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Awarding Union Citizenship: National Citizenship in the Context of EU Migration Policy

A. Introduction

Recently, it has been claimed that certain new EU Member States (MS) have adopted the practice of granting their respective citizenship under less strict conditions to nationals of certain third countries than to others. The supposed reason for this practice is that these MS enjoy special historical, cultural and/or linguistic bonds with the given third countries. Lately, Romania has been given quite some attention, since it is said to grant Moldovans favourable access to its citizenship. The intriguing assumption that Moldovans and other third country nationals enter the European Union through the back door while side lining visa requirements and other more burdensome obstacles of a common immigration policy in order to seek work in the Union\(^1\) prompts the question if such a practice is compatible with EU Law.

The following analysis aims to provide a general assessment of the MS discretion when awarding national citizenship from the point of EU Law, placing a special emphasis on restrictions which might derive from the aim to establish a common immigration policy.

To this end, the first part of this article briefly covers the European Union’s Area of Freedom, Security and Justice in general to subsequently address the development of a common immigration policy in particular. The second part is devoted to the fundamental status of Union citizenship and the legal status of third country nationals under EU Law. The third part covers the issue of national citizenship in the context of EU Law, focusing firstly on the question whether national citizenship is *per se* beyond the realms of EU Law or is just to be considered an element of national identity, warranting special respect under EU Law. In another subsection of this third part, possible limitations of awarding national citizenship to third country nationals are discussed from an individualistic point of view, questioning the MS’ discretion in light of some recent rulings of the Court of Justice of the European Union (ECJ) in the field of Union citizenship. The same question is also dealt with in a more general context, asking whether MS face certain limitations with respect to general principles of EU Law and the right of the MS “to determine volumes of admission of third-country nationals coming from third countries in order to seek work, whether employed or self-employed”\(^2\).

The subsequent subsection addresses the issue of proportionality and how a test of proportionality must be construed to balance competing principles of EU Law in the context

\(^{1}\) *SpiegelOnline*, Romanian Passports for Moldovans – Entering the EU Through the Back Door, 7. March 2010 (http://www.spiegel.de/international/europe/0,1518,706338,00.html [30.3.2012]).

\(^{2}\) Art 79 para 5 TFEU.
of awarding national citizenship. Finally, the conclusion provides a short assessment of the findings.

B. The Area of Freedom, Security and Justice and a common migration policy

1. The Area of Freedom, Security and Justice and EU Migration policy in general

With the entry into force of the Treaty of Lisbon the European Union lost its architecturally cherished pillar-structure becoming a monolithic sculpture with a little appendix in the front and a somewhat inconclusive bulge in the middle. The skilled art connoisseur will be able to picture this absurdly modern deconstruction of a once ancient Greek temple as a profound architectonical description of the Union’s legal *status quo*. For the passionate ignorant of modern art, however, a more legal description may be better served to depict that the Union’s policy in the field of a Common Foreign and Security Policy still adheres to the intergovernmental *modus vivendi* and that the policy in the Area of Freedom, Security and Justice has not yet cut all ties with intergovernmentalism. Though the Union’s aim to “offer its citizens an area of freedom and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime” now effectively covers all the aspects that were split between the third pillar and Title IV of the EC-Treaty, the MS stronghold can still be detected in various forms. The changes brought by the Treaty of Lisbon are, however, more than a unification under the umbrella of the TFEU but also comprise an extension of Union competences. For the purpose of the present analysis not all the changes but merely the gradual development of a common immigration policy shall be covered.

2. Art 79 TFEU – A common migration policy

The first aspect to be highlighted here is the very notion of a “common immigration policy” that in the farfetched meaning of developing an “efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States and the prevention of” and enhanced combat of illegal immigration and human trafficking has been

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3 Art 3 para 2 TEU.
4 Eg Art 76 TFEU derogates the Commissions initiative monopoly as also a quarter of the MS can initiate the adoption of measures referred to in the field of judicial cooperation in criminal matters, police cooperation and Art 74 TFEU. Further examples can be found in Art 69, 72, 73, 81 para 3 subpara 3, Art 82 para 3, Art 83 para 3 and Art 87 para 3 TFEU.
5 Besides some minor changes in the field of judicial cooperation in civil matters and police cooperation the changes in the field of judicial cooperation in criminal matters including new competences to harmonise criminal procedural law, criminal law and to establish a European Public Prosecutor’s Office have been praised as a substantial widening of Union competences.
set as an aim for the Union only by the Treaty of Lisbon. Immigration policy under the EC-Treaty was purpose-limited to measures on immigration policy within certain areas, implying that the competences of the then EC were not intended to develop something like a “common” immigration policy. The new elevation in the very aim underlying the Union’s competences in the field of immigration policy certainly asks for an extension in competences to match.

