. It is precisely for these economic reasons that we considered the government's position to extend the program to be correct. The Ministry of the Interior of Montenegro confirmed that as of September 29, 2022, the Prime Minister had submitted 420 proposals for the acquisition of Montenegrin citizenship by admission (for 420 applicants and 956 members of their families, which makes up a total of 1,376 people).

### **5.3 Albania**

The Albanian legislation is not fully liberalized with regard to the acquisition of real estate by foreigners. EU Citizens/companies and other foreigners do not have the right to acquire agricultural land, pastry and forestry. To tackle this issue, which is one of the obligations of Albania in the framework of the Stabilization and Association Agreement with EU, an inter-institutional working group has been established by the Order of Prime Minister No. 141, of 29.10.2020. The working group, headed by the deputy secretary general of Prime Minister's Office, is composed of relevant representatives from various institutions such as the Ministry Justice, Ministry of Agriculture and State Cadastre Agency, and others.

Albanian legislation, Law 113/2020 "For the Albanian citizenship" in article 9 foresees the specific cases of achievement of Albanian citizenship, more concretely the Albanian citizenship is gained by a foreign citizen that is over 18 years, is not a

person that damages the public rule of law and national security of Albania, or a person in which Albania has national interest or interest in education, science, arts, culture, economy or sports. Based on this law, in November 2020 is created the State Agency for designing the special citizenship programmes.

Among the main tasks of the Special Citizenship Programs Drafting Agency (AHPVSH) is the preparation of the special program in the field of economy for the acquisition of Albanian citizenship by foreign citizens who invest or contribute to the economic development of the country, the preparation of technical criteria for the acquisition of citizenship under this program, the determination of application procedures, as well as the determination of specific rules of special control of security and cleanliness of the image in the highest standards.

The program of gaining Albanian citizenship through special contribution in the field of economy has potential positive aspects. Such programs are expected to bring advantages through positive effects in the Albanian economy, mainly related to:

- increase of direct and indirect foreign investments in the Republic of Albania;
- increase of income in the state budget with taxes and duties paid by the persons who will apply for the Albanian citizenship through the contribution in the field of economy;
- creation of new jobs;
- an opportunity to change the tax residence, for foreign citizens, creating facilities for other investments in the future.

The disadvantages of creating special citizenship programs based on investment mainly consist of:

- the European Commission considers these schemes contrary to EU law and has sent Malta to the Court of Justice of the EU for violation of Article 3 point 4 of the TBE and Article 20 TFEU. Despite the fact that the Court of Justice has not yet expressed itself regarding this issue, the European Commission leads the process of developing negotiations with the EU and the position of the Commission represents added importance for the candidate countries.
- the European Commission draws attention through the annual reports of the years 2019, 2020, 2021 and 2022 that such schemes present a risk for issues of security, money laundering, fiscal evasion, financing of terrorism, corruption and infiltration of organized crime. Albania as a candidate country should avoid setting up such citizenship schemes, and in the 2022 report it is specified that such a scheme would be contrary to the EU acquis.

According to the European Commission in its Report to the Parliament and the European Council of December 6, 2022, for candidate countries such as Albania, Montenegro and North Macedonia, it states that the creation of a scheme for obtaining citizenship through investments would be contrary to the recommendations made in the Report the fourth under the Visa Suspension Mechanism and the 2021 enlargement package. This type of scheme can be used to circumvent the EU short-stay visa procedure by bypassing the in-depth assessment

of individual migratory and security risks that involves this procedure, including a possible avoidance of measures to prevent money laundering and terrorist financing. The Commission is of the opinion that if such schemes are deemed to pose an increasing risk to the internal security and public policies of the Member States, the visa-free regime may be suspended (for Albania, Montenegro and North Macedonia). Specifically, for our country, Albania should refrain from implementing a citizenship scheme based on investment and abolish the legal basis for such a scheme by amending the Law on Citizenship. On March 3, 2022, the Commission of the European Union announced the decision taken following the proposal made to the European Parliament for the partial removal of the right of visa-free movement in the Schengen area of citizens of Vanuatu holding a passport issued after May 25, 2015, date that coincides with the entry into force of the investment scheme in this country.

#### **6. European Union position related to citizenship by investment and residence by investment**

The European Parliament has approved Resolution No. P9\_TA(2022)0065 dated 9 March 2022 asking the European Commission to exert as much pressure as possible to ensure that third countries that have investment-based citizenship and residence schemes and that benefit from travel visa-free in the EU under Annex II of Regulation (EU) 2018/1806, repeal their citizenship by investment schemes and reform their residence by investment schemes to bring them into line with the law and European Union standards.

With the March 2022 resolution, the Parliament proposed that the termination of investment-based citizenship schemes and the regulation of residence schemes be included in the membership criteria, bearing in mind the Copenhagen criteria and the body of Union rules (*acquis-in*) that a country the candidate must adopt and implement to be eligible to join the EU, in particular, chapters 23 and 24.

