The Impact of Union Citizenship on National Citizenship Policies

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I. INTRODUCTION

Willingness to take advantage of belonging to the Union on the one hand, and a the desire to retain national sovereignty on the other hand, has long marked the process of European integration. Recently, this duality can be well observed in the example of national citizenship policies. Interestingly, *independent* nationality legislation in many European Union (EU) countries has been undergoing transformation *in parallel* with the establishment of EU citizenship. The link between introducing the status of Union citizen and reforms of nationality laws deserves special attention.

It must be noted that introducing EU citizenship was a significant moment in the European integration process—it caused a genuine stir among the Member States (MS) during the debate preceding its establishment. Firstly, it provoked strong objections from the MS to delegation of powers to the EU level in the domain of nationality policy. Although acquisition of national citizenship remained in the states'

discretion, it did not prevent certain countries from expressing worries that Community citizenship threatened their independence. In fact, as it will be shown, granting all MS nationals the status of EU citizen increased the interdependence of nationality policies. Changes in this field introduced at the national level no longer have exclusively domestic impact, but affect other MS. Thus, it will be claimed that a need to harmonise legislation in this area is emerging. Currently, despite strong opposition of the MS authorities to conferral of competences concerning national citizenship, the convergence of nationality regulations may be observed. Can this trend be interpreted as the result of reflexive harmonisation? Are the transformations of certain MS nationality laws second-order effects of European integration fostered by implementing Union citizenship?

Secondly, adopting Union citizenship created a debate on the position of third-country nationals residing in the EU. Excluding all foreign residents from the right to acquire Community citizenship is considered to have deteriorated their relative position in European societies. Did this situation provoke national authorities to any action? May the reforms facilitating access to national citizenship be considered as a result of this deterioration, and hence ultimately of implementing Union citizenship? Also, how has the EU reacted to the deepened gulf between EU and non-EU citizens? In this light, the Council Directive on third-country nationals who are long-term residents should be considered. The provisions enshrined in the Directive harmonise the conditions for acquiring the status of long-term resident in all MS and grants them a certain set of rights. Although this Community act was officially aimed at compensating the position of non-EU nationals, who suffered from introducing Union citizenship, in fact it has much wider implications.

Last but not least, introducing the status of EU citizen violated a traditional understanding of citizenship, which was for centuries associated solely with the nation state. Decoupling the notion of citizenship from the national level provoked a wide debate on the general concept of citizenship. Has the time to redefine this notion come? Has Union citizenship affected the identity of MS nationals or third-country residents? May EU law, by inducing changes in nationality, cause a convergence of ideas of belonging?

What is worth emphasising is the fact that until recently legislation of the MS was amended for two reasons: either a given country decided independently that the change was necessary, or it was imposed by Community law. Are these the only possibilities to induce legal

transformation on the national level? As this Article will discuss, there is a middle way indicated by the theory of reflexive harmonisation, which suggests combining self-regulation with adjusting to common external rules. This method seems to be very well suited to the wishes of the EU countries at the current stage of integration. At present, most of the MS are reluctant to confer further competences to the EU level and then to adopt hard law acts subsequently added to the European Community (EC) law. In this respect, soft law (SL), which has a voluntary character and leaves the MS a certain autonomy in adjusting their legislations to the "acquis communautaire", has started to gain popularity. It will be argued that soft law instruments, deprived of coercive mechanisms, seem to be in line with the needs of the Community Members, and therefore may be considered as an up-to-date tool to encourage them to further integration. In the case of nationality policies, non-coercive influence tactics, encouraging voluntary action, seem to be more desirable than issuing new legal provisions.

The above leads to a formulation of the three main aims of this Article. Firstly, it will be argued that changes to nationality legislation have been implemented under the pressure of other MS and as a result of adopting EU citizenship. It will be claimed that EU countries are encouraged to harmonise their laws without this involving legal provisions at the Community level. However, attention will be also drawn to the fact that EU acts adopted by the MS indirectly interfere in what is thought to be an exclusively national domain. The second objective is to show that in this context soft law instruments are generally more desirable and effective than new hard law (HL) acts. Finally, it will be examined whether EC law, by inducing changes in nationality, may add depth to EU citizenship and lead to the revision of the general concept of citizenship.

The structure of this Article is as follows: Parts II and III provide theoretical background for the analysis of practical examples, which is presented in Part IV.

Part II is devoted to the investigation of the idea of citizenship. The attention is particularly drawn to the role of citizenship in creating sense of belonging. Consideration is given to the way in which citizenship affects the collective identity. Then, the concept of Union citizenship is explained with an emphasis on its relationship with national citizenships and the affiliations prescribed to MS nationals by granting them the status of EU citizen.

In Part III, the idea of reflexive harmonisation as a new form of governance is presented. It is shown that the MS are influenced not only

by legal provisions enshrined in the EC law, but also by soft law instruments, which encourage them to adjust their legislations to the "acquis communautaire" voluntarily.

Part IV aims at discovering the relationship between Union citizenship and national citizenship legislations. The focus is laid on the indirect impact of the European Community on national policies. The on-going reform of regulations concerning acquisition and loss of nationality in some MS are analysed mainly in the relation to the debate on the need to coordinate national citizenship legislations. It will be shown that a degree of harmonisation is occurring in the absence of co-operation at an official level. Moreover, the implications of the "Directive on the status of third-country nationals who are long-term residents" issued by the Council in 2003 will be analysed in the context of national citizenship policies.