The difference between Art 79 para 2 TFEU and Art 63 para 1 no 3 and 4 EC-Treaty, the respective core provisions of immigration policy, at first sight suggest however little change to this end. Apart from the competence to adopt measures to combat trafficking in persons in Art 79 para 2 lit d TFEU, Art 79 para 2 TFEU resembles the already known. The essential difference then is that the already wide competences of the Union have been set into the context of a holistic approach. Part of this approach is that the Union shall not only develop a common immigration policy in the sense of determining the requirements, conditions, rights as well as the removal and repatriation of (il-)legal third country nationals pursuing a long-term stay within the Union and the fight against human trafficking but shall moreover develop a common immigration policy “at all stages” providing for a differentiatied and yet integrated approach in relation to short-term measures based on Art 77 TFEU. The common immigration policy thus goes hand in hand with the Union’s short-term visa policy, essentially covering all aspects of migration from short-term stay to long-term residence.

3. Art 79 para 5 TFEU and the issue of economic migration

Considering this primary legal framework, the question arises: What powers are left for the MS in the field of immigration policy? Any assessment of this question must keep in mind that immigration policy and the Area of Freedom, Security and Justice at large are shared competences of the EU and that moreover Art 79 para 4 and 5 TFEU enshrine certain restriction for the Union’s common immigration policy. While the former aspect evidently protects the MS power only in a relative sense, the latter provisions demand further attention.

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6 Art 79 para 1 TFEU.
7 Art 63 para 1 no 3 EC.
8 As far as Art 79 para 2 lit d TFEU goes it should be noted that this provision essentially positively stipulates a competence that has already been implicitly assumed by the EC; see Hoppe in Lenz/Borchardt (eds), EU-Verträge/ Kommentar nach dem Vertrag von Lissabon (2010) Art 79 margin no 5.
9 Art 79 para 1 TFEU.
10 In this sense Thym in Grabitz/Hilf/Nettesheim (eds), Das Recht der Europäischen Union EL 46 (2011) Art 79 margin no 16 and 23.
11 The distinction between short and long term stays is not predetermined by the treaty itself. However, in line with Art 62 para 2 no 2 EC and the already adopted secondary law on short term visa intended for stays not exceeding three months (eg Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001 L 81, 1), it seems wise to assume a continuity along this three months criterion.
12 Art 4 para 2 lit j TFEU.
Art 79 para 4 TFEU allows for the adoption of measures promoting the integration of third country nationals residing legally in the MS, giving way for the inclusion of yet another important aspect of immigration policy, but at the same time “excluding any harmonisation of the laws and regulation of the Member States.” For this very aspect of immigration policy the Union is thus rendered to merely support the actions of the MS, who remain in charge of their own integration policy.\(^{13}\)

The meaning and relevance of Art 79 para 5 TFEU, stipulating that the MS ultimately retain the power “to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed”, is harder to assess. In principle, Art 79 para 5 TFEU reads like a contradiction of the aim of a holistic common immigration policy, as economic migration undoubtedly constitutes an essential part of any immigration policy. But how can the aspiration of a common immigration policy then be upheld against the background of Art 79 para 5 TFEU? To give the answer right away: In a true sense it cannot.

However, as with any legal problem, the way leading to the answer is more complex than the answer itself. That is to say that Art 79 para 5 TFEU on the one hand was intended to clarify the general scope of the Union’s immigration policy, which in the absence of the clause enshrined in para 5 would also include all aspects of economic migration.\(^{14}\) Although, para 5 on the other hand is obviously meant to restrict the Union’s competences in this very field. The MS’ power to determine the volumes of third country nationals seeking work is nevertheless relative, as the Union by virtue of Art 79 para 2 lit a TFEU may still regulate the conditions for access to labour market of third country nationals who legally immigrated to the MS of the EU for other reasons than to seek work\(^ {15}\) and moreover the Union may also regulate the legal status of those third country nationals that have legally taken residence in the territory of the MS based on Art 79 para 5 TFEU.\(^ {16}\) So although the Union’s means may fall short in the light of the aim of developing a truly common immigration policy,\(^ {17}\) it is no exaggeration to conclude that there is little in this field that is left beyond a possible Europeanisation of immigration policy,\(^ {18}\) but the very basis of economic migration. One should nevertheless also note that based on the already existing secondary legislation the emphasis is on “possible”, as the Union so far has only partially made use of these competences.\(^ {19}\)

\(^{13}\) For a critical assessment Thym in Grabitz/Hilf/Nettesheim, Europäische Union EL 46 Art 79 margin no 41.

\(^{14}\) See Thym in Grabitz/Hilf/Nettesheim, Europäische Union EL 46 Art 79 margin no 43.

\(^{15}\) Thym in Grabitz/Hilf/Nettesheim, Europäische Union EL 46 Art 79 margin no 44.

\(^{16}\) Hoppe in Lenz/Borchardt, EU-Verträge\(^ {5}\) Art 79 margin no 10.

