



ARTICLES

SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS

THE SALE OF CONDITIONAL EU CITIZENSHIP: THE CYPRUS INVESTMENT PROGRAMME UNDER THE LENS OF EU LAW

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ABSTRACT: This *Article* focuses on the consequences of the acquisition of Cypriot citizenship through Cyprus's new Investment Programme, adopted in 2013. One of the criteria for the acquisition of citizenship is the investment of Euro two million in Cypriot banks, immovable property or companies which must be retained on Cypriot territory for at least three years. However, immovable residential property to a value of Euro 500,000 must be retained in Cyprus indefinitely or there is a risk of citizenship being revoked. These criteria raise concerns, particularly in light of EU law on citizenship and the free movement of capital. This *Article* analyses the possible violations of EU law in this context and argues against the conditional nature of the citizenship provided by the Programme, which results in violation of the free movement of capital and restricts the genuine enjoyment of the status of EU citizenship. Case law by the Court of Justice and academic literature analysing the right to the free movement of capital and revocation of citizenship in an EU context will be examined to determine the repercussions of the Cyprus Programme. This topic is extremely relevant today, as it sheds light on the developing nature of EU citizenship and the relationship between EU citizenship rights weighed against the national interests of the Member States.

KEYWORDS: investment migration – EU citizenship – revocation of citizenship – free movement of capital – non-discrimination – Cyprus Investment Programme.

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I. INTRODUCTION

The rise of investment migration has become subject to intense study worldwide. These schemes are characterised as an “exchange of national membership rights for immigrants’ financial and human capital” and have been introduced worldwide with great success, especially in North and Latin America.¹ Despite facing criticism,² the increasing popularity of investment migration schemes has reached the EU, with Austria, Malta and the Republic of Cyprus (hereinafter “Cyprus” or “Republic”) being leading Member States granting both national and EU citizenship to third-country nationals in exchange for financial contribution to their economies.³ Cyprus, a member of the Union since 2004, introduced its Investment Programme in 2013, which was amended to its current form in 2018.⁴ As the Programme is proving successful in attracting foreign investors,⁵ the importance of ensuring its legality in light of EU law is indisputable. The strict territorial link to the institution of citizenship⁶ as an attribute of state sovereignty⁷ has been

¹ A. GAMLEN, C. KUTARNA, A. MONK, *Re-thinking Immigrant Investment Funds*, in *Investment Migration Working Papers*, no. 1, 2016, p. 1.

² A. SHACHAR, *Dangerous Liaisons: Money and Citizenship*, in R. BAUBÖCK (ed.), *Debating Transformations of National Citizenship*, Berlin: Springer Verlag, 2018, pp. 9, 13-14; R. BARBULESCU, *Global Mobility Corridors for the Ultra-rich. The Neoliberal Transformation of Citizenship*, in R. BAUBÖCK (ed.), *Debating Transformations of National Citizenship*, cit., p. 29; A. SCHERRER, E. THIRION, *Citizenship by Investment (CBI) and Residency by Investment (RBI) Schemes in the EU*, in *European Parliamentary Research Service*, 2018, pp. 20-25; H. COOPER, *MEPs Slam Cypriot Citizenship-for-Sale Scheme*, 19 September 2016, www.politico.eu; L. MAVELLI, *Citizenship for Sale and the Neoliberal Political Economy of Belonging*, in *International Studies Quarterly*, 2018, pp. 1, 4-5; O. PARKER, *Commercializing Citizenship in Crisis EU: The Case of Immigrant Investor Programmes*, in *Journal of Common Market Studies*, 2016, pp. 332, 234-345, 338-340; S. KLIRIDES, *Σχέδια προσέλκυσης επενδυτών μέσω της αγοράς γης οδηγούν σε τεχνητή αύξηση των τιμών των ακινήτων και συνεπώς σε δημιουργία υπεραξίας (Plans to Attract Investors Through the Land Market Lead to Artificially Rising Property Prices and the Creation of Overvaluation)*, in *Eurokerdos*, 5 August 2017, www.eurokerdos.com.

³ K. SURAK, *Global Citizenship 2.0: The Growth of Citizenship by Investment Programmes*, in *Investment Migration Working Papers*, no. 3, 2016, pp. 16-17, 21, 24-25; L. VAN DER BAAREN, H. LI, *Wealth Influx, Wealth Exodus: Investment Migration from China to Portugal*, in *Investment Migration Working Papers*, no. 1, 2018, pp. 2-3; J. DŽANKIĆ, *The Pros and Cons of Ius Pecuniae: Investor Citizenship in Comparative Perspective*, in *EU Working Papers*, no. 14, 2012, pp. 11-13; O. PARKER, *Commercializing Citizenship in Crisis EU*, cit., p. 335.

⁴ Proceedings of the Ministerial Meeting on 13 September 2016, Cyprus Investment Programme, on the basis of subsection 2 of Art. 111, para. A, of the Civil Registry Law 114(I)/2002 and “Cyprus Investment Programme” for family members of the naturalised investor according to the decision of the Council of Ministers, available at www.moi.gov.cy.

⁵ S. FAROLFI, L. HARDING, S. ORPHANIDES, *EU Citizenship for Sale as Russian Oligarch Buys Cypriot Passport*, in *The Guardian*, 2 March 2018, www.theguardian.com; P. LEPTOS, *Σχέδιο πολιτογράφησης μέσω επένδυσης: Σημαντικά τα οφέλη για την οικονομία (Scheme for Naturalisation Through Investment: Significant Benefits for the Economy)*, in *InBusinessNews*, 12 April 2018, inbusinessnews.reporter.com.cy.

⁶ R. BRUBAKER, *Citizenship and Nationhood in France and Germany*, Cambridge MA: Harvard University Press, 1992, pp. 23-26.

loosened through the formation of polities beyond the state, with the emergence of the EU and the institution of Union citizenship⁸ as prime examples. Attention must be paid to the potential legal issues originating from the criteria imposed on applicants and their aftermath under EU law, considering that Cyprus is obliged to respect and follow the rules of the *acquis*. The criteria imposed on applicants are to a certain extent similar to those of other investment migration programmes, a topic elaborated in the first section of this *Article*. However, two elements of the Programme are open to question: first, the requirement to retain residential property permanently in the Republic to preserve citizenship status and second, the threat of retroactive revocation of Cypriot and EU citizenship upon non-compliance with the criterion mentioned.

This *Article* analyses the legal implications of the acquisition of EU citizenship through the Cyprus Programme in light of EU law, particularly on the free movement of capital and citizenship. Accordingly, by focusing on the above-mentioned aspects, two principal questions will be addressed:

1) Does the requirement to permanently own residential property in Cyprus result in a violation of the free movement of capital under EU law?

2) Does the possibility of revocation of Cypriot nationality for non-compliance with the above-mentioned requirement violate EU citizenship case law?

To answer the first question, section II will focus on the origins of the freedom of movement of capital and on the constraints imposed on it by the Programme's requirements. Following a close examination of the case law of the CJEU the underlying presumption that economic objectives cannot justify restrictions on capital movements⁹ will aid in the assessment of the legality of the Programme. Section III examines the second question; throughout its evolution in the case law of the CJEU and the work of legal scholars, Union citizenship has acquired a unique status which is not a mere extension of the Member States' nationalities.¹⁰ The applicability of Union law in matters of citizenship is established in *Micheletti*,¹¹ and the material scope of Union citizenship was further expanded in *Rottmann*¹² and *Ruiz Zambrano*.¹³ The evaluation of the legality of the Cyprus Investment Programme in light of EU citizenship case law will show that Cyprus cannot take measures which will undermine the rights attached to EU citizen-

⁷ D. KOCHENOV, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2009, pp. 169, 178.

⁸ *Ibid.*, p. 181.

⁹ Court of Justice, judgment of 4 June 2002, case C-367/98, *Commission v. Portugal*, para. 52.

¹⁰ M. SZPUNAR, M.E. BLAS LÓPEZ, *Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, pp. 111-112.

¹¹ Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti and Others v. Delegación del Gobierno en Cantabria*.

¹² Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann* [GC].

¹³ Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC].

ship, nor should it impose conditions on its citizens in situations where the future prospect of exercising the said rights would be impossible.¹⁴ In this regard, the status and the rights of the family members of the investor will also be taken into consideration and the *Rottmann* criteria will be applied by analogy to the Cyprus Investment Programme. Its examination in light of the above-mentioned will lead to conclusions suggesting an urgent need to amend its provisions and comply with Union law.

II. THE UNIQUE CASE OF THE CYPRUS INVESTMENT PROGRAMME

Before analysing the specific attributes of the Investment Programme introduced in Cyprus, it is important to set out the geopolitical conditions of the island in order to understand its relationship with the Union and the context in which the Programme will be analysed.