II. STATUS OF CITIZEN

Introducing Union citizenship challenged the modern understanding of citizenship, which was considered an exclusive attribute of the nation-state. Widening this notion raised numerous questions. What does it mean to be a citizen? Does citizenship influence one's identity? Is it possible to share two different levels of citizenship? What are the attitudes of Europeans towards the idea of Union citizenship? These kinds of questions led to numerous conceptual studies and practical research projects on citizenship. Exploring the status of citizen is also essential for the purposes of this Article; it will provide the theoretical background for analysing the impact of Union citizenship on Member States nationality policies.

The aim of this Part is to examine the general concept of citizenship, present the establishment of EU citizenship and discuss the relationship between national and European citizenship. Part II.A is devoted to the analysis of the bond between citizenship and identity—different dimensions of citizenship will be presented with an emphasis on the role that citizenship plays in developing a sense of belonging to a polity. In Part II.B, the concept of Union citizenship will be introduced: the legal bases, its practical meaning, the reasons for its establishment and the controversies which arose after its implementation.

A. Citizenship and Identity

In the beginning it must be noted that citizenship is not only a juridical concept (functional approach), but also embodies political

community, and therefore develops socio-psychological identity (non-functional approach).[1] For centuries citizenship was considered as an exclusive attribute of the nation-state; therefore, it has become conflated with nationality.[2] In this Subpart, it will be shown how the status of citizen, with all the entitlements it entails, strengthens the feeling of belonging to the community, and prevents non-citizens from full membership in a given polity.

1. Idea of Citizenship

The primary feature of citizenship is the conferral of certain rights and obligations.[3] Citizens are people who enjoy the same rights and share the same duties. Secondly, the concept of citizenship is closely connected with a political community. Since ancient Greece "those who held power" have decided who could acquire citizenship. Nowadays the political authorities through national legislation grant the status of citizen. This leads to a basic definition of citizenship as "a status of full membership of a political community".[4]

According to Goudapel, the notion of citizenship can be viewed from two perspectives: functional and non-functional.[5] The functional approach refers to "an individual's membership of a political community", whereas the non-functional one concerns a sense of cultural identity, which is perceived as very difficult to measure in a legal context.[6] However, the socio-cultural implications of citizenship are significant, when the question of full membership in a polity is considered. In this Subpart the connection between belonging to a polity (functional aspect) and shaping identity (non-functional aspect) will be emphasised.

First, special attention will be drawn to the functionalist approach. Looking at the concept of citizenship from this perspective displays the connection between the entitlements conferred to an individual and their position in the community. The first aspect, or the role,[7] of citizenship

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1. J. Shaw, *Citizenship of the Union—Towards Post National Membership?*, pt. IV.D (Harvard Jean Monnet Working Paper 6/97); F. Goudappel, *A Comparative Approach to European Union Citizenship*, *available at* http://hdl.handle.net.

2. J.H.H. Weiler, *To Be a European Citizen—Eros and Civilization*, 4 J. EUR. PUB. POL'Y 20, 37 (1997).

3. M. VINK, LIMITS OF EUROPEAN CITIZENSHIP. EUROPEAN INTEGRATION. POLICIES IN NETHERLANDS 17 (2003).

4. *Id.* at 21-22.

5. Goudappel, *supra* note 1.

6. *Id.*

7. Shaw perceives granting rights and building a sense of community as "the role and function" of citizenship. Shaw, *supra* note 1.

(according to functionalist approach) is granting rights to individuals. There are three types of rights, which all citizens should enjoy, namely civil, political and social rights, known as Marshall's triad.[8] As they are defined by national legislations, there will be differences between particular countries.[9] However, the main aim of this Subpart is to examine the effect of granting a certain set of entitlements to an individual. Regardless of differences between particular national citizenship legislations, citizenship always assigns individuals with equal rights and duties. All citizens are treated on the same basis, because a fundamental value of citizenship is equality.[10]

Sharing identical liberties and responsibilities develops a sense of belonging to a given community, which is perceived as a second function of citizenship.[11] As Held observed: "Citizenship has meant a reciprocity of rights against, and duties towards, the community. Citizenship has entailed membership, membership of the community in which one lives one's life. And membership has invariably involved degrees of participation in the community".[12] Membership of a polity, confirmed by granting the status of citizen, creates relation between an individual and the authorities of a political community as well as affiliation between the members of the community.[13] By establishing these two-dimension bonds, citizenship fulfils, according to its modern conception, an important organisational role.[14]

2. Citizenship—Marker of Belonging

An interesting issue concerns the relationship between members of a given community. A sense of belonging depends strongly on the entitlements and obligations assigned to an individual. The "legal equality" translates into the feeling of being equal in daily life. To a certain extent legal links can help foster a sense of "common identity and shared destiny", especially in the EU, where law has played a significant

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8. Y. Deloye, *Exploring the Concept of European Citizenship*, *in* EUROPEANISATION: INSTITUTION, IDENTITIES AND CITIZENSHIP 199 (R. Harmsen & T.M. Wilson eds., 2000); VINK, *supra* note 3, at 22.