\(^{17}\) See Rossi in Calliess/Ruffert (ed), EUV/AEUV. Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta\(^ {4}\) (2011) Art 79 margin no34; Hoppe in Lenz/Borchardt, EU-Verträge\(^ {5}\) Art 79 margin no 10.

\(^{18}\) Hecker, Zur Europäisierung des Ausländerrechts, ZAR 2011, 46 (47).

\(^{19}\) For an intuitive overview see Hecker, who estimates that roughly one third of the regulations governing immigration of third-country nationals, excluding the right of free-movement of Union citizens and their relatives as well as asylum and refugee laws, is in the one or the other way influenced by EU Law; Hecker ZAR 2011, 48.
4. The legal status of third-country nationals in light of Art 79 para 5 TFEU

For the analysis at hand it is important to see that the MS’ prerogative to determine the volume of admission of third country nationals seeking work on their territory does not automatically correspond with a legal status for these third country nationals under EU Law. As opposed to citizens of the MS, who by virtue of Art 20 TEU are citizens of the Union and thus *ratione personae* can rely on the right of free movement within the territory of MS and the fundamental freedoms, third country nationals are subject to further conditions and requirements to acquire certain rights granted under secondary legislation.

The difference is most intriguing, when trying to assess the requirements and conditions for moving to another EU MS in order to pursue employed or self-employed work for a Union citizen on the one hand and a third country national on the other hand. For Union citizens such a situation is governed by the freedom of movement of workers under Art 45 TFEU or the freedom of establishment under Art 49 TFEU, granting them equal access and rights with nationals. Whereas third country nationals in line with the Council Directive 2003/109/EC concerning the status of third-country nationals who are long term residents\(^{20}\) must have been legally and continuously residing in a MS for five years,\(^{21}\) provide evidence “of stable and regular resources to maintain himself/herself and the members of his/her family, without recourse to the social assistance system”, must have a health insurance and must comply with integration conditions, if foreseen by national law, to acquire a long term status in the first place,\(^{22}\) which under the conditions set out in Art 15 of Directive 2003/109/EC entitles them to take residence in another MS in order exercise an economic activity in an employed or self-employed capacity.\(^{23}\) The right to take residence in another MS is however not absolute, as MS “may limit the total number of persons entitled to be granted right of residence, provided that such limitations are already set out for the admission of third-country nationals in the existing legislation at the time of the adoption of the directive”.\(^{24}\)

Even if allowed to take residence in another MS, third country nationals may face certain disadvantages in respect of gaining access to the labour market or self-employment, as for labour policy reasons MS “may give preference to Union citizens, to third-country nationals, when provided for by Community legislation, as well as to third country nationals who reside legally and receive unemployment benefits in the Member State concerned”.\(^{25}\) It is thus obvious that the hurdles to overcome are much more manifold and burdensome for third country nationals than they are for Union citizens.

The competence of MS to determine the volumes of admission of third country nationals seeking work and everything that follows from it entails some important implications which

\(^{20}\) OJ 2003 L 16, 44.
\(^{21}\) Art 4 para 1 Directive 2003/109/EC.
\(^{22}\) Art 5 Directive 2003/109/EC.
\(^{23}\) Art 14 para 1 Directive 2003/109/EC.
\(^{24}\) Art 14 para 4 Directive 2003/109/EC.
need to be taken into account in the context of this analysis. The power of the MS to decide upon who is given admission to their territory in order to reside and work there inhibits the logic that the respective MS also remain individually responsible for these third country nationals. Phrased differently, third-country nationals under Art 79 para 5 TFEU in principle remain legal subjects of the respective national legal orders and only gradually develop to become common legal subject under secondary EU Law and thus gain rights that stretch beyond the respective host MS. The measures of secondary EU Law are however bound to respect the MS’ prerogative under Art 79 para 5 TFEU, meaning that none of the measures adopted by the Union is to eradicate the MS’ competence to decide on the admission of economic migrants. The principle of mutual recognition thus does not apply in the field of economic migration *strictu sensu* but is rather subject to secondary legislation, which is to define the further requirements and conditions opening the ambit of EU Law for third country nationals *rationae personae*. From a different point of view this very aspect translates into an obligation of the MS *inter alia* to procure each other from an impediment of their respective economic migration policies.

C. The fundamental status of nationals of the MS under EU Law

An assessment of Union citizenship in the same light provides not only for some interesting but also for some rather different conclusions. First of all, Union citizenship is granted based on Art 20 para 1 TFEU, stipulating that “[e]very person holding the nationality of a Member State shall be a citizen of the Union”, which according to the new wording introduced by the Treaty of Lisbon shall be “additional” to national citizenship.26 The mere fact that Union citizenship as well as the principal rights of Union citizens, enlisted in Art 21 to Art 24 TFEU, are established on a treaty basis reflects the specific legal quality of Union citizenship.