Following the Turkish military intervention in 1974 and the unrecognised declaration of independence of the Turkish Republic of the Northern Cyprus (hereafter “the TRNC”) in 1983,¹⁵ Cypriot membership of the EU was achieved in 2004, but the application of the *acquis communautaire* is suspended in the northern part of the island’s territory, in accordance with Protocol 10 annexed to the Act of Accession.¹⁶ The status of the TRNC is a unique case in the EU, very different to that enjoyed by the outermost regions¹⁷ or overseas territories¹⁸ of its other Member States, as the suspension of the

¹⁴ D. KOCHENOV, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, pp. 55, 94, 96.

¹⁵ J. KER-LINDSAY, *The Cyprus Problem: What Everyone Needs to Know*, Oxford: Oxford University Press, 2011, pp. 5-6.

¹⁶ Protocol no. 10 on Cyprus of Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded 2003.

¹⁷ In Outermost Regions (9) EU law applies according to Art. 355, para. 1, TFEU, under conditions laid down by the Council in Regulations such as Regulation (EC) 1447/2001 of the Council of 28 June 2001 amending Regulation (EC) 1260/1999 laying down general provisions on the structural funds, Regulation (EC) 1448/2001 of the Council of 28 June 2001 amending, as regards structural measures, Regulation (EEC) 3763/91 introducing specific measures in respect of certain agricultural products for the benefit of the French overseas departments and Regulation (EC) 1452/2001 of the Council of 28 June 2001 introducing specific measures for certain agricultural products for the French overseas departments, amending Directive 72/462/EEC and repealing Regulations (EEC) 525/77 and (EEC) No 3763/91 (Poseidom). See N. SKOUTARIS, *Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?*, in *Cambridge Yearbook of European Legal Studies*, 2017, pp. 287, 300; for more information on the status of Outermost Regions see I. OMARJEE, *Specific Measures for the Outmost Regions After the Entry into Force of the Lisbon Treaty*, in D. KOCHENOV (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, Alphen aan den Rijn: Kluwer Law International, 2011, pp. 121-136.

¹⁸ These are territories where the applicability of EU law is governed by Part 4 TFEU and their corresponding association agreements. See N. SKOUTARIS, *Territorial Differentiation in EU Law*, cit., pp. 287, 301-

acquis in TRNC is a consequence of a military intervention.¹⁹ It has been acknowledged that the area is under the effective control of Turkey²⁰ and as a consequence, a special regime has been established for the Turkish-Cypriot community residing in the north. The judgments of TRNC courts are not recognised or enforced in other Member States and *vice versa*,²¹ and while the Union citizenship status of Turkish Cypriots and the rights it entails are uncontested, it remains in “hibernation”²² as long as they reside in the TRNC because the protection of their rights there falls under the jurisdiction of Turkey.²³ To provide certain guarantees for the enjoyment of EU rights for such citizens, the Union adopted the Green Line Regulation on the administration of the rules concerning the crossing of the line dividing the island.²⁴ It is worth mentioning that the Green Line does not constitute a border in the EU²⁵ so the Green Line Regulation authorises Cyprus to impose checks on the crossing of persons, goods and services that originate or have as their destination the northern part.²⁶ Due to this state of affairs, the Investment Programme discussed in this *Article* is enforced only in the southern part of the territory of Cyprus as that is the only area of the island where the Cypriot government exercises effective control and where EU law is applied in its entirety.

The Investment Programme has been variously amended since its adoption in 2013 by the Cypriot Council of Ministers, before culminating in its current version in May 2018.²⁷ According to this Programme, any third-country national can acquire Cypriot citizenship if they meet certain economic criteria such as investment in real estate, land development and infrastructure projects, the purchase or establishment or participation in Cypriot companies or businesses, or investment in alternative investment funds or financial assets in Cypriot companies or organisations. The investment funds must

302. For more information on the status of the Overseas Territories see D. KOCHENOV (ed.), *EU Law of the Overseas*, cit., pp. 47-50.

¹⁹ N. SKOUTARIS, *The Cyprus Issue: The Four Freedoms in a Member State Under Siege*, Oxford: Hart, 2011, pp. 52-54.

²⁰ Art. 1 of the Protocol no. 10 on Cyprus; N. SKOUTARIS, *Differentiation in European Union Citizenship Law, The Cyprus Problem*, in K. INGLIS, A. OTT (eds), *The Constitution for Europe and an Enlarging Union: Union in Diversity?*, Groningen: Europa Law Publishing, 2005, pp. 172-173; European Court of Human Rights, judgment of 18 December 1996, no. 15318/89, *Titina Loizidou v. Turkey*, para. 56.

²¹ Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

²² N. SKOUTARIS, *The Cyprus Issue*, cit., p. 65.

²³ *Ibid.*, pp. 55-56.

²⁴ Regulation (EC) 866/2004 of the Council of 29 April 2004 on a regime under Article 2 Protocol 10 to the Act of Accession; N. SKOUTARIS, *Differentiation in European Union Citizenship Law*, cit., pp. 171-172.

²⁵ Recital 7 of Regulation 866/2004, cit.; S. LAULHÉ SHAELOU, *The EU and Cyprus: Principles and Strategies of Full Integration*, Leiden: Martinus Nijhoff Publishers, 2010, p. 270.

²⁶ Titles II-IV of Regulation 866/2004, cit.; N. SKOUTARIS, *The Cyprus Issue*, cit., pp. 111-114.

²⁷ Cyprus Investment Programme, cit.

be at least Euro two million and must be retained in the Republic for a period of at least three years from the date of naturalisation.²⁸

Additional obligations are imposed on the applicants, incorporated in the terms and conditions following the main economic criteria of the Programme. These include due diligence checks, the possession of a residence permit in Cyprus and most importantly with respect to this *Article*, residential property which the applicant must retain ownership of. Residence permits are granted to third-country nationals already living in the Republic in accordance with Regulation 1030/2002,²⁹ but for the purposes of acquiring Cypriot nationality through investment, an immigration permit is granted to applicants on the basis of Regulation 6(2) of the national Aliens and Immigration Law.³⁰ The criteria for the acquisition of an immigration permit are included in sections A and B of the Investment Programme,³¹ in addition to requirements for a number of financial guarantees such as secure annual income and property title deeds.³² According to the Programme, if naturalisation is declined or revoked, the immigration permit obtained for the purposes of naturalisation will also be nullified.³³ To complete the due diligence checks, applicants must possess clean criminal records and must not be included in the list of persons whose assets have been frozen within the EU as a result of sanctions, in accordance with Directive 2014/42.³⁴

As for the purchase of permanent residential property, it should be worth at least Euro 500,000 (plus VAT) and must be retained in the Republic permanently.³⁵ Private ownership of indefinite duration of a residence in Cyprus is a crucial requirement for both admissibility and for the retention of Cypriot citizenship. The Programme clearly states that where periodic checks discover that any criterion or term and condition ceased to be complied with, naturalisation will be revoked. This is in accordance with Art. 54, para. 4, of the General Principles of the Administrative Law of Cyprus, which permits the revocation of any administrative decision in situations where the factual circumstances constituting the basis of the decision or which constituted the conditions

²⁸ *Ibid.*, pp. 1-2.

²⁹ Regulation (EC) 1030/2002 of the Council of 13 June 2002 laying down a uniform format for residence permits for third-country nationals.

³⁰ Second Revision of the Criteria for Granting an Immigration Permit within the Scope of the Expedited Procedure to Applicants who are Third-Country Nationals and Invest in Cyprus, 2016, available in English at www.moi.gov.cy.

³¹ Cyprus Investment Programme, cit., p. 4.

³² Second Revision of the Criteria for Granting an Immigration Permit within the Scope of the Expedited Procedure to Applicants who are Third-Country Nationals and Invest in Cyprus, cit., section 2.

³³ Cyprus Investment Programme, cit., p. 4.

³⁴ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

³⁵ Cyprus Investment Programme, cit., pp. 3-4.

for the issuance of that decision have changed.³⁶ In practice, resale of the property is allowed only when it is followed by the purchase of other residential property in the Republic for the applicant's personal use.

Therefore, this Programme provides the possibility of investing in Cyprus, while obliging the applicants to lock part of their investment within its borders, and as a result, obtain Union citizenship, the status of which is enduringly conditional upon the ongoing ownership of the investment. These two issues are crucial when examining the Programme in light of the right to the free movement of capital and EU citizenship law respectively, both of which will be analysed in the following sections.