9. H. STAPLES, THE LEGAL STATUS OF THIRD COUNTRY NATIONALS RESIDENT IN THE EUROPEAN UNION 74 (1999).

10. Shaw, *supra* note 1, pt. II.A.

11. *Id.*

12. D. Held, *Between State and Civil Society: Citizenship*, *in* CITIZENSHIP 20 (Andrews ed., 1991).

13. VINK, *supra* note 3, at 22-23, 162-63; D. HEATER, A BRIEF HISTORY OF CITIZENSHIP 141 (2004).

14. Shaw, *supra* note 1.

role in the integration process.[15] This mechanism represents the socio-psychological (non-functionalist) dimension of citizenship.[16] People enjoying the same rights are more likely to establish relationships. The same rights "imply an affiliation with a social and historical group, a condition of solidarity . . . that is never acquired 'naturally'".[17] Whereas lack of certain rights ascribed to other members of community leads to the feeling of exclusion,[18] or even discrimination. Non-citizens who live within a certain community may feel less willing to identify themselves with the citizens. As Balibar pointed out humanity is divided into "unequal species" according to the status of citizenship.[19]

Citizenship, with the rights and obligations that it entails, embodies the idea of political community,[20] which can be described as an association of individuals, who share the common life and therefore are especially committed to each other.[21] That implies that citizenship binds citizens together. Breton analyzed a number of ways in which a system of collective organization (and political community is undoubtedly one of those) shapes individual and social identities, and he found that people's conception of themselves depends on the group they belong to.[22] Also Verhoeven drew attention to the fact that citizenship implies membership in the community, which is closely related to "belonging" and "sense of identity".[23] Interestingly, political rights may imply "moral membership", which requires that all members of the community participate in the collective decision-making. As La Torre pointed out, "political rights are the most important adjunct of membership of a community".[24] Also according to Verhoeven, legitimacy of political action enables better identification with a community.[25] Hence, those who are not entitled to vote will not be accepted as full members of the community. This brings us to another significant issue related to

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15. C. BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 421-23 (2004).

16. *Id.*

17. *Id.* at 61.

18. E. BALIBAR, WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 76 (2004).

19. *Id.*

20. VINK, *supra* note 3, at 23.

21. E. MEEHAN, CITIZENSHIP AND THE EUROPEAN COMMUNITY 22 (1993).

22. R. Breton, *Identification in Transnational Political Communities*, *in* RETHINKING FEDERALISM: CITIZENS, MARKETS, AND GOVERNMENTS IN A CHANGING WORLD (K. Knop, S. Ostry, R. Simeon & K. Swinton eds., 1995).

23. A. VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 160 (2002).

24. M. La Torre, *Citizenship: A European Wager*, 8 RATIO JURIS 113-20 (1995).

25. VERHOEVEN, *supra* note 23, at 168.

belonging—the perception of non-citizens by citizens. There is an evident tendency to treat those, who do not enjoy political rights as "outsiders".[26] Such an exclusive perception makes integration of non-citizens into society more complicated, because it is much more difficult to identify oneself with a given community if you are judged as the "other". Obviously, equal rights are not the sole factor determining a feeling of belonging to a group, but they are a foundation ensuring equality, which is indispensable to common identity.

3. Conclusions

On the basis of the presented discourse, it is possible to conclude that citizenship plays an important role in shaping common identities. It cannot be viewed as an exclusively legal concept. By ascribing equal rights, especially political rights, to individuals, citizenship strengthens their feeling of belonging to the community, and therefore leads ultimately to identifying oneself with other members of the polity as well as with the state itself. In other words, the meaning of citizenship has moved beyond purely legal rights. Regardless of differences between citizenship legislations in particular countries, its broader (socio-cultural) notion holds particular meaning, especially in the context of Union citizenship. As citizenship was for centuries linked to the nation-state,[27] people tend to link citizenship with national identity.[28] Meehan quotes Leca that "there is a powerful overlap in people's thinking amongst citizenship, legal nationality and national identity".[29] These attitudes hold a special meaning in the context of EU citizenship, which will be developed in the next Subpart.

B. The Concept of Union Citizenship

1. Uniqueness of EU Citizenship

The concept of Union citizenship emerged long before its formal establishment. The idea had been developing since a very early stage of the Communities,[30] but the final provisions were approved during the

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26. *Id.*

27. Goudappel, *supra* note 1, at 50-55.

28. Weiler, *supra* note 2, at 20; Z. Layton-Henry, *Insiders and Outsiders in the European Union*, *in* THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION 50-55 (E. Guild ed., 1999).

29. MEEHAN, *supra* note 21, at 151.

30. For details, see LEGAL ISSUES OF THE MAASTRICHT TREATY 87-92 (D. O'Keeffe & M. Twomey eds., 1994); HEATER, *supra* note 13, at 103-04; S. O'LEARY, THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP 18-25 (1996); STAPLES, *supra* note 9, at 200-01.

Luxemburg European Council and inserted into the 1992 Treaty of Maastricht. Among the reasons for introducing Community citizenship, there are three of a particular importance, namely encouraging free movement, reducing the European Union's democratic deficit and forming a base for the construction of European identity.[31]

European citizenship is regulated by articles 17-18 of the European Communities Treaty. According to these provisions, Union citizenship is conditional upon national citizenship, which makes the concept of citizenship unique. The EU does not have legal authority to grant the status of citizen; it can be acquired only through nationality of one of the Member States. The exclusive competence of the MS to determine who is a national, and therefore an EU citizen, deprives the Community of the right to decide who is subjected to the EC law.[32] Issuing legal provisions for "unknown" subjects is rightly considered to be anomalous.[33] However, the MS put a veto on conferring this right to the EU level, because nationality policy is associated with state independence.[34]

In modern states, nationality may be granted according to two main principles, namely *ius soli* and *ius sanguinis*.[35] In countries where the *ius soli* rule is applied, everyone born within their territory acquires nationality automatically. If a country adopts the principle of *ius sanguinis*, the nationality of a child is determined by the nationality of the parents regardless of the place of birth.[36] In most cases, however, nationality legislations combine these two rules, creating a wide range of "middle solutions".