This is further fortified in the face of the case law of the ECJ. In its famous ruling *van Gend en Loos* the ECJ held that the then European Economic Community “constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals”.27 Needless to say that this ruling on the direct applicability of EU Law is at the core of the fundamental freedoms and all other individual rights granted by EU Law, but what is especially noteworthy for the present context is that the ECJ used individual rights and rights of nationals, and thus Union citizens, interchangeably.

The special nature of national citizenship and consequently Union citizenship under EU Law has ultimately been distilled in *Grzelczyk*,28 where the ECJ defined Union citizenship as

26 Art 17 para 1 EC provided that Union citizenship was to “complement” national citizenship rather than being “additional”.
“the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality”. So although Art 20 para 2 subpara 2 TFEU stipulates that the rights of Union citizenship enlisted in Art 20 para 2 subpara 1 lit a to d TFEU shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder, the fundamental status of Union citizenship is as such not subject to secondary EU Law but forms a core part of the Union’s legal order.

Another aspect highlighting the difference between the legal status of national citizens of the MS and third country nationals under EU Law is the simple fact that national citizenship of MS is understood as a formal criterion, meaning that while third country nationals are bound to fulfil specific (individual) conditions and requirements in order to acquire a legal status under EU Law, nationals of the MS can simply rely on the triggering momentum of their citizenship to acquire the fundamental status under EU Law, irrespective of the requirements, conditions, rights and obligations that arise from national citizenship.

The individual rights of nationals of the MS under EU Law differ from the rights of third-country nationals not only by their legal quality but also rely on the principle of mutual recognition. In Micheletti29 the ECJ affirmed that “it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality” and that it is not permissible under EU Law (then Community Law) for another MS to “make recognition of the status of Community national” that follows from national citizenship of MS subject to further conditions.30

It is nevertheless obvious that an unfettered practice of granting national citizenship by one MS bears implication for all other MS. But in contrast to immigration policy, where MS have retained the power to determine – and hence also to restrict – the volume of admission of third country nationals entering coming to their territory in order to seek work, MS have no legal means to deny Union citizens’ rights granted by EU Law on a general basis. A practice of a MS to grant admission to its territory only to certain Union citizens would render the individual rights, such as the right of free movement, the freedom of establishment or the freedom of movement of workers of those excluded nugatory and would therefore constitute a breach EU Law itself. The question thus arises if the practice of a MS pursuing a laissez-faire citizenship policy in the first place is compatible with EU Law. In order to assess the possible limitations of the MS in the field of national citizenship, especially in the context of a common immigration policy, it is necessary to take a closer look on national citizenship and determine whether this very issue warrants special guarantees under EU Law. To this end, the obligation of the Union to respect the national identities of the MS stipulated in Art 4 para 2 TEU will be given scrutiny.

30 See footnote 29.
D. Naturalisation of third-country nationals under EU Law

1. National citizenship as part of national identity of the MS

The conditions for the acquisition of citizenship established by a MS reflect its own historical, cultural, social background, which does not necessarily have to be shared by all of the MS. The competence for defining the conditions for acquisition and loss of citizenship remains with the MS and have not been transferred explicitly, either in whole or only partially to the EU, either within the context of the Area of Freedom, Security and Justice or as part of its competence in any other area. In line with the case-law of the ECJ it is important to note that “the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter”. The Union for its part shall, however, respect the national identities of MS, “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”. The acquisition of a MS citizenship, as citizenship policy in general, is obviously linked to national identity, triggering the question what the obligation of the Union to respect national identities amounts to.

If citizenship policy and the respective national regulations represent a part of the national identity of the MS, are the measures it undertakes in view of its safeguarding subject to scrutiny under EU Law and the principle of proportionality or are these measures with the aim of protecting the national identity per se immune from any influence of EU Law? The rather weak term “respect” used to define the obligation of the Union seems to stand in the way of an interpretation granting immunity per se thus implying that any measure must be compatible with EU Law and thus stand a test of proportionality.

The difference between these two approaches can also be assessed when trying to define the meaning of national identity. In this sense, the latter approach, immunizing all measures relating to the protection of national identity, could be understood as a general exemption clause, thus warranting a delimiting definition of the very notion of national identity. As any other exemption clause enshrined in the Treaties, the definition is subject to an interpretation within the context of the Treaties. The meaning and hence the scope of this clause would thus be uniform for all 27 MS of the EU. If, however, the clause in Art 4 para 2 TEU is understood as a mere principle that relies on the MS endogenous “national identity”, a final definition would neither be subject to a restrictive Treaty interpretation nor would it be possible. The principle to respect the national identity would thus resemble a means for the MS to bring into play their national identities according to their own perceptions. That is to say that the EU, as a consequence, would be under an obligation to weigh any measure against the underlying interests of a MS deemed to form a part of the respective national identity.