III. RESTRICTIONS ON FREE MOVEMENT OF CAPITAL

III.1. CAPITAL MOVEMENT, ITS RESTRICTIONS AND JUSTIFICATIONS

The internal market of the European Union is an area without internal frontiers, which ensures the free movement of goods, persons, services and capital.³⁷ Art. 63 TFEU sets out the prohibition on all restrictions on capital movement between the Member States and between the Union and third countries.³⁸ The lack of an exact definition of capital movement in the Treaties led to the adoption of Directive 88/361 which provides an explanatory Nomenclature in its first Annex.³⁹ The list provided for in the annex is not exhaustive, but offers an adequate explanation of the types of capital movement available.⁴⁰ Relevant to this *Article* are the definitions of *Direct Investment* and *Investment in Real Estate*, the meanings of which are provided in the explanatory notes.⁴¹ Direct investment includes investments by all kinds of natural or commercial undertakings, which enable the establishment of lasting and direct links between the undertaking and the entrepreneur to which the capital is made available, in order to carry on an economic activity. Investment in real estate is the purchase of buildings and land for personal use.⁴² These are wide definitions and must be interpreted accordingly.

The CJEU has been called upon to provide guidance to the Member States in numerous cases regarding the nature of restrictions prohibited by Art. 63 TFEU. The Court insists

³⁶ Art. 54, para. A, General Principles of Administrative Law 158(I)/1999.

³⁷ Art. 4, para. 3, TFEU.

³⁸ Art. 63 TFEU.

³⁹ Art. 1 para. 1, Annex I, of Directive 88/361/EEC of the Council of 24 July 1988 for the implementation of Article 67 of the Treaty; J.A. USHER, *The Evolution of Free Movement of Capital*, in *Fordham International Law Journal*, 2007, pp. 1533, 1537-1538.

⁴⁰ J.A. USHER, *The Evolution of Free Movement of Capital*, cit., pp. 1533, 1537-1538; G. BABER, *The Free Movement of Capital and Financial Services: An Exposition?*, Cambridge: Cambridge Scholars Publishing, 2014, p. 26.

⁴¹ Directive 88/361/EEC, cit., explanatory notes.

⁴² *Ibid.*

on a broad interpretation of the freedom and its possible restrictions,⁴³ since the proper functioning of the internal market relies on free capital movement in combination with the free movement of persons, goods and services.⁴⁴ The first identified restriction to the free movement of capital was discrimination between domestic and cross-border movement and between two cross-border movements.⁴⁵ However, to extend the protective nature of the freedom, the Court has broadened its scope so that it goes beyond the notion of non-discrimination. In *Commission v. France*, it ruled that the prohibition of restrictions of capital movement “goes beyond the mere elimination of unequal treatment”⁴⁶ and has reaffirmed the non-hindrance test⁴⁷ in *Commission v. Portugal*, where it established that a regulation which restricts the possibility for foreign investors to acquire shares in certain Portuguese undertakings is: “capable of impeding capital movements and dissuading individuals in other Member States from investing”.⁴⁸

Such a regulation may render the free movement of capital illusory and therefore violate Art. 63 TFEU. Other examples of the application of the non-hindrance test include a requirement for prior authorisation for the acquisition of a plot of land in order to demonstrate that the planned acquisition will not be used to establish a secondary residence in *Konle*,⁴⁹ and a requirement for the security of a mortgage debt which is payable in the currency of another Member State, to be registered in the national currency in *Trummer and Mayer*.⁵⁰

Derogations to the free movement of capital are allowed if they fall under the reasons listed in Art. 65 TFEU,⁵¹ otherwise, they must be justified on the basis of overriding public interests and objective reasons on grounds of public policy and public security within the meaning of the case law of the CJEU.⁵² In principle, it is up to the Member States to “decide on the degree of protection under which they wish to afford to such legitimate inter-

⁴³ T. HORSLEY, *The Concept of an Obstacle to Intra-EU Capital Movement in EU Law*, in N. NIC SHUIBHNE, L.W. GORMLEY (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher*, Oxford: Oxford University Press, 2012, pp. 163-164.

⁴⁴ S. HINDELANG, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, Oxford: Oxford University Press, 2009, p. 128; M. ANDENÆS, T. GÜTT, M. PANNIER, *Free Movement of Capital and National Company Law*, in *European Business Law Review*, 2005, pp. 757-758.

⁴⁵ S. HINDELANG, *The Free Movement of Capital and Foreign Direct Investment*, cit., pp. 130-131.

⁴⁶ Court of Justice, judgment of 4 June 2002, case C-483/99, *Commission v. France*, paras 40-41.

⁴⁷ A. DE LUCA, *New Developments on the Scope of the EU Common Commercial Policy Under the Lisbon Treaty*, in K.P. SAUVANT (ed.), *Yearbook on International Investment Law and Policy*, Oxford: Oxford University Press, 2012, pp. 189-191; T. HORSLEY, *The Concept of an Obstacle to Intra-EU Capital Movement in EU Law*, cit., p. 164.

⁴⁸ *Commission v. Portugal*, cit., paras 9-12, 44-45.

⁴⁹ Court of Justice, judgment of 1 June 1999, case C-302/97, *Konle*, para. 39.

⁵⁰ Court of Justice, judgment of 16 March 1999, case C-222/97, *Trummer and Mayer*, para. 28.

⁵¹ Art. 65 TFEU.

⁵² *Klaus Konle v. Republik Österreich*, cit., para. 40; Court of Justice, judgment of 21 December 2011, case C-271/09, *Commission v. Poland*, para. 55.

ests" but they must do so within the limits of EU law, particularly by complying with the principle of proportionality.⁵³ The Court established in its case law on the free movement of goods⁵⁴ and services⁵⁵ that economic grounds cannot serve as a justification for derogations from the Member States' obligations.⁵⁶ As the scope of the Treaty provisions on the four fundamental freedoms has expanded and the *Gebhard* formula⁵⁷ has been applied consistently in case law relating not only to the freedom of establishment,⁵⁸ the prohibition of using pure economic justifications extends also to measures restricting the free movement of capital.⁵⁹ Accordingly, limitations on capital movements cannot be justified by the financial interests of Member States,⁶⁰ such as strengthening the structure of the market⁶¹ or primary budgetary objectives.⁶² One issue remains, however, which is the difficulty of obtaining a precise definition of what constitutes strictly economic interests.⁶³ As a result, the Court sometimes adopts an "avoidance strategy",⁶⁴ where it disregards the possible economic justifications of a measure and is satisfied by argumentation based on the general interest of the state.⁶⁵

Understanding the basic principles which govern the freedom of capital movement in the context of this *Article* is paramount to reviewing the legality of the Cyprus Investment Programme adequately. Even though the freedom acquired a wide definition, the Court's methods in assessing measures breaching Art. 63 TFEU have now become uniform and systematic. Member States may not limit the ability or dissuade their citizens from liquidating or reallocating their investments without a legitimate reason. Most importantly, this reasoning should not be purely economic, despite the difficulty which exists in identifying wholly economic justifications.

⁵³ Court of Justice, judgment of 28 September 2006, joined cases C-282/04 and C-283/04, *Commission of the European Communities v. The Netherlands*, paras 32-33.

⁵⁴ Court of Justice, judgment of 9 December 1997, case C-265/95, *Commission v. France*, para. 62.

⁵⁵ Court of Justice, judgment of 5 June 1997, case C-398/95, *SETTG*, para. 23.

⁵⁶ *Commission v. Portugal*, cit., para. 52.

⁵⁷ Court of Justice, judgment of 30 November 1995, case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, para. 37.

⁵⁸ Court of Justice: judgment of 11 July 2002, case C-294/00, *Gräbner*, para. 39; judgment of 17 October 2002, case C-79/01, *Payroll and Others*, para. 28; E. SPAVENTA, *From Gebhard to Carpenter: Towards a (non-) Economic European Constitution*, in *Common Market Law Review*, 2004, pp. 473, 749-750.

⁵⁹ E. SPAVENTA, *From Gebhard to Carpenter*, cit., p. 751; Communication of 19 July 1997 from the Commission on Certain Legal Aspects Concerning Intra-EU Investment, para 9.

⁶⁰ T. HORSLEY, *The Concept of an Obstacle to Intra-EU Capital Movement in EU Law*, cit., p. 167.

⁶¹ *Commission v. Portugal*, cit., para. 52.

⁶² Court of Justice, judgment of 7 February 1984, case C-238/82, *Duphar*, para. 23.

⁶³ J. SNELL, *Economic Justification and the Role of the State*, in P. KOUTRAKOS, N. NIC SHUIBHNE, P. SYRPIS (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*, Oxford: Hart, 2016, pp. 16-17.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*; Court of Justice: judgment of 28 April 1998, case C-120/95, *Decker*, para. 39; judgment of 28 April 1998, case C-158/96, *Kohll*, para. 41.