The Maastricht European Citizenship Clause was modified in Amsterdam—the additional phrase "Citizenship of the Union shall complement and not replace national citizenship" is an evident response to anxiety of the Member States that EU citizenship somehow threatens national citizenships.[37] Union citizenship is believed to contribute to the development of a sense of belonging to the European Union.[38] Personal

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31. S. O'Leary, *The Options for the Reform of European Union Citizenship*, *in* S. O'LEARY & T. TIILIKAINEN, CITIZENSHIP AND NATIONALITY STATUS IN THE NEW EUROPE 84-86 (1998).

32. O'LEARY, *supra* note 30, at 39-40.

33. LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 30, at 92.

34. H. D'Oliveira, *Nationality and the European Union After Amsterdam*, *in* LEGAL ISSUES OF THE AMSTERDAM TREATY 411 (D. O'Keeffe & M. Twomey eds. 1999).

35. O'LEARY, *supra* note 30, at 6.

36. STAPLES, *supra* note 9, at 74.

37. Weiler, *supra* note 2, at 6-7, 30-31.

38. M. Wathelet, *European Citizenship and Freedom of Movement in the Case Law*, *in* THIRTY YEARS OF FREE MOVEMENT OF WORKERS IN EUROPE: PROCEEDINGS OF THE

mobility, which is an important factor of Union citizenship, seems to play a significant role in identity-building.[39] Freedom of movement, which entails an increase in cross-country relationships, certainly helps to overcome national divisiveness.

Another contribution of Union citizenship to European identity is through the reduction of the democratic deficit. Because there is "an intimate link between giving effect to principles of democracy and the complex identities of EU citizens",[40] promoting democratic legitimacy of the EU can positively influence people's awareness of their Europeaness. Union citizenship, which entails some political rights giving Europeans bigger opportunities to participate in the decision-making processes, reduces the gap between individuals and organisations.[41] The awareness of the possibility to influence the EU's decisions by individuals, even on a small scale, strengthens their feeling of belonging to the European Community. As was discussed earlier, the legitimacy of political action enables better identification with a community.[42] And development of a sense of identity between citizens and the Union is thought to contribute to strengthening the political dimension of European integration process.

2. Union Citizenship—Watershed (?) in Europeans' Lives

Although a list of entitlements linked to Union citizenship seems long,[43] most of them are only confirmation or development of rights already existing.[44] The most meaningful entitlement granted to EU citizens is political rights. Firstly, involving people in the decision-making process contributes to reducing the democratic deficit, which is one of the biggest problems the EU is facing nowadays.[45] Secondly, the ability to participate in political life strengthens links among citizens and between citizens and the state.

Another significant liberty inherent in Union citizenship is freedom of movement. However, its importance is often questioned; some

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CONFERENCE, BRUSSELS, 17 TO 19 DEC. 1998, at 270 (J. Carlier & M. Verwilghen eds., European Communities 2000).

39. VERHOEVEN, *supra* note 23, at 178-79.

40. Shaw, *supra* note 1, pt. IV.B.

41. Breton, *supra* note 22.

42. VERHOEVEN, *supra* note 23, at 168.

43. Treaty Establishing European Communities (consolidated version) arts. 18-23; Charter of Fundamental Rights of the European Union (CFR) ch. V (Citizenship).

44. LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 30, at 106; E. Meehan, *Europeanisation and Citizenship of the European Union*, *in* EUROPEANISATION: INSTITUTION, IDENTITIES AND CITIZENSHIP, *supra* note 8, at 166-69, 172.

45. M. Curtin, *Open Decision-Making and EU (Political) Citizenship*, *in* LEGAL ISSUES OF THE AMSTERDAM TREATY, *supra* note 34, at 73-74.

scholars argue that introducing the institution of EU citizenship added little substantially new value—it mainly confirmed already existing migration law under the EU law. According to these opinions, replacing the notion of "worker" (or "privileged alien") with "Union citizen"[46] held more symbolic than practical meaning. Nevertheless, moving beyond the status of employee, which may seem a minor change, indeed introduced a significant difference. The right of free movement decoupled from performance of economic activity potentially embraced all MS nationals.[47] Hence, describing Union citizenship as "a purely decorative and symbolic institution"[48] does not seem to be right, especially if it is analysed in the light of the changes in national citizenship policies of some Member States.[49]

Interestingly, Union citizenship does not entail any explicit duties at the moment. Because one of the original reasons of its establishment was overcoming the democratic deficit, the focus was laid on assigning rights to EU citizens.[50] However, it does not mean that some obligations cannot be added to the *dynamic* concept of Union citizenship, which has the prospect for change explicitly built into the mechanisms for its future review.[51] The evolutive clause confirms the dynamic character of EU citizenship by "recognition of its limited extent at present and a means to improve on its limited nature".[52] The need for amendments in the content of Union citizenship is the logical result of the increasing scope of EU competences; the Union should consequently grant the rights in these new areas.

Another distinctive feature of Union citizenship, which makes the whole concept unique, is providing EU citizens with a new kind of relation. Apart from developing bonds between individuals of a given MS (horizontal link), and individuals and their state (vertical link), which is also characteristic for national citizenship, it establishes a relation between individuals and authorities of other MS (diagonal link?). As Wiener has said, "every citizen of the Union enjoys a first circle of nationality rights within a Member State and a second circle of new

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46. F. Dellólio, *The Redefinition of the Concept of Nationality in the UK: Between Historical Response and Normative Challenges*, 22 POLITICS 14 (2002).

47. STAPLES, *supra* note 9, at 326-28.

48. D. Kostakopoulou, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, 68 MODERN L. REV. 233-59 (2005).

49. This issue is developed *infra* Part IV.

50. STAPLES, *supra* note 9, at 202.

51. *See* LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 30, at 102; B. Nascimbene, *Towards a European Law on Citizenship and Nationality?*, *in* O'LEARY & TIILIKAINEN, *supra* note 31, at 71; Meehan, *supra* note 44, at 169.