Both approaches bear severe limitations, as the notion of national identity is either rendered to be a uniform yardstick, irrespective of the peculiarities of the MS or diffuses into a

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31 See CoJ, case C-135/08, Rottmann, report 2010 I-1449 margin no 41 and the herein quoted cases.
32 Art 4 (2) TEU.
heterogeneous cacophony. A solution for this dilemma is hinted by the fact that the very wording of Art 4 para 2 TEU refers to a plurality of “national identities” while at the same time linking these identities to the inherent “fundamental structures, political and constitutional, inclusive of regional and local self-government”. It seems though that Art 4 para 2 TEU provides for an intertwined approach whereby EU law erects the very skeleton for the concept of “national identities” but leaves it for the MS to put flesh on these bones. In practical terms Art 4 para 2 TEU thus constitutes an opening clause that reimburses respect for certain fundamental differences of the 27 MS in the context of an ever expanding EU Law.

The room for manoeuvre under this norm is nevertheless restricted in a twofold way. Firstly, the concept of national identity only relates to the “fundamental structures, political and constitutional, inclusive of regional and local self-government” and therefore does not correspond with a wider cultural concept of national identity and secondly, any measure concerning the national identity of a MS is not per se exempted from the scope of EU law, but must rather stand a test of proportionality. Respect for national identity in this sense warrants an open-ended act of balancing of the EU’s interest for a uniform application of EU Law on the one side and the MS’ interest to preserve the core of their national identities on the other side. Any such act of balancing may however only take place if a measure of a MS falls within the ambit of EU law and the concept of national identity likewise, as it is only then when the obligation for the Union to respect the national identities of MS arises.

When assessing the issue citizenship, we are therefore confronted with two separate questions: (a) Does a MS’ decision to award national citizenship to an individual fall within the scope of EU Law and (b) can any such measure be considered a matter of national identity as protected by Art 4 para 2 TEU?

The latter question refers back to the very scope of national identity, respectively the ‘framework’ of this concept. For the further analysis it is thus not to ask if citizenship constitutes a matter of national identity from the point of view of MS in the first place, but rather if this issue can be subsumed to be a part of one of the aspects narrowing down the concept of national identity from the Union – Treaty – point of view. Albeit the issue of citizenship is not explicitly mentioned in Art 4 para 2 TEU, the context as well as the abstraction of the mentioned aspects allows for an inclusive understanding. When looking at the context, we find that Art 4 para 2 TEU does not only stipulate respect for the national identities of MS but furthermore obliges the Union to “respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguard national security.” The final sentence additionally sets out that “in particular,

national security remains the sole responsibility of each Member State.” From an overall perspective, the core theme and aim of this provision is to procure an erosion of essential “State competences”. It seems worth remembering at this point that the overarching ratio of Art 4 para 2 and Art 4 TEU is to determine the relation between the Union and the MS being States in their own right and this necessarily entails the capacity to legally determine the bond between a Nation and its nationals or, in other words, a State and its citizens.

Additionally, one might also be tempted to read Art 4 para 2 TEU in the light of International Law, linking the concept of national identity and the interrelated question of essential State functions to the classical doctrine of Statehood and sovereignty. This line of thought bears some resemblance to the arguments put forward by Advocate General Maduro in Rottmann, as he recalls the traditional concept of citizenship under international law in order to subsequently conclude that the “question of nationality are in principle within the reserved domain of States” and that the “Union does not deviate from the solution adopted under International Law”. Maduro is, however, quick to bolster this outside the EU Law-box argument by inferring that also Declaration No 2 on nationality of a Member State implies the same conclusion. Though, knowing that the concept of domaine réservé under international law is relative itself, it is not difficult to see that the concept of domaine réservé, used in the context of Rottmann to (in principle) delimitate the MS’ competence in the field of citizenship, and the concept of national identity enshrined in Art 4 para 2 TEU run in the same veins. In essence, both concepts encapsulate the logic that a sovereign State must preserve at least some (essential) matters within his regulatory competence. The annotations of Maduro in Rottmann, though given before the entry into force of the Treaty of Lisbon, may therefore be looked upon as to provide a yardstick for assessing the issue of citizenship within the context of Art 4 para 2 TEU. The afore given answer that the issue of citizenship falls very well within ambit of Art 4 para 2 TEU is thus not only supported by employing a deductive contextual line of thought but can also be fortified by a wider inductive assessment. As a side note it is, however, to be kept in mind that respect for national citizenship under Art 4 para 2 TEU does cover the legal bond between an individual and a MS but does in principle neither attribute specific weight to certain features of this special bond nor in a border sense defines the comprising rights and obligations of a MS citizenship.

39 As the Opinion was written before the entry into force of the Treaty of Lisbon the Declaration referred to is the Declaration No 2 on nationality of Member States, annexed by the Member States to the Final Act of the Treaty of the European Union, OJ 1992 C 191, p 45.
41 Ziegler, Domaine Réservé, in Wolfrum (ed), Max Panck Encyclopedia of Public International Law, margin no 1 (http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1398&recno=1&searchType=Quick&query=Domaine+r%C3%A9serv%C3%A9 [29.3.2012]).
To this end it is therefore possible to conclude that the special bond of citizenship between an individual and a MS which specifically materializes in the process of naturalisation warrants special respect under EU Law.