III.2. APPLICATION OF THESE PRINCIPLES TO THE *CYPRIO*T CASE

The Cyprus Investment Programme requires applicants to invest in private immovable property, part of which must be retained in the Republic indefinitely. This particular condition amounts to a *de facto* barrier to the right of free movement of capital in the form of real estate investments. Newly-naturalised Cypriots are prevented from exercising their right to move their investment freely, without any restrictions, limitations or unfair repercussions, such as the threat of revocation of their citizenship status. In this context, we cannot disregard the right to property, included in the European Convention on Human Rights (ECHR),⁶⁶ the Charter of Fundamental Rights of the European Union (Charter)⁶⁷ as well as the Cyprus Constitution.⁶⁸ The right to own and dispose of lawfully acquired possessions is an intrinsic element in all three articles and while limitations may be imposed, they must be made in the name of public interest and be regulated by law. As the focus of this section is the right to free movement of capital, an analysis of the restriction imposed by the duty to retain the property permanently and its possible justifications will proceed.

Firstly, I argue that the Programme lacks any guarantee for the equal treatment of domestic and cross-border capital movement. Citizens who naturalised through this Programme are able to move their investment only within the borders of Cyprus (apart from the northern part where the government does not exercise effective control); relocation of the investment to other Member States or sale of the property without the immediate purchase of a replacement will result in the revocation of citizenship. Such a requirement is not imposed on other Cypriots. Secondly, the obligation to retain ownership of residential property in the Republic forever – regardless the fact that it is part of the investment used for naturalisation – can be argued to constitute a violation of Art. 63 TFEU, if it is considered in light of the rulings in *Commission v. Belgium*⁶⁹ and *Commission v. Portugal*,⁷⁰ where the non-hindrance test was applied and the Court stated that where a measure has a deterrent or discouraging effect on individuals seeking to invest abroad, Art. 63 TFEU is breached. A similar conclusion can be drawn by looking at the judgment in *Verkooijen* where the applicant was restricted from investing in companies outside the Netherlands⁷¹ as a result of a measure which does not grant

⁶⁶ Art. 1, Protocol no. 1, of ECHR.

⁶⁷ Art. 17, para 1, of the Charter.

⁶⁸ Art. 23 of the Constitution of the Republic of Cyprus.

⁶⁹ The case concerned a Belgian Royal Decree which prohibited Belgian residents from obtaining loans issued by German banks above the fixed rate. In its evaluation of the measure, the Court established that limitations on acquiring loans from other Member States, as well as making investments abroad, constitute violations of Art. 63 TFEU; Court of Justice, judgment of 26 September 2000, case C-478/98, *Commission v. Belgium*, paras 3 and 18.

⁷⁰ *Commission v. Portugal*, cit., paras 44-45.

⁷¹ Court of Justice, judgment of 6 June 2000, case C-35/98, *Verkooijen*, paras 34-35.

tax exemptions to individuals who receive dividends on shares in foreign companies.⁷² Such a restriction, according to the Court, dissuades individuals from investing their capital in other Member States,⁷³ a ruling that can be applied by analogy to the duty to retain ownership of residential property used for investment in exchange for citizenship. Allowing Member States to impose restrictions as such, creates the illusion of the freedom of movement of capital and creates problems with legal certainty and the uniform application of Union law.

Furthermore, by providing Union citizenship, the Programme makes it more attractive for third-country nationals to lock their investment in the Republic, which could gradually lead to the obstruction of free movement of capital to other Member States. Liberalisation of cross-border capital movement within the EU is an intrinsic feature of the internal market and it is essential for the attainment of the socioeconomic objectives of the Union.⁷⁴ Obstruction of the possibility of making the best use of this freedom affects the individuals whose Union rights are violated, but it also has detrimental effects on the economic prosperity of other Member States, which the Union aims to guarantee.⁷⁵ Despite the fact that the legal requirements for the acquisition of EU Citizenship through investment in Cyprus do not take the form of exchange authorisation or affect the general possibility of investment abroad, they could constitute an obstacle to the broadest possible liberalisation of the capital movement markets in the EU, as was established in the *Brugnoni* case.⁷⁶

That said, the possible justifications which could validate the implementation of restrictive measures in the Republic and the derogation from its obligations towards the Union must be examined. The Programme was adopted to overcome the economic challenges the Republic was confronted with after the 2012 financial crisis and to attract foreign investment by encouraging natural persons with high incomes to establish themselves in the Republic.⁷⁷ These are the only explicit objectives found in the government's website and public statements, which I would argue can be considered purely economic motives. The consequences have been indeed positive: increased tax revenue and in-

⁷² *Ibid.*, paras 6-11. Note that in this case it was established that the receipt of dividends from companies in other Member States is an "indissociable from a capital movement", see para. 29.

⁷³ *Ibid.*, para. 34.

⁷⁴ Art. 3, para. 1, TEU; S. HINDELANG, *The Free Movement of Capital and Foreign Direct Investment*, cit., pp. 10-11; European Commission, National Institute of Economic and Social Research, *Capital Market Liberalisation, (summary)*, in *Single Market Review Series*, 1996.

⁷⁵ For an extensive analysis of the socioeconomic benefits of the free movement of capital see S. HINDELANG, *The Free Movement of Capital and Foreign Direct Investment*, cit., pp. 19-24.

⁷⁶ Court of Justice, judgment of 24 June 1986, case C-157/85, *Brugnoni and Ruffinengo v. Cassa di Risparmio di Genova e Imperia*, para. 22.

⁷⁷ Cyprus Investment Programme, cit.; G. ANTONIOU, *Limits on Passports to Investors*, in *Philenews*, 8 October 2017, www.philenews.com.

creased investment in real estate, tourism and development.⁷⁸ Economic prosperity surely resonate with the interest of those individuals who can profit from the clear deficiencies of this Programme, which disadvantages others with respect to Union law. The Cypriot government aims to boost the national economy through this Programme and the restriction imposed on applicants would fall under the justification of establishing and maintaining lasting economic links between the investors naturalising and the Republic.

However, justifying such an obvious restriction on capital movement on the basis of economic prosperity would be rather difficult before the Court. As mentioned in the preceding passage, the Court is reluctant to allow justification of a restriction on strictly economic grounds.⁷⁹ Another approach would be to consider the principle of the general interest of the state as an overriding justification for restrictions of the freedom. However, previous cases in which the Court ruled on the general interest of a state, as opposed to focusing on purely economic justifications, such as *Decker*⁸⁰ and *Kohl*,⁸¹ the justification used to restrict the free movement of goods and services respectively was to secure the financial balance of the social security systems of the Member States. In both cases, neither restriction was found to have any significant effect on the social security system of the Member States in question and the Court proceeded in examining alternative justifications.⁸² I believe that a similar outcome would result from such an approach to justification during the examination of the conformity of the Cyprus Programme with Art. 63 TFEU. Alternatively, the Court would find the justifications used by the Cyprus government as strictly economic. Either way, requiring individuals to retain their investment in Cyprus indefinitely raises serious problems in view of the right of individuals to move their capital freely within the Union: such a limitation constitutes a violation of the Republic's obligations under the Treaties and surviving the judicial scrutiny of the Court can be difficult.

IV. CITIZENSHIP OF THE EU

IV.1. INVESTMENT MIGRATION SCHEMES IN THE EU AND THE EVOLVING NATURE OF UNION CITIZENSHIP

Examining investment migration schemes in the framework of the EU legal order can be challenging, considering the unconventional character of EU citizenship and its effects

⁷⁸ M. MAURIDES, *Η πώληση διαβατηρίων είναι εργαλείο ανάπτυξης* in *η σημερινή*, 26 December 2017, www.sigmalive.com; A. ΠΟΥΛΚΑΡΠΟΥ, *Ρώσοι και Άραβες επενδυτές κατέκλυσαν την Κύπρο*, in *offsite*, 29 June 2017, www.offsite.com.cy.

⁷⁹ J. SNELL, *Economic Justification and the Role of the State*, cit.

⁸⁰ *Decker*, cit., para. 39.

⁸¹ *Kohl*, cit., para. 41.