52. Nascimbene, *supra* note 51, at 71.

rights enjoyed in any Member State of the EU."[53] These ties stem from ascribing EU citizens with transnational political rights. Firstly, all EU citizens are entitled to vote in municipal elections in the host country under the same conditions as nationals of that state.[54] Secondly, every holder of EU citizenship has a right to vote and stand for elections for the European Parliament on the basis of place of residence.[55] Thirdly, the status of Union citizenship guarantees diplomatic and consular protection of any MS in a third country if a home state is not represented.[56] In this sense, implementing Union citizenship contributed to dissociation between political participation at European level and MS nationality.[57] Significantly, the two first rights undoubtedly facilitated integration of MS nationals, residing in a different EU country, with their host environment and enhanced their status as compared with third-country nationals.[58] In other words, EU citizenship by creating closer relation of MS nationals with the authorities of their state of residence ameliorated their position in the host country.

3. Controversies Raised by EU Citizenship

As citizenship is often associated with the State and the Nation, introducing this notion into the European context inevitably caused problems.[59] Union citizenship automatically evokes fears—at first glance it seems to threaten national citizenship, which is believed to be "a last bastion of sovereignty",[60] and therefore national identity. According to Deloye these worries are not groundless as "European citizenship produces a reordering of identities".[61] Despite its complementary and dispersed character, EU citizenship challenges the structure of European identity/identities established by particular nation-states.[62] Hence, many Europeans presume that acquiring European citizenship may lead to a new European identity. Rejection of the Maastricht Treaty by Denmark illustrates these worries perfectly. The negative response of Denmark to the concept of Union citizenship was followed by "a declaratory

53. A. Wiener, *Rethinking Citizenship: The Quest for Place-Orientated Participation in the EU*, 7 OXFORD INT'L REV. 44-51 (1996).
54. EC Treaty art. 19(1).
55. *Id.* art. 19(2).
56. *Id.* art. 20.
57. O'Leary, *supra* note 31, at 93.
58. Nascimbene, *supra* note 51, at 69-70; STAPLES, *supra* note 9, at 206.
59. VINK, *supra* note 3, at 4; Weiler, *supra* note 2, at 6-7, 30-31.
60. VINK, *supra* note 3, at 4.
61. Deloye, *supra* note 8, at 211.
62. *Id.* at 211-15.

confirmation by the European Council that nothing in the provisions of the Treaty of Maastricht in any way displaces national citizenship".[63] Even the founding Treaty stating that the Community is supposed to "lay the foundations of an ever closer union *among the peoples of Europe*",[64] not create one people,[65] does not seem reassuring. As Deloye rightly pointed out, an attempt to impose a new configuration of norms and identities, endowed by EU citizenship, will face the opposition of numerous social actors.[66] The notion of Union citizenship itself may imply an attempt to create one European state. As Weiler argues, Union citizenship contradicts the preservation of independent nation-states. He suggests either leaving the concept of European citizenship aside and continuing the idea of "union among peoples of Europe" or modifying it so it becomes clear that it serves the building of a new, namely European, nation-state.[67] According to his conservative view, adopting citizenship leads inevitably to nation-building.

On the contrary, European citizenship and European identity is also perceived as an additional level, not interfering with national ones. The concept of "multiple demos" indicates that one can simultaneously belong to different levels of a community.[68] Practical examples prove that some people do not have problems with admitting to being a part of two communities. Migrants often tend to describe themselves as Scottish British or Bavarian German.[69] The phenomenon of combining several layers of identities is described in detail by Hofstede, who states that "almost everyone belongs to a number of groups and categories of people at the same time"[70]; hence sharing at least two identities is a norm. The possibility to combine various levels of identities is to a certain extent confirmed by the results of 2002 Eurobarometer survey on European and national identity.[71] 59% of Europeans, compared to 52% in 1999,[72] admit to some European components in their identity.[73] In the beginning of 2004, after including 10 candidate countries, this number

63. Shaw, *supra* note 1, pt. I.
64. *Id.*
65. Weiler, *supra* note 2, at 7.
66. Deloye, *supra* note 8, at 211-15.
67. Weiler, *supra* note 2, at 32.
68. *Id.*
69. MEEHAN, *supra* note 21, at 152.
70. G. Hofstede, *Levels of Culture*, *in* G. HOFSTEDE, CULTURES AND ORGANISATIONS: SOFTWARE OF THE MIND 10 (1991).
71. VINK, *supra* note 3, at 5.
72. *How Europeans See Themselves: Looking Through the Mirror with Public Opinion Surveys*, EUROBAROMETER, Oct./Nov. 1999, *available at* www.europa.eu.int.
73. VINK, *supra* note 3, at 5.

experienced a slight reduction of 3%.[74] Nevertheless, these results show that over half of Europeans recognise some European elements in their identity.

4. Conclusions

To summarise, the status of citizen implies belonging to a certain community. By assigning a number of rights, citizenship contributes to building a common sense of identity and grants citizens a privileged position over non-citizens. This fact is of a great importance when the introduction of Union citizenship is considered. The implications of this concept, which is conditional upon nationality of the Member States, are not unequivocal. While some authors point out the significant role of Union citizenship in creating bonds between EU citizens, and therefore contributing to development of European identity, others argue that its establishment had purely symbolic meaning, because it mostly confirmed already existing rights. Although for most Europeans their national identity is more important than their European one, many of them recognise some European elements in their identity. Commitment to a European integration process was reinforced by Union citizenship, which conferred a number of equal rights to all MS nationals.