2. Naturalisation of third-county nationals and individual rights

As stated above, the obligation for the Union to respect the national identity of a MS arises only if the process of naturalisation falls within the scope of EU Law. Henceforth it is to question when – if at all - the awarding of a MS’s citizenship bears momentum under EU Law.

This question is to be distinguished from the mere fact of competences, as it is unequivocal that the competence for the issue of citizenship remains solely with the MS. The question essentially boils down to the fact whether there are any obligations under EU Law that interfere with this competence of MS and hence could trigger the ambit of EU Law.

When looking at the relevant case law, albeit none of which deals with the issue of awarding citizenship, we always find that the actual background entails a possible impediment of individual rights granted under EU Law. In Micheletti, for example, the right of establishment was called into question and in Rottmann not a single right, but almost all rights as Union citizen were on the spot. Also, in Kaur the ECJ was asked if EU Law provided for directly applicable rights that could be invoked before national courts in order set aside restrictive national regulations and therefore questioned the conformity of national law. At first sight, this implies that EU Law only comes into play if issues of national citizenship interfere with directly applicable individual rights under EU Law. It is submitted that this observation, though sketchy, seems to hold quite well with the broader approach of the ECJ. Ever since the ECJ established that EU Law constitutes “a new legal order” that is intended to confer rights upon individuals, has the ECJ emphasized and substantially widened the individual dimension of EU Law against the MS regulatory authority. Still, any such protection, as can be seen from Kaur, rests upon the fact that the respective individual possesses a legal status under EU Law in the first place. Obviously, in most cases this means being a Union citizen and hence enjoying “the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality”.

But what about those individuals who only by their naturalization acquire this fundamental (legal) status? Well, the answer is as intuitive as forthright: An individual who has no legal status yet cannot possibly be infringed in his or her yet inexistent rights under EU Law.

42 See CoJ, case C-135/08, Rottmann, report 2010, l-01449 margin no 39 and 41.
43 See footnote Fehler! Textmarke nicht definiert..
44 For an insightful analysis on the expansion of individual rights in light of the latest case-law of the ECJ see Hailbronner/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, CML Rev (2011) 1253.
45 See footnote Fehler! Textmarke nicht definiert.
The same conclusion, although on a different line of thought, can be drawn for individuals who possess a (certain) legal status within the EU prior to their naturalisation. In line with the Council Directive 2003/109/EC concerning the status of third-country nationals who are long term residents\textsuperscript{46} third-country nationals may under certain conditions, as has been pointed out above, acquire the right to take residence in another MS and work there. These rights are however minor to the rights of Union citizens as they may be restricted by the MS under certain conditions. Naturalisation by a MS thus implies more and not less rights for the respective individual, making it very difficult to see where the change of status under EU Law could be used to encroach on those lesser rights. From this point of view, the process of naturalisation is hence not only an element intrinsically linked to the national identity of the MS but is at the same time beyond the realms of EU Law.

3. Naturalisation of third-country nationals in the light of general principles of EU Law

Naturalisation may, however, also be examined from a more general perspective. A conflict with EU Law may not only stem from an impediment of individual rights but may well be the result of the neglect of general principles of EU Law.

What comes to mind in this respect is the principle of loyalty and sincere cooperation stipulated in Art 4 para 3 subpara 1 to 3 TEU warranting MS to mutually respect and assist each other when “carrying out tasks which flow from the Treaties”, “to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union as well as “to facilitate the achievement of the Union’s tasks and to refrain from any measures which could jeopardise the attainment of the Union’s objectives”.

Assuming that a MS effectively uses naturalisation to provide a means for third country nationals to more easily overcome the hurdles that these individuals face when trying to seek work in a MS of the EU, we are therefore again to ask if such measures are compatible with EU Law. Though difficult it would be to prove any such “circumvential” approach, it is quite intuitive that such measures would obstruct a common immigration policy that still inhibits the basic logic that the individual MS are free to determine the volumes of admission of third country nationals coming to their territory in order to seek work. In case of an excessive use of naturalisation by one MS the different legal status of third-country nationals and EU citizens would effectively topple the freedom of the other MS enshrined in Art 79 para 5 TFEU.