⁸² *Decker*, cit., paras 40-41; *Kohl*, cit., paras 42-43.

on the complicated relationship between the supranational EU and national legal orders, ever since its recognition as the intended future fundamental status of Member States' nationals in 1992.⁸³ *Prima facie*, agreeing with Jo Shaw, there is no legal basis for EU-level opposition to these programmes,⁸⁴ because of the derivative nature of Union citizenship.⁸⁵ Nevertheless, different nationality laws have always raised concerns within the Union, as the result of granting the unifying EU citizenship status to third-country nationals would be the availability of EU rights such as freedom of movement, which ultimately affects all Member States.⁸⁶ In 2014 the European Parliament, while underlining its own lack of legal competences over this matter,⁸⁷ adopted a Resolution on EU Citizenship for sale in response to the Maltese Individual Investors Programme (hereafter the "IIP"), where it expressed its concerns at the development of investment migration in the EU and requested the Commission to examine their legality.⁸⁸

Attention must also be drawn to the principle of recognition of other Member State nationalities, regardless of their mode of acquisition, developed in *Micheletti*.⁸⁹ Accordingly, Member States have to respect the EU citizenship status of nationals from other Member States as well as the nationality their own citizens.⁹⁰ This line of reasoning was previously indicated in *Auer*, where the Court ruled that: "There is no provision of the Treaty which [...] makes it possible to treat nationals of a Member State differently according to the time at which *or the manner in which they acquired the nationality of that State*".⁹¹

This is crucial to the development of investment migration and the concerns raised by Member States that such practices affect the entire Union. The CJEU's approach to the recognition of Member States' nationalities makes investment migration schemes perfectly legitimate: "investment Cypriots" – just as the "investment Maltese" – are full-fledged citizens of the EU. According to *Auer* and *Micheletti*, the mode of naturalisation is irrelevant to the validity and recognition of the EU citizenship status of an individual by other Member States and any distinction between groups of nationals of Member

⁸³ Court of Justice: judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31; judgment of 17 September 2002, case C-413/99, *Baumbast and R*, para. 82.

⁸⁴ J. SHAW, *Citizenship for Sale: Could and Should the EU Intervene?*, in R. BAUBÖCK (ed.), *Debating Transformations of National Citizenship*, cit. pp. 63-64.

⁸⁵ Art. 20 TFEU.

⁸⁶ D. KOCHENOV, *Ius Tractum of Many Faces*, cit., pp. 182-183.

⁸⁷ Recital 7 of European Parliament Resolution P7_TA(2014)0038 of 16 January 2014 on EU citizenship for sale.

⁸⁸ *Ibid.*, recitals 1 and 3.

⁸⁹ *Micheletti v. Delegación del Gobierno en Cantabria*, cit., para. 10; D. KOCHENOV, *Ius Tractum of Many Faces*, cit., p. 182.

⁹⁰ H.U. JESSURUN D'OLIVEIRA, *Case C-369/90 Mario Vicente Micheletti v. Delegación del Gobierno en Cantabria, Judgment of 7 July 1992*, in *Common Market Review*, 1993, pp. 623, 628.

⁹¹ Court of Justice, judgment of 7 February 1979, case C-136/78, *Ministère Public v. Auer*, para. 28 (emphasis added).

States made in this regard shall be deemed unacceptable.⁹² In addition, the argument proposed by the AG Poiares Maduro in *Rottmann*,⁹³ that mass naturalisations of third-country nationals could contradict the principle of sincere cooperation in Art. 4, para. 3, TEU⁹⁴ if not performed in consultation with other Member States,⁹⁵ seems inapplicable to the case of investment schemes, given that the number of naturalisations through investment remain low in the EU, especially compared with analogous situations, such as the large numbers of Latin Americans naturalised as Italians.⁹⁶ Even if these numbers were to grow in the future, we must consider that third-country nationals naturalising in any Member State through investment migration schemes are individuals of high net worth who would not impose an “unreasonable burden” on the social welfare systems of Member States if they were to decide to use their free movement rights according to the Citizenship Directive.⁹⁷ These individuals contribute to the functioning of the internal market and the objectives of European economic integration, making them valuable citizens in light of EU’s internal market logic.⁹⁸

The rights attached to the status of EU citizenship were initially manifested in activity within the internal market through the free movement rights,⁹⁹ which explains the Court’s insistence on the requirement for cross-border movement to ascertain the ap-

⁹² Art. 5, para. 2, of the 1997 European Convention on Nationality; D.A.J.G. DE GROOT, *Free Movement of Dual EU Citizens*, in *European Papers*, Vol. 3, 2018, No 3, www.europeanpapers.eu , p. 1075 *et seq.*

⁹³ *Rottmann* [GC], cit.

⁹⁴ Art. 4, para. 3, TEU.

⁹⁵ Opinion of AG Poiares Maduro delivered on 30 September 2009, case C-135/08, *Rottmann*, para. 30.

⁹⁶ D. KOCHENOV, *Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price*, in R. BAUBÖCK (ed.), *Debating Transformations of National Citizenship*, cit., pp. 51-55; G. TINTORI, *The Transnational Political Practices of “Latin American Italians”*, in *International Organization for Migration: International Migration*, 2011, pp. 168, 172-173; K. SURAK, *Global Citizenship 2.0*, cit., p. 6.

⁹⁷ Art. 7, para 1, let. b), of 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) 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); A. HEINDLMAIER, M. BLAUBERGER, *Enter at Your Own Risk: Free Movement of EU Citizens in Practice*, in *West European Politics*, 2017, pp. 1198, 1200-1201; D. THYM, *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, in *Common Market Law Review*, 2015, pp. 17, 20.

⁹⁸ D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, pp. 36-39. D. KOCHENOV, *Interlegality – Citizenship – Intercitizenship*, in G. PALOMBELLA, J. KLABBERS (eds), *The Challenge of Interlegality*, Cambridge: Cambridge University Press, 2019.

⁹⁹ D. KOSTAKOPOLOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *Modern Law Review*, 2005, pp. 233, 238-239; Z. YANASMAYAN, *European Citizenship: A Tool for Integration*, in S. CARRERA, K. GROENENDIJK, E. GUILD (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, London: Routledge, 2009, p. 68; E. SPAVENTA, *Earned Citizenship. Understanding Union Citizenship Through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., pp. 206-207.

plicability of Union law in citizenship cases.¹⁰⁰ The cross-border rationale continues to exist but is now broadened by the inclusion of potential cross-border movement and with added emphasis on individual rights through the expansion of the material and personal scope of Union citizenship through the case law of the CJEU.¹⁰¹

*Rottmann*¹⁰² is of utmost importance in this respect. The Court for the first time provided a clarification of the principle “due regard to Community law”, established in *Micheletti*.¹⁰³ Essentially, the ruling resulted in limiting the Member States’ discretion in measures revolving around the grant and revocation of nationality by introducing the principle of proportionality to the decisions taken by national authorities:¹⁰⁴ this led to the reassessment of the interdependent relationship between national and EU citizenship.¹⁰⁵ Despite AG Poiares Maduro’s suggestion that a cross-border element is a prerequisite to triggering the Court of Justice’s involvement, the Court’s approach to this case was different.¹⁰⁶ Accordingly, a situation in which an individual is faced with a decision withdrawing his naturalisation falls “by reason of its nature and its consequences within the ambit of EU law”.¹⁰⁷ The Court’s departure from the traditional requirement of cross-border movement indicates a shift of emphasis to the protection of the individual, who is placed in a situation where they lose the status conferred by Art. 20 TFEU and the rights attached to it.¹⁰⁸ By bringing Dr Rottmann’s case within the scope of EU law, the Court effectively

¹⁰⁰ N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, pp. 1597, 1612.

¹⁰¹ *Ibid.*, pp. 1612, 1613-1614; D. KOCHENOV, *A Real European Citizenship*, cit., pp. 59-60.

¹⁰² *Rottmann* [GC], cit.

¹⁰³ In *Micheletti* the Court mentioned the principle “due regard to community law” but it was perceived as *obiter dictum* of the ruling; G.-R. DE GROOT, *Towards a European Nationality Law*, in *Electronic Journal of Comparative Law*, 2004; H.U. JESSURUN D’OLIVEIRA, *Case C-369/90 Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, Judgment of 7 July 1992, cit., p. 634.

¹⁰⁴ *Rottmann* [GC], cit., para. 55.

¹⁰⁵ D.J. MANN, K.P. PURNHAGEN, *The Nature of Union Citizenship Between Autonomy and Dependency on (Member) State Citizenship – A Comparative Analysis of the Rottmann Ruling, or: How to Avoid a European Dred Scott Decision*, in *Wisconsin International Law Journal*, 2011, pp. 484, 491-493; J. SHAW, *Deprivation of Citizenship: Is There an Issue of EU Law?*, in R. BAUBÖCK (ed.), *Debating Transformations of National Citizenship*, cit., pp. 236-238.