The entitlements endowed by European citizenship hold significance, especially if compared with long-term residents of third countries, whose position deteriorated as the result of granting (or even formal approving of) a set of rights only to MS nationals. The fact, which deserves special attention, is assigning EU citizens with political rights, which enable them to participate in the decision-making process, and excluding third-country nationals from the political dimension of European integration process. This issue is highly controversial in view of long-term third-country national residents, who like MS nationals contribute to the European welfare, but are deprived of the right to take part in political life. Similarly, the free movement of persons, reserved for MS nationals, discriminates non-EU citizens. In this context establishment of Union citizenship has deepened the gulf between EU and non-EU citizens. Has this fact provoked any reaction from MS authorities? This matter will be discussed in Part IV,[75] which generally examines the attitudes of the MS authorities towards EU citizenship, and

74. *Comparative Highlight Report*, EUROBAROMETER, Feb./Mar. 2004, *available at* www.europa.eu.int.

75. *See infra* Part IV.D-E.

particularly the reasons for amendments in nationality policies introduced since 1992.

III. REFLEXIVE HARMONISATION

Community law is a relatively new system; with its roots in the 1950s, it can be described as "an infant in comparison with the long history of the legal orders of the Member States."[76] The European Union, formed on the bases of European Economic Community (EEC), supervises a continuously increasing number of different policies, which requires new regulations and amendments of existing ones.[77] Therefore, it is still significantly developing. The evolution of the European Economic Community into the European Union, which supervises a constantly increasing number of different spheres, entails numerous changes in the Community legal system. In other words, the dynamic character of EC law is endowed by the evolving needs and objectives of the EU.[78]

The EU, as a complex structure consisting of 25 Member States, definitely needs some kind of regulation to function as a coherent organism. Undoubtedly, the success of integration depends on the chosen method of co-ordination. The type of influence tactics is extremely important, because it may either encourage MS to comply with common standards, or cause reluctance in amending national policies. Therefore, the EU should take into consideration MS attitudes towards harmonisation and use the kind of regulation, which will be the most effective.

This Part draws attention to reflexive harmonisation as a new form of governance, which, although not always explicitly, is gaining popularity at the present stage of European integration. Firstly, the historical background of reflexive harmonisation will be provided to illustrate an increasing interdependence of Member States in different policies. Then, general influence tactics will be discussed, followed by the description of reflexive harmonisation. Next, the so-called Community Method (primarily used regulation technique based on hard law) will be criticised in order to show the need for a new way of influencing MS. In this context, the concept of soft law will be

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76. L. SENDEN, SOFT LAW IN EUROPEAN COMMUNITY LAW: ITS RELATIONSHIP TO LEGISLATION 5 (2003).

77. *Id.* at 9; C. Harlow, *European Administrative Law*, *in* P. CRAIG & G. DE BURCA, THE EVOLUTION OF EU LAW 276 (1999).

78. K. DAVIES, UNDERSTANDING EUROPEAN UNION LAW 46 (2d ed. 2003); P. Slot, *Harmonisation*, 21 EUR. L. REV. 382 (1996).

introduced as a means of encouraging MS to voluntary adjustment of their legislations to the EC law. Then, the main mechanisms of soft law will be explained. Finally, it will be argued that soft law can be applied in the domains so far strictly reserved for hard law; and which is important, it may be even more effective. The whole discourse serves as a theoretical basis for the discussion about influence of Union citizenship on national citizenship legislations, which is the subject of the next Part.

A. The History of Reflexive Harmonisation

The scope of domains that the Community is responsible for has increased over time significantly.[79] The huge and complex mechanism of the twenty five members stems from the EEC formed as a customs union of six countries. Agreeing on common external tariffs, which none of the countries treated as a serious loss of national competences, in fact laid the foundation of the process of continuous interdependence of MS policies. Firstly, the idea of the Internal Market began to be realised according to the resolution inherent in 1986 Single European Act (SEA). The SEA also laid down provisions for political co-operation between Member States,[80] which was the first step to move beyond purely economic integration. The next stage, which reinforced the relationship between EU countries was the signing of the Treaty on European Union (TEU) in 1992, which established the European Union,[81] introduced Union citizenship[82] and provided provisions for Economic and Monetary Union (EMU).[83] Following the full implementation of economic and monetary union, traditionally national domains such as employment policy and social protection, were included into areas of "common concern".[84] On the basis of the Amsterdam Treaty provisions concerning employment, the Luxembourg Jobs Summit launched the European Employment Strategy in 1997.[85]

Due to the continuous introduction of new Community areas and expansion of the existing ones, national policies are becoming

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79. For details, see LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 30, at 135-36; D. Trubek & L. Trubek, *Hard and Soft Law in the Construction of Social Europe*, 11 EUR. L. REV. 350 (2005).

80. K. Jacobsson, *Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy*, 14 J. EUR. SOC. POL'Y 357 (2004).

81. TEU arts. 11-42.

82. Treaty Establishing the European Community arts. 17-18, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

83. *Id.* arts. 98-124.

84. Jacobsson, *supra* note 80, at 357.

85. http://europa.eu.int/comm/employment_social/employment_strategy/index_en.htm.

increasingly interdependent. This mechanism of transferring subsequent competences to the Community level is described in terms of spillover effects or externalities. Both terms originally refer to economic aspects. Externality can be defined as "a side-effect or consequence (of an industrial or commercial activity) which affects other parties without this being reflected in the cost of the goods or services involved."[86] Similarly, the notion of spillover, which was introduced by Haas—an author of the neofunctionalist theory of integration—expresses a universal, linear and inevitable process referring to a situation in which integrating one sector of the economy will inevitably lead to the integration of other economic and political activities.[87] A more general statement was formulated by another neofunctionalist Lindberg: "the initial task and grant of power to the central institutions creates a situation or series of situations that can be dealt with only by further expanding the task and the grant of power."[88] This rule illustrates perfectly the integration process of the European Community, where the transition from common market to common social policy is a typical functional spillover.