When looking at the principle of loyalty and sincere cooperation we are nevertheless confronted with the fact that the primary purpose of this principle is to compel MS to ensure the fulfilment of the obligations arising from the Treaties or resulting from the acts of the EU

\textsuperscript{46} OJ 2003 L 16, 44.
institutions. However, the MS’ power to determine the volume of admission of third country nationals seeking work in itself constitutes no obligation under EU Law but is rather meant to limit the competences of the Union. The same conclusion pertains when assessing the problem in light of the principle of loyalty and sincere cooperation between the MS, as Art 4 para 3 subpara 1 TEU warrants mutual respect and assistance amongst MS where obligations flow from the Treaties. In this context, it is nonetheless submitted that any limited interpretation of the principle of loyalty and sincere cooperation would ignore that the legal order of the European Union is not simply construed as a set of obligations and duties of the MS vis-à-vis the Union but has rather been established as a multidimensional integrated legal order attributing (new) rights and duties on all its entities and subjects. The consequence, namely that the right of the one embodies the duty of someone else demands mutual respect and assistance in a broader sense and although the principle of loyalty and sincere cooperation enshrined in Art 4 para 3 TEU is limited by its wording we find reassurance throughout the Treaties in various articles calling for solidarity between the MS. For the example at hand Art 80 TFEU states that “[t]he policies of the Union set out in this Chapter […] shall be governed by the principle of solidarity and fair sharing of responsibilities […] between the Member States”. The rather obvious background of this provision is that a common border, asylum and immigration policy also requires a fair burden sharing between those MS with extended external borders and those without. In a broader sense the principle of solidarity must be understood as a means to enhance and complement the principle of loyalty and sincere cooperation between MS. Solidarity by the very wording of Art 80 TFEU stretches beyond the obligations enshrined in the Treaties, including explicitly a fair sharing of responsibilities and burdens of the financial implications of a common border, asylum and immigration policy. It is thus only forthright to conclude that MS must also adhere to the principle of solidarity in other areas that are left in their responsibility but bear severe implications for a common border, asylum and immigration policy. Clearly, Art 79 para 5 TFEU and the herein enshrined freedom of MS to determine the

47 In this context Streinz argues that the principle of sincere cooperation is essentially “Vertragsakzessorisch” (obligations ancillary to a treaty); Streinz in Streinz (ed), EUV/AEUV. Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union (2012) Art 4 margin no 25.
48 See especially Art 222 TFEU, but also Art 24 para 2 and 3, Art 31 para 1 subpara 2 and Art 32 TFEU as well as Art 122 para 1 and Art 194 TFEU. Calliess also points out that solidarity is a “Leitwert” of the Union that shines through in variety of rules and mechanisms that do not explicitly refer to the solidarity; Calliess in Calliess/Ruffert, EUV/AEUV (ed) Art 222 margin no 5.
50 Vedder in Vedder/Heintschel von Heinegg, Europäisches Unionsrecht Art 4 para 22, argues that solidarity between the MS constitutes a concretization of the principle of sincere cooperation whereas Rossi perceives solidarity as complementation of the principle of solidarity, that in this is context is however only political appellative rather than legally binding; Rossi in Calliess/Ruffert, EUV/AEUV (ed) Art 80 margin no 1 and 2.
volumes of admission of third country nationals coming to their territory in order to seek work qualifies under the given pretext, warranting MS *inter alia* to respect their remaining competences. Any *laissez-faire* naturalisation policy that is intended to by-pass or just on a practical basis by-passes the (limits of a) common immigration policy would thus encroach on the principle of solidarity under EU Law.

The mere fact that a MS pursues a *laissez-faire* naturalisation policy seemingly contradicting Art 79 para 5 TFEU, however, is in itself not conclusive to finally answer the question whether such measures are compatible with EU Law. In light of the aforesaid such an assessment can however clarify two things: firstly, by relying on the principle of solidarity in connection with Art 79 para 5 TFEU it becomes clear that the MS’ citizenship policy is not *per se* beyond the realms of EU Law; and secondly, by the same token possible limitations to this policy field of the MS rooted in EU Law appear on the horizon. Although the argument that an encroachment of the principle of solidarity in connection with Art 79 para 5 TFEU might still be compatible with EU Law may seem illogical at first sight, one must not forget that also the MS’ citizenship policy as an aspect of national identity warrants respect under Art 4 para 2 TUE. The question of EU Law compatibility of a MS’ naturalisation policy can hence neither be answered by relying just on one of these competing principles nor can it be answered in abstraction. Compatibility can only be assessed in the light of the facts at hand and by employing a test of proportionality. Practically this means assessing whether the measures taken are capable of achieving a valid aim, are necessary to this end and are proportional in light of the principle of solidarity and the freedom of the other MS to determine the volume of admission of third country nationals coming to their territory to seek work.

4. **The question of proportionality**

Certainly, the application of a test of proportionality is no easy task. Theoretically, however, the question about the proportionality of a measure boils down as to whether the following scheme is applicable to the measures of a MS through which it defines the conditions for acquisition of its respective citizenship:

- Identification of the objective that is pursued by the MS on the basis of the national legal framework;
- assessment of the measures in respect of capability and necessity, asking whether the national measures represent a part of a coherent set of measures aimed at the achievement of the same objective and whether there are other less restrictive measures through which it could be achieved;
- weighing the measures and the impact of this measures against other competing objectives.