¹⁰⁶ Opinion of AG Poiares Maduro, *Rottmann*, cit., paras 10, 14 and 23; D. KOCHENOV, *Case C-135/08, Janko Rottmann v. Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet Reported, in *Common Market Law Review*, 2010, pp. 1831, 1832-1833; D. KOSTAKOPOULOU, *The European Court of Justice, Member State Autonomy and European Citizenship: Conjunctions and Disjunctions*, in H.-W. MICKLITZ, B. DE WITTE (eds), *The European Court of Justice and the Autonomy of the Member States*, Cambridge: Intersentia, 2012, pp. 198-199.

¹⁰⁷ *Rottmann* [GC], cit., para. 42; H. VAN EIJKEN, *European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals*, in *Utrecht Journal of International and European Law*, 2010, pp. 65, 68-69.

¹⁰⁸ D. KOCHENOV, *A Real European Citizenship*, cit., pp. 58-61; Art. 20 TFEU; *Rottmann* [GC], cit., para. 42.

expanded the *ratione materiae* of EU citizenship.¹⁰⁹ Accordingly, the need to exercise free movement rights is no longer the paramount requirement for the Court to intervene; the status of being a Union citizen and the rights associated with it have become sufficient foundation to engage EU law and determine any violations of it.¹¹⁰

Another critical case which builds on the *Rottmann* line of reasoning is *Ruiz Zambrano*.¹¹¹ This case dealt with the decision of the Belgian authorities to deprive the residency and working rights of Mr Ruiz Zambrano, a Colombian national and parent of two children born in Belgium.¹¹² The Court insisted on the applicability of the case under EU law, despite the absence of cross-border movement, because Mr Zambrano's children were Union citizens and would be deprived of "the genuine enjoyment of the substance of [their] rights"¹¹³ if forced to move outside the territory of the Union.¹¹⁴ Unfortunately, in the following case law, particularly *McCarthy*¹¹⁵ and *Dereci*,¹¹⁶ the Court adopted a more restrictive approach to situations which potentially deprive individuals of the substance of their Union citizenship rights,¹¹⁷ by qualifying the ruling in *Ruiz Zambrano* as an exceptional case.¹¹⁸ Notwithstanding that, the formula of "substance of rights" established in *Ruiz Zambrano*, though uncertain, remains promising¹¹⁹ and constitutes a stepping stone on the way to shaping the material scope of Union law by defending the future ability of individuals to enjoy their EU rights.¹²⁰

¹⁰⁹ D. KOCHENOV, *A Real European Citizenship*, cit., pp. 64, 67-69.

¹¹⁰ N. CAMBIEN, *Case C-135/08 Janko Rottmann v. Freistaat Bayern*, in *Columbia Journal of European Law*, 2011, pp. 375, 383-384.

¹¹¹ *Ruiz Zambrano* [GC], cit.

¹¹² *Ibid.*, paras 14-16, 43-44.

¹¹³ *Ibid.*, paras 40-44; A. LANSBERGEN, N. MILLER, *Court of Justice of the European Union European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*, in *European Constitutional Law Review*, 2011, pp. 287, 291.

¹¹⁴ N. NIC SHUIBHNE, *(Some of) The Kids Are All Right*, in *Common Market Law Review*, 2012, pp. 349, 350-352; K. HAILBRONNER, D. THYM, *Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, not yet Reported*, in *Common Market Law Review*, 2011, pp. 1253, 1255-1257.

¹¹⁵ Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*.

¹¹⁶ Court of Justice, judgment of 15 November 2011, case C-256/11, *Dereci and Others* [GC].

¹¹⁷ *McCarthy*, cit., paras 46-47; *Dereci and Others* [GC], cit., paras 40, 74; E. SPAVENTA, *Earned Citizenship – Understanding Union Citizenship through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., pp. 212-213.

¹¹⁸ *Dereci and Others* [GC], cit., para. 55; N. NIC SHUIBHNE, *Limits Rising, Duties Ascending: The Challenging Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, pp. 889, 901-902.

¹¹⁹ S. IGLESIAS SÁNCHEZ, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?*, in *European Law Journal*, 2014, pp. 464, 474.

¹²⁰ D. KOCHENOV, *The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?*, in *International and Comparative Law Quarterly*, 2013, pp. 97, 101.

The judgments in *Micheletti*, *Rottmann* and *Ruiz Zambrano* pave the way towards a better understanding of the relationship between national and Union citizenship.¹²¹ With the expansion of the scope of EU citizenship *ratione materiae*, the requirement of cross-border movement is proven illogical¹²² in a “Union without borders” and contrary to the spirit of European integration.¹²³ In the current context, three conclusions can be drawn which will provide guidance in the assessment of the Cyprus Programme. Firstly, Member State nationality must be recognised and respected by all Member States (including the Member State issuing the nationality),¹²⁴ regardless the mode of naturalisation. Secondly, even though the derivative nature of EU citizenship is uncontested, the need to preserve its unique status and protect the individuals’ rights requires limitations on Member State competences in matters of citizenship, particularly when EU rights are undermined by a measure adopted at the national level. Thirdly, Member States should not impose restrictive conditions on their own citizens, the effects of which would be to render the future prospect of exercising their Union rights impossible.

IV.2. THE CYPRUS INVESTMENT PROGRAMME: REVOCATION OF UNION CITIZENSHIP, DISCRIMINATION, FAMILY MEMBERS AND THE RIGHT TO LEAVE

The adoption of investment migration schemes in Member States is not uncommon and, as has been established in the previous section, does not necessarily violate Union law. However, the Cyprus Investment Programme appears to be significantly different due to the requirement imposed on investors to retain ownership of residential property in the Republic for an unlimited period. This condition can cause future complications, as it places individuals who decide to sell their property in Cyprus or to relocate beyond the island’s territory in a situation where their Cypriot nationality and EU citizenship will be revoked.¹²⁵ Attention must be paid to the conditional nature of the citizenship acquired through investment,¹²⁶ as it prompts several issues when viewed in

¹²¹ D. KOCHENOV, *A Real European Citizenship*, cit., p. 86; K. KRÜMA, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, Leiden: Martinus Nijhoff Publishers, 2013, p. 124.

¹²² D. KOCHENOV, *A Real European Citizenship*, cit., pp. 92-93.

¹²³ D. KOCHENOV, *Citizenship Without Respect: The EU’s Troubled Equality Ideal*, in *Jean Monnet Working Paper*, no. 8/10, 2011, pp. 43-44.

¹²⁴ Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevinger* [GC], paras 56-58.

¹²⁵ Cyprus Investment Programme, cit., p. 1.

¹²⁶ “Conditional Citizenship” is not merely a Cypriot invention; the UK adopted a similar approach and according to the Immigration, Asylum and Nationality Act 2006, deprivation of citizenship constitutes a valid measure that can be taken by the Secretary of State of the Home Department in an attempt to “fight terrorists ‘disguised’ as UK citizens”. The difference between the UK and Cyprus is that firstly, the conditionality of the British citizenship applies to all citizens, regardless whether they acquired their nationality by birth or through registration and naturalisation and secondly, this conditionality is activated when a citizen engages in terrorist activity; thus, the deprivation is seen as a form of a punitive measure

the light of EU citizenship law: the ability of Cyprus to revoke citizenship upon the exercise of rights protected by EU law and the consequences such measures would have on the investor's family.

The revocation of citizenship based on non-compliance with the conditions of the Cyprus Programme must be closely analysed in light of *Rottmann* and *Ruiz Zambrano*. In *Rottmann* the Court concluded that Member States must take decisions on the revocation of nationality having due regard to Community law and proceeded to delegate the proportionality test to the German court.¹²⁷ Empowering the national courts with the application of the principle of proportionality could undermine the principle of legal certainty for individuals and threaten the uniform application of Union law;¹²⁸ however, it can also be considered as an efficient method of allowing cooperation between the national courts of the Member States and the CJEU, once the latter establishes its jurisdiction and the potential breach of the substance of EU citizenship rights.¹²⁹ In *Rottmann* the national courts found that the revocation of Dr Rottmann's citizenship was proportionate because of his criminal history and the fact that it did not breach any international or EU law requirements.¹³⁰

Notwithstanding the discretion Member States enjoy in nationality matters, national measures regarding the withdrawal of nationality must be legitimate and justifiable in light of EU law.¹³¹ When comparing the argumentation and the outcome of *Rottmann* to the *Cypriot* case, fundamental differences must be pointed out. To begin with, the decision of an individual to exercise their Union rights and relocate their investment outside the territory of a Member State cannot be compared to the situation in *Rottmann*, where the applicant was found guilty of obtaining German nationality by deception.¹³² Consequently, the revocation of nationality was considered legitimate in the name of protecting the solidarity between all the citizens of Germany. In the *Cypriot* case the

to protect national security. In Cyprus on the contrary, the conditional nature applies only to investor Cypriots who exercise their right to the free movement of capital by re-investing outside the Republic's territory. See S. MANTU, "Terrorist" Citizens and the Human Right to Nationality, in *Journal of Contemporary European Studies*, 2018, pp. 28, 32-33; S. LAVI, *Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel*, in *New Criminal Law Review: An International and Interdisciplinary Journal*, 2010, p. 404, 409-411; C. JOPPKE, *Terror and the Loss of Citizenship*, in *Citizenship Studies*, 2015, pp. 728, 733-734.