Albania has been included in the "enhanced monitoring" jurisdictions for money laundering by the FATF (grey list) since March 2020, making Albania a country with limited credibility regarding the implementation of money laundering legislation. In addition to Albania, this list includes the following countries: Barbados, Burkina Faso, Cambodia, Cayman Islands, Democratic Republic of Congo, Gibraltar, Haiti, Jamaica, Jordan, Mali, Morocco, Mozambique, Nicaragua, Pakistan, Panama, Senegal, Syria, Tanzania, Turkey, Uganda, United Arab Emirates, Yemen.

At the national level, investment schemes can lead to an increase in the price of properties as a whole, including residential houses in particular. Depending on the programs that may be approved, the impact may be limited to specific areas or projects. In certain countries, investment schemes have affected the supply and price in preferential areas, part of the program such as the historic central area or preferred tourist and coastal areas, making access to these areas difficult for the local population.

## 7. Conclusions

Checking the integrity profile of the applicants through these schemes presents problems related to the difficulties to verify their possible problems with the justice systems. The vetting process can present problems in impartially assessing the integrity of applicants. The greater the value of the required investment, the greater will be the pressure on immigration officials to reduce the rigor of control, leaving more room for impunity for crimes, especially potentially bringing the risk of money laundering and financing of terrorism. This situation becomes even more problematic in cases where Albania does not have a bilateral extradition agreement or mutual legal assistance agreement in the criminal field with the applicant's country of origin or his country of residence.

According to the European Commission and the European Parliament, the implementation of citizenship-by-investment schemes puts EU citizenship at risk. According to them, the Citizenship of the European Union (EU citizenship right) is a unique and fundamental status that is given to the citizens of the Union alongside the national citizenship and represents one of the main achievements of the integration in the EU, giving equal rights to citizens throughout the Union European.

Such schemes by EU countries constitute a violation of the principle of sincere cooperation (Article 4(3) Treaty on European Union) and the definition of Union citizenship as provided for in the Treaties (Article 20 Treaty on the Functioning of the European Union). While Member States remain responsible for deciding who can become a citizen of those States, the Court of Justice of the EU has made it clear on numerous occasions that the rules on acquiring the citizenship of a Member State must do so by "keeping in consideration of EU law" (due regard of EU Law).

A Member State's decision to grant citizenship by investment automatically grants the beneficiaries rights in relation to other EU Member States, in particular the right to freedom of movement in other States, the right to vote and to run as a candidate in the local and European elections, the right to consular protection, the rights of access to the internal market to exercise economic activities. These schemes also generate risks for other member states, related to corruption and money laundering; bearing in mind that these issues are also regulated by the legislation of the European Union.

According to the Parliament, such practices turn EU citizenship into a "luxury good", undermining the values of the European Union, in particular equality, always bearing in mind that legal migration routes to the Union and rights related to residence are already covered from the EU legislation, specifically from the Long-term Residence Directive.

The investor programs raise important legal issues related to transparency, international criminality, and tax evasion. Tina Mlinaric, a campaigner at Global Witness, declared that the entire EU is exposed to "significant money laundering,

tax evasion and corruption risks, as well as threatening its security”<sup>31</sup>. Various scandals have been unveiled in the last few years, shedding light on the risks these schemes bear in relation to the integrity of the applicants that raise risks for organized terrorism and collective security<sup>32</sup>. With these schemes, “Europe has opened its door to the criminal and corrupt, with some member states running a lucrative industry of trading citizenship for money”, as stated in a report by “Transparency International and Global Witness”. From another point of view, whether the wealthy will install themselves in one country as opposed to another depends on a calculation of multiple personal and social factors, but also on a calculation of the costs and benefits of competing programs that offer tax incentives to immigrants. However, according to an OECD study, the investor schemes can be exploited to circumvent the Common Reporting Standards that are set to avoid tax evasion. As an overall evaluation, the positive impact of these schemes, as a contribution to Foreign Direct Investment (FDI), however does not counterbalance the negative effects, such as creating macroeconomic imbalances and pressuring the real estate sector<sup>33</sup>. If these problematic aspects of the *ius pecuniae* can somehow be kept under control through stronger EU cooperation and international regulatory mechanisms, there still are others that have immediate and uncontrollable impacts on a social and on a political level. In these, an additional complication is foreseen, related to the contested authority of the EU institutions: Europe cannot arrogate a mandate on matters that exclusively fall within national competence. This challenge adds to another complication, which is the lack of a dedicated controlling organ or mechanism able to defend an autonomous European standpoint on citizenship matters.

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<sup>32</sup> Organized Crime and Corruption Reporting Project (OCCRP), <https://www.occrp.org/en/goldforvisas/>, consulted on 15.04.2023.

<sup>33</sup> Portugal is one of the EU countries which has granted the most golden visas (more than 22,000 since 2012). As an answer to reports criticizing the increase of house prices and rents for local in Lisbon and Porto, authorities impose some geographical restrictions. However, “the proposed measures do not even attempt to directly address the corruption and money laundering risks” the analysis found: <https://www.euractiv.com/section/justice-home-affairs/news/golden-passports-still-widespread-in-europe-study-finds/>, consulted on 15.04.2023.

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