Although the representatives of all the MS participate in making the most important decisions concerning further integration, they often feel obligated to approve closer cooperation, because they do not see any other option. Losing full control over subsequent domains, however, often causes discontent. This became particularly visible, when the integration included the political sphere, which is perceived as more difficult to harmonise than the economic one. It is argued that the nature of economy leads to solidarity and cooperation, whereas the transfer of political competence to a new centre encounters attempts to delay the process by those who are attached to old centres. In other words, resistance to further reduction of national powers at the present stage of European integration can be explained by the fact that many states recognise the need to join "inter-state and multi-state networks for functional reasons [without the real will to] subordinate themselves to a large comprehensive network".[89] Many MS are reserved when called

86. OXFORD ENGLISH DICTIONARY, www.oed.com.

87. E.B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMICAL FORCES 1950-1957, at 15-23 (1958).

88. L.N. Lindberg, *Integration as a Source of Stress on the European Community System*, 2 INT'L ORG. 238 (1966).

89. D. Elzar, *The United States and the European Union: Models for Their Epochs*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 48 (K. Nicolaidis & R. Howse eds., 2001).

upon to adopt common policies on matters that have been hitherto perceived as typically national.[90]

B. The Role of Influence Tactics

Undoubtedly, every process of integration requires adjustment to the common rules, and in the light of an increasing number of EU "areas of concern", changes in national legislation are inevitable. Nevertheless, the method of influencing the MS plays a significant role in shaping attitude towards changes. It is worth remembering that the general reluctance to act results not only from "what" is expected to be done, but very often "how" the action is approached. In other words, willingness to comply with the common rules depends on the influence tactics in use.[91] The choice of influence tactics holds great importance, because it affects the relationship between the agent (the side which wields influence) and the target (the side on which influence is exerted). Generally, influence tactics are divided into two categories:

- soft influence tactics—do not use coercive mechanisms, they allow the target freedom to decide whether to comply or not,
- hard influence tactics—use controlling and coercive mechanisms to make sure that the target will obey the agent's requirements entirely.

As we can see, the differentiating factor is the forcefulness of the influence tactics. Soft influence methods are considered to be more friendly and socially desirable, because they do not resort to threat, coercion, pressure or obstruction. Deprived of these discouraging features, they often enhance commitment to targets, at the same time supporting good relationships with the agent. Hard influence tactics, on the other hand, can serve as a means to achieve the goal quickly and accurately. However, obtaining the desirable effect usually evokes resistance affecting negatively the bonds between both sides. Therefore, if maintaining good relations is at stake, the preference should be given to soft methods, while hard ones should be treated as a last resort.

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90. D. Trubek, P. Cottrell & M. Nance, "Soft Law", "Hard Law", and European Integration: Toward a Theory of Hybridity 15, *available at* www.wisc.edu/wage/pubs/papers/; S. Borra & K. Jacobsson, *The Open Method of New Governance Patterns in the EU*, 11 J. EUR. PUB. POL'Y 190 (2004).

91. The rest of this paragraph is based on B. VAN KNIPPENBERG, DETERMINANTS OF THE USE OF HARD AND SOFT INFLUENCE TACTICS 4-12 (1999).

C. The Essence of Reflexive Harmonisation

To put it in the EU context, enthusiasm to participate in further integration will certainly depend on the way that the EU influences the MS to adopt common policies. The fact that harmonising national policies to some extent is necessary is widely recognised. EU membership obligates compliance with the permanently evolving EC law. However, what needs to be stressed is the significance of the influence tactic in use. There are several different approaches towards harmonisation that the EU has tried to apply in order to establish an equal "playing field", while respecting diverse national systems.[92] However, it will be argued that reflexive harmonisation, as the most sophisticated method, suits best the present stage of European integration.

The theory of reflexive harmonisation, taking into consideration the necessity of transnational harmonisation of laws, suggests combining external regulations with self-regulation. The idea is borrowed from reflexive law, which aims at finding a golden means to coordinate diverse legislation. The optimal way is believed to be a compromise between "instrumentalist theories of regulation", which impose concrete outcomes, and "deregulatory theories" arguing for removal of all external control. According to the reflexive approach, the most effective regulatory interventions are those that seek to obtain their goals indirectly instead of providing the direct prescription. Thus, the goal of reflexive harmonisation is to encourage autonomous process of adjustment by supporting mechanisms of group representation and participation. The focus is laid not only on the input of national authorities, but also local governments and social actors. Based on these assumptions, reflexive harmonisation aims at preserving a space for experimentation in the rule-making on the national level and promotes "regulatory learning through the exchange of information between different jurisdiction levels". In other words, harmonisation should not serve as a way to replace state-level regulations, but should leave some autonomy to the MS allowing them to figure out their own solutions to regulatory problems, which should obviously be consistent with common goals.

Reflexive harmonisation provides conditions for a process of discovery and/or adaptation that are thought to be more effective than establishing "optimal states" to be achieved, especially given that

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92. For more details about different approaches to harmonisation, see BARNARD, *supra* note 15, at 507-35; C. Barnard & S. Deakin, Market Access Regulatory Competition 14-15, *available at* www.jeanmonnetprogram.org; C. Barnard & S. Deakin, *In Search of Coherence: Social Policy, the Single Market and the Fundamental Rights*, 31 INDUS. REL. J. 341-44 (2000).