¹²⁷ *Rottmann* [GC], cit., paras 58-59.

¹²⁸ In *Rottmann*, before delegating the competence to the German court, the Court of Justice included some suggestions on how to assess proportionality which made the outcome of the German ruling more predictable, see *Rottmann* [GC], cit., para. 56; H. VAN EIJKEN, *European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of Their Nationals*, cit., 2010, pp. 65, 69.

¹²⁹ D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in *European Law Review*, 2012, pp. 369, 386, 392-393.

¹³⁰ D. KOCHENOV, *A Real European Citizenship*, cit., pp. 78.

¹³¹ *Rottmann* [GC], cit., para. 51; J. SHAW, *Deprivation of Citizenship*, cit., p. 235.

¹³² *Rottmann* [GC], cit., para. 28.

withdrawal of Cypriot nationality from Cypriots who acquired citizenship through investment is a consequence of their decision to move their capital away from the territory of Cyprus, relying on Arts 26 and 36 TFEU. The revocation of Cypriot nationality for non-compliance with the condition to permanently own property in Cyprus is a restriction of the EU right to free movement of capital and the possibility of this measure being justified is very unlikely, as was established in the previous section: the restriction directly contradicts the very *raison d'être* of supranational law.

The measure also restricts the applicants' right to leave the territory of Cyprus and establish themselves in other Member States. Adam Łazowski argues that the right to exit is a *condition sine qua non* to the right to move and reside freely within the Union,¹³³ as it is implied in Art. 21 TFEU.¹³⁴ The right to exit is also established in Art. 4 of the Citizens' Directive¹³⁵ and was affirmed by the Court in *Jipa* and subsequent cases where individuals were prevented from leaving their Member State of nationality.¹³⁶ This right is compromised by the Investment Programme as it practically ties the applicants to the Republic, making the exercise of the right to move freely to other Member States unappealing. Even if this does not amount to a direct restriction to the right to leave, it is nonetheless incompatible with the objective to eliminate any obstacles to free movement within the EU, a prerequisite to the functioning of the internal market.¹³⁷

Adopting a naturalisation programme on the basis of limiting the exercise of rights accorded by EU law seems to be contrary to the letter and the spirit of the Treaties as it interferes with the goal of gradual integration even if, paradoxically, it is presented under a pretext of enhancing economic integration, and is considered illogical, based on the judgment in *Lounes*.¹³⁸ Through the case law on citizenship, the Court established itself as the final arbitrator and protector of EU citizens through the activation of EU law when national measures result to the loss of the rights attached to the status of Union citizen-

¹³³ A. ŁAZOWSKI, *Darling You Are Not Going Anywhere: The Right to Exit and Restriction in EU Law*, in *European Law Review*, 2015, pp. 877, 888.

¹³⁴ Art. 21 TFEU.

¹³⁵ Art. 4 of Directive 2004/38/EC, cit.

¹³⁶ Court of Justice, judgment of 10 July 2008, case C-33/07, *Jipa*, para. 18; this line of reasoning continued in subsequent judgments, see Court of Justice, judgment of 17 November 2011, case C-430/10, *Gaydarov*; judgment of 17 November 2011, case C-434/10, *Aladzhov*.

¹³⁷ Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock and Others* [GC], para. 68; G.-R. DE GROOT, A. SELING, *The Consequences of the Rottmann Judgment on Member States Autonomy. The Court's Avant-Gardism in Nationality Matters*, in J. SHAW (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in National Law?*, in *EUI Working Papers*, no. 62, 2011, p. 62.

¹³⁸ Court of Justice, judgment of 17 November 2017, case C-165/16, *Lounes* [GC], paras 56-58; D.A.J.G. DE GROOT, *Free Movement of Dual EU Citizens*, cit.; D. KOCHENOV, *Ius Tractum of Many Faces*, cit., pp. 191-192.

ship¹³⁹ and as a result, decision-making and the adoption of policies such as the Cyprus Programme no longer fall under the sovereignty umbrella. Potential violations of the substance of Union citizenship can be manifested through restrictions to the exercise of one of the fundamental rights of the Treaties¹⁴⁰ and are amplified when a Member State's naturalisation process leads to the granting of Union citizenship status which is absurdly conditioned by a limitation of the rights it is associated with. The priority to enact measures which would result in relative economic prosperity should not overshadow the arbitrary effects of such measures on individuals' lives. The interests of other Member States must also not be ignored: using a measure such as the withdrawal of nationality if individuals decide to exercise their right to the free movement of capital is burdensome to say the least and contrary to the aim of achieving a functioning internal market within the EU.¹⁴¹ Based on these findings, one must conclude that a measure withdrawing the naturalisation of an EU citizen on the basis of their exercising their right to the free movement of capital alongside their right to exit, cannot be considered legitimate.

In addition to the effects on the main investor, family members are also greatly affected by this Investment Programme. Cypriot and Union citizenship is granted initially to the main investor and subsequently can be acquired by their parents, spouse or partner and by their financially dependent adult children,¹⁴² while their minor children naturalise in accordance with Art. 110, para. 3, of Civil Registry Law.¹⁴³ However, there is no mention of the circumstances under which the family members lose their nationality. The extent of their dependency on the investor's citizenship is unclear and their legal status is questionable if the citizenship of the former is revoked because of future non-compliance with the conditions of the Programme. Relying on the Citizens' Directive¹⁴⁴ would only be possible if the family moves to another Member State and satisfied the criteria of Art. 7, para. 1, and Art. 14, para. 2.¹⁴⁵ The predicament here is that, if the family wished to exercise the right to relocate within the Union by relying on the Directive, it

¹³⁹ K. LENAERTS, *Civis Europaeus Sum: From the Cross-border Link to the Status of Citizen of the Union*, in A. ROSAS, N. WAHL, P. LINDH, P. CARDONNEL (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Oxford: Hart, 2012, pp. 141-142.

¹⁴⁰ G.-R. DE GROOT, *Towards a European Nationality Law*, cit.

¹⁴¹ Art. 26 TFEU; S. HINDELANG, *The Free Movement of Capital and Foreign Direct Investment*, cit., pp. 10-11.

¹⁴² Cyprus Investment Programme, cit., p. 1. For clarification, adult dependent children of the applicants are considered students under the age of 28 and children with severe physical or mental disability, see p. 2.

¹⁴³ Art. 110, para. 3, of Civil Registry Law 114(I)/2002 provides that minor children of a citizen of the Republic may acquire Cypriot nationality upon a request made to the Ministry of Internal Affairs.

¹⁴⁴ Arts 6 and 7 of Directive 2004/38/EC, cit.

¹⁴⁵ Court of Justice, judgment of 21 December 2011, joined cases C-424/10 and C-425/10, *Żiołkowski and Szeja* [GC], paras 40-41; M. JESSE, *Joined Cases C-424/10, Tomasz Żiołkowski v. Land Berlin, and C-425/10, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011, nyr.*, in *Common Market Law Review*, 2012, pp. 2003, 2008.

is very likely that the residential property forming part of their investment would be sold in Cyprus and at most, be reinvested in another Member State. This case, based on the wording of the Programme, would lead to the revocation of at least the main investor's citizenship, and most likely that of all family Members except for those minor children naturalised under the ordinary national naturalisation procedures noted above. Therefore, the possibility to acquire or retain residency rights and invoke the right to family reunification becomes ambiguous, as the beneficiaries of the Directive remain Union citizens and their family members.¹⁴⁶

The Programme also fails to detail the effects of the loss of the Union citizenship of the main investor and their family on future generations. If the nationality of both parents is revoked in accordance with the Programme, their children, born in Cyprus and, therefore, Cypriot citizens *iure soli*, would be forced to leave the territory of the Union and thus be deprived of the substance of their Union rights analogously to the situation in *Ruiz Zambrano*.¹⁴⁷ An upcoming case that is of important relevance in this regard is *Tjebbes*,¹⁴⁸ where a question regarding the loss of nationality of minors as a consequence of the deprivation of the nationality of their parent was submitted to the Court. In his opinion, AG Mengozzi considered that the principle of uniform nationality within the same family should not be burdensome on the substantive rights and interests of minors, which must be recognised as being independent from those of their parents.¹⁴⁹ Depriving the status of Union citizenship of minors born in a Member State on the basis of an unjustified revocation of the nationality of their parents seems highly inappropriate and any justification based on economic grounds or the discretion accorded to Member States to govern their nationality laws would contradict the approach taken by the Court in *Ruiz Zambrano*.