Obviously, the focus of any test of proportionality for the specific context rests upon the last point as it at is this level where the conflicting principles go head to head. But also the second and the first point in this scheme entail crucial elements as the application of the
proportionality test relies on the fact that the measures of the MS are intended, capable and necessary to establish a special bond of citizenship between an individual and a MS that is protected by Art 4 para 2 TEU. This is to say, that any assessment of a MS citizenship policy in the very context of a test of proportionality has to take into account the legal measures and its underlying motives. So albeit EU Law is not to define or determine the elements of national citizenship, respect under Art 4 para 2 TEU is subject to the fact that the respective MS pursues a coherent and objective related policy.

To this end, International Law may provide some useful hints. In the famous Nottebohm case the International Court of Justice ruled that naturalisation was an act under national law but that the right of a State to exercise diplomatic protection for an individual under International Law rests upon the fact that “nationality must correspond to the factual situation” and that according to international practice, nationality was “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”\(^{52}\). In a case where such a “genuine connection” could not be established a State was not entitled under International Law to exercise diplomatic protection.

In line with the ratio of this ruling one can draw the conclusion that also under EU Law respect for a MS citizenship policy under Art 4 para 2 TEU relies on the fact that the respective national legal framework of MS as well as the facts on the ground provide for the establishment of a genuine bond between a MS and its citizens defining the primary individual subjects of that very State. It should be remembered that this conclusion does in no way interfere with the MS competence in the field of citizenship policy but merely limits the possibility of a MS to invoke the respect for its national identity. A laissez-faire citizenship policy of a MS undermining the competence of the other MS to determine the very parameters of their economic migration policies that bears no validity in this sense can thus not be deemed compatible with the principle of solidarity and EU Law at large.

Things are however different if the objectives and means are to meet the criteria outlined before, as the clash of interests then becomes an outright clash of principles under EU Law: on the one side the principle of solidarity and on the other side the principle of respect for the national identities of the MS. Which of these principles is eventually to prevail in the process of weighing and balancing is subject to the facts of the very case at hand.

Although any abstract assessment cannot provide for a convincing conclusion for this problem, there is at least one thing that should be born in mind. The principle of solidarity, as described above, is in its essence a peripheral means of EU Law to shield and maximise the effects of EU Law, meaning that solidarity as a prohibitive principle only takes precedence where the Treaties fall short in formulating concrete legal obligations for the MS inter alia, but where an unfettered use of MS regulative powers might still bear severe implications for the other MS. The principle of respect for the national identities of the MS on the other hand is a principle at the core of the Union’s legal order, essentially defining the

relationship between the Union and the MS as sovereign States.\textsuperscript{53} As a consequence, the intrinsic value of these conflicting principles must be taken into account, thus making it rather difficult to imagine a situation whereby a MS citizenship policy aimed at establishing a special bond of citizenship could be rendered incompatible with EU Law.

E. Conclusion

Union citizenship is a concept which despite being additional to national citizenship is still build upon the formal criterion of being a citizen of a MS. National citizenship and its comprising elements in turn are however solely defined by the MS. Furthermore, the presumption that citizenship of a State establishes a special bond defining the individual subjects of a State prompts the argument that citizenship is not only a requirement for Union citizenship but constitutes an intrinsic part of national identity and therefore warrants protection under Art 4 para 2 TEU.

Union citizenship and thus citizenship of a MS as such has been described by the ECJ as the fundamental status of individuals under EU Law, attributing rights and duties on the respective individuals. At the core of the privileges that come with Union citizenship is the right to rely on the fundamental freedoms and the right to move and reside freely within the territory of the MS, granting citizens of a MS a favourable legal status in all the MS of the Union.

Third country nationals coming to a MS seeking work enjoy no such favourable status as under Art 79 para 5 TFEU MS remain free to decide upon the volume of admission of third country nationals coming to their territory seeking employed or self-employed work. Moreover, under secondary EU Law respective third country nationals are given only a less favourable status in other MS of the Union than Union citizens.

The differences between these two concepts and the underlying ratio are at the heart of the question whether MS face certain limits under EU Law when awarding their citizenship to third country nationals. In the assessment at hand it has been argued that, albeit citizenship policy remains an exclusive competence of the MS, the ambit of EU Law is triggered if a MS pursues a \textit{laissez-faire} naturalisation policy effectively undermining Art 79 para 5 TFEU, as MS under the principle of solidarity are bound to use their regulative powers without repercussions for the other MS. Such an encroachment of the principle of solidarity is however not \textit{per se} incompatible with EU Law as the field of citizenship policy and hence naturalisation of third country nationals must be respected as a part of the national identities of the MS. A solution for this clash of principles can only be derived through the application of a proportionality test which eventually and in light of the specific circumstances of the case must weigh the specific interests and the effects of the measures adopted against each other.

\textsuperscript{53} Puttler in Calliess/Ruffert, EUV/AEUV\textsuperscript{4} Art 4 margin no 8.