Non-compliance with the requirement of retaining the invested residential property in the Republic will result in the withdrawal of the investor's Cypriot and EU citizenship and have a knock-on effect on any family members. The ambiguity of the Programme permits the strict interpretation of its provisions, which leads to the following conclusions: the investor and their family members acquire a very peculiar Union citizenship, the validity of which depends on limiting the rights accorded to all EU citizens and the revocation of which exposes the entire family to a regime with which fails to provide for legal remedies.

We must consider whether alternative, more appropriate measures could be taken to integrate newly naturalised investors and at the same time achieve the goal of economic prosperity and development. For instance, the Programme could require that the

¹⁴⁶ Art. 3 of Directive 2004/38/EC, cit.; D.A.J.G. DE GROOT, *Free Movement of Dual EU Citizens*, cit., pp. 18-19; *Lounes* [GC], cit., para. 35.

¹⁴⁷ *Ruiz Zambrano* [GC], cit., paras 40-44.

¹⁴⁸ Court of Justice, case C-221/17, *Tjebbes and Others*, still pending.

¹⁴⁹ Opinion of AG Mengozzi delivered on 12 July 2018, case C-221/17, *Tjebbes and Others*, paras 122-125.

applicants contribute financially to the economy of the government similarly to the Maltese IIP, which despite facing criticism from the EU continues to operate successfully.¹⁵⁰ Analogous criteria are adopted in Antigua and Barbuda,¹⁵¹ Dominica¹⁵² and other Caribbean islands.¹⁵³ It is obvious that the main difference between the Cyprus Programme and other investment migration schemes is the conditional character of the citizenship granted to investors, since the requirement of withholding the residential property has no time limitation¹⁵⁴ and non-compliance results in the revocation of their nationality.¹⁵⁵ Imposing a reasonable time limit on the ownership of the residential property would not raise concerns in the domain of the free movement of capital.¹⁵⁶ The absolute prohibition from selling the residential property used as an investment for the purposes of naturalisation in the Republic contradicts the very essence of investment, which is conditioned on the prospect of future liquidity.¹⁵⁷ This peculiar requirement becomes even more superfluous, considering that investors are not obliged to reside in Cyprus after they have naturalised. As most of them prefer travelling back and forth for business purposes, the probability of building ghost cities of empty skyscrapers with luxury apartments persists, given that the value of properties has increased dramatically and is practically unattainable for the local population. Rather than focusing on how to prevent violations of EU law and altering the Programme so that the investment would be a truly valuable contribution to the Cyprus economy, the government has so far modified the amount of investment required in 2016,¹⁵⁸ imposed annual caps on naturalisations carried out each year and changed its name from “Naturalisation of Investors” to its current one, “Cyprus Investment Programme”.¹⁵⁹

Balancing the economic benefits of a measure, which has indeed succeeded in generating Euro 4.8 billion in investment as of March 2018,¹⁶⁰ with its adverse effects on individuals while taking into account the decision in *Ruiz Zambrano* and the possible

¹⁵⁰ K. SURAK, *Global Citizenship 2.0*, cit., p. 25; Maltese Citizenship Act (CAP.188), Individual Investor Programme of the Republic of Malta Regulations, L.N. 47/2014, www.maltaimmigration.com.

¹⁵¹ Antigua and Barbuda Citizenship by Investment (Amendment) Act of 31 May 2016.

¹⁵² Commonwealth of Dominica, Citizenship by Investment (Amendment) Regulations 23/2017, www.dominicacitizenshipbyinvestment.com.

¹⁵³ U.P. BARZEY, *4 Caribbean Citizenship by Investment Programs*, in *Caribbean & Co.*, 22 June 2015, www.caribbeanandco.com.

¹⁵⁴ Cyprus Investment Programme, cit., pp. 3-4.

¹⁵⁵ *Ibid.*, pp. 1-2.

¹⁵⁶ Limitations to the free movement of capital are allowed for a certain period of time, according to Art. 3, para 4, and Art. 6 of Directive 88/361/EEC, cit.

¹⁵⁷ UBS, *The Liquidity of Real Estate Investments: Investor Challenges During the Real Estate Cycle*, in *UBS White Paper*, May 2017, p. 5.

¹⁵⁸ Cyprus Investment Programme, cit.

¹⁵⁹ *Ibid.*

¹⁶⁰ S. FAROLFI, L. HARDING, S. ORPHANIDES, *EU Citizenship for Sale as Russian Oligarch Buys Cypriot Passport*, in *The Guardian*, 2 March 2018, www.theguardian.com.

outcome in *Tjebbes*, could be a tough task. It is my view, however, that the nature of the Cypriot citizenship granted to investors and the limitations imposed on them demonstrates an unreasonable violation of the substance of Union citizenship, as established by the CJEU's jurisprudence.¹⁶¹ With the evolution of a "new logic of citizenship",¹⁶² the importance of Union law and principles shall not be underestimated by national authorities when exercising their competences in matters of naturalisation.

V. CONCLUSIONS

The legal analysis of the Cyprus Investment Programme in light of EU law on the free movement of capital and citizenship has proven that there is an immediate need for amendments and improvements, which will not only guarantee compliance with Union rules but also advance the benefits for the economy of Cyprus and possibly secure its continuation in the future.

With regards to the question whether the requirement of the Programme imposes restrictions to the free movement of capital, the case law of the Court of Justice demonstrates that, inasmuch as economic objectives cannot justify derogations from the obligation to prohibit measures that would result in a restriction to the freedom guaranteed in Art. 26 TFEU,¹⁶³ advancing the national economy through a stream of foreign investment, part of which must be kept indefinitely in Cyprus, violates Art. 63 TFEU.¹⁶⁴ Therefore, the Programme must be reformed and the requirement to maintain residential property in the Republic indefinitely must be altered with the introduction of time limitations or replaced with a more straightforward and outright criterion, such as financial contribution to the government not in the form of investment, similarly to the Maltese IIP.

As for the question of the possible violations of EU citizenship law, this *Article* finds that the requirements of the Cyprus Programme are dubious to say the least. The liberalisation of Union citizenship from its traditional establishment in the Treaties through the case law of the CJEU has played a detrimental role in the decisions Member States can take in matters regarding the grant and revocation of nationality. The judgments of *Rottmann*, *Ruiz Zambrano*, *Lounes* and *Tjebbes* guided the process of the evaluation of the Cyprus Programme and accordingly, the revocation of Cypriot nationality and EU citizenship as a result of non-compliance with the condition to retain the investment in the Republic forever is illegitimate and unjustifiable, as it leads to the revocation of Union citizenship based on the exercise of the rights it grants access to and leaves the investor's entire family unprotected and with no other alternative but to leave the territory of the Union.

¹⁶¹ *Ruiz Zambrano* [GC], cit., paras 40-44.

¹⁶² D. KOCHENOV, R. PLENDER, *EU Citizenship*, cit., p. 387.

¹⁶³ Art. 26, para. 2, TFEU.

¹⁶⁴ Art. 63 TFEU.

Naturalisation should be a transparent and just process, regardless of the financial status of individuals. As a Member of the EU, Cyprus is under an obligation to follow Union principles such as sincere cooperation and loyalty and is required to eliminate any unjustified obstacles to the free movement of capital. Current and future legislators and other public authorities adopting measures on matters of naturalisation and citizenship in general should remember that serving national economic interests should not restrict fundamental EU rights. The increasing significance of the supranational character of Union citizenship proves that compliance is not a mere formalistic obligation imposed on the Member States: the objectives of the Union¹⁶⁵ must be internalised and prioritised in every national policy of the Member States. Effective cooperation between national and EU authorities is the best way adequately to shape and preserve the essence of EU citizenship and define the extent to which EU institutions can intervene in the sovereign powers of the Member States. The Cyprus Programme is just one example of the discrepancies that emanate from the uncertainty and disparity in the CJEU's case law. Be that as it may, the Court is not solely to blame for the troubled development of EU citizenship; national authorities which continue to disregard the supranational character of the Union are accountable for the current state of affairs. Instead of contemplating methods to profit from systemic inadequacies, both legal orders must work together to prioritise individual rights, the protection of which both are pledged to guarantee.

¹⁶⁵ Art. 3 TEU.