"optimal solutions" are often very difficult to identify. The experimentalist approach puts a great emphasis on comparison and learning from the action of others. Rule-making powers are devolved to self-regulation processes, because the MS are believed to be able to choose the most appropriate means to adjust their legal systems to EC law. Reflexive harmonisation is seen as an up-to-date regulatory technique, because it combines benefits of centralization together with local autonomy and involves a wide range of actors, which is especially important in the case of enforcement.

As it appears from the above examination of regulatory methods, reflexive harmonisation responds to the need to coordinate national policies, while respecting their diversity. This condition is definitely not fulfilled by exhaustive harmonisation, which is based exclusively on hard law regulations. Below the defaults of hard law will be presented to underline its inconvenience in certain domains and show that it can be replaced by soft regulations, which can also bring the desirable results. What is more, soft law is argued to bring better results due to its voluntary character and participation of all relevant actors in the decision-making process.

D. Defects of Hard Law

So far European integration has been dominated by the Community Method, which is associated with hard law, because it "creates uniform rules that the Member States must adopt, provides sanctions if they fail to do so, and allows challenges for non-compliance to be brought in court".[93] Hard law, which is provided with legally binding force,[94] has been widely used through numerous decisions, regulations and directives. These legal instruments are aimed at harmonising national legislations in the areas of Community concern.[95] Nevertheless, the abundance of hard law has contributed to the effectiveness, legitimacy and transparency crisis which the Community has been facing already for more than two decades.[96] Including subsequent policies into EC responsibility resulted in a huge number of legal provisions that led to loss of transparency in the EC law. In the mid-eighties Community legislation came to be highly criticised for its excessive quantity and lack

93. Trubek & Trubek, *supra* note 79, at 2.
94. SENDEN, *supra* note 76, at 28.
95. *Id.* at 42-43.
96. The rest of this paragraph is based mainly on Senden, *id.* at 8-11.

of quality.[97] Taking into consideration the diversity of legal cultures represented by the different MS, the detailed nature of EC legislation, also accused of inconsistency, has posed numerous difficulties for national laws required to comply with it. Generally the abuse of hard law, resulting in "overregulation", leads to eurosceptisism.[98]

E. Alternative to Hard Law—Soft Law

In order to overcome the democratic deficit, increasing interest has been given to soft law.[99] Because soft law is a broad concept, it lacks one clear definition.[100] Mainly it is described as rules of conduct, which, according to Senden "are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain indirect legal effects, and that are aimed at and may produce legal effects."[101] However, soft law can be also perceived as a method of governance that "operate[s] in place of, or along with, the hard law that arises from treaties, regulations, and the Community Method."[102]

Regardless of some differences, all definitions of soft law emphasise its lack of binding force. In fact, there are no legal provisions, which would obligate the MS to comply with soft law acts; the decision to incorporate them into national legal orders is entirely left to the MS authorities.[103] Even if we take into consideration the general principle of loyal cooperation,[104] which "gives rise to certain legal obligations, such as the duty to consider and make effort to comply with soft law and not act against it unless good reasons for doing so are set out", it comes down to an obligation of effort, not an obligation of result.[105] In other words, it is another *attempt* to encourage the MS to adjust their laws to the EC legal order.

Among numerous features of this method, six general principles can be formulated: voluntary participation and power sharing, multi-level integration, deliberation, diversity and decentralisation (subsidiarity), flexibility and revisibility and finally experimentation and knowledge

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97. *See also* K. Armstrong, *Governance and the Single European Market*, *in* CRAIG & DE BURCA, *supra* note 77, at 757.

98. SENDEN, *supra* note 76, at 12.

99. F. SNYDER, THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOEL 199 (1994); Trubek, Cottrell & Nance, *supra* note 90, at 2.

100. SENDEN, *supra* note 76, at 463.

101. *Compare id. with* definitions by SNYDER, *supra* note 99, at 198, *and* Thurer (as quoted by SENDEN, *supra* note 76, at 103).

102. Trubek, Cottrell & Nance, *supra* note 90, at 1.

103. SENDEN, *supra* note 76, at 366.

104. EC Treaty art. 10.

105. SENDEN, *supra* note 76, at 368-69.

creation.[106] What is particularly important for the examples described in the next Part is diversity and decentralisation. Common action at the Community level does not have to entail either further delegation of competence to the EU institutions, or setting formal binding homogenous political solutions.[107] According to the principle of subsidiarity, competences should be divided between different centres of governance so the problems at issue were tackled most effectively. In other words, the powers should be allocated at the lowest level possible to comply with the EU's assumption that decisions should be taken "as closely as possible to the citizen". Hence, subsidiarity corresponds perfectly with the heterogeneous character of the EU as it "minimize[s] the loss of political autonomy at the more local level".[108]

Accommodating diversity within a single European project shows that intra-EU heterogeneity does not have to be considered as a serious constraint; this perspective adds a new dimension to the whole European integration.[109] Similarly, flexibility and revisibility, characteristic for non-coercive mechanisms, have contributed significantly to the new evolving image of the EU. Focusing on setting general goals without establishing detailed provisions for their achievement, allows the MS to choose the method best suited to the national conditions.

F. Effectiveness of Soft Law

The Community Method, although applied successfully in some areas, has proved to fail in those, which were included into an area of "common concern", but remained the subject of strong national sensitiveness.[110] Soft law proved to be the right solution to attract the attention of the MS to particular issues without interfering directly with national policies.[111] In this way it contributed to revision of national policies in the light of new "common problems" and to redefining them in terms of "common concerns" and the concerns of other states and nationals, which have been so far largely ignored.[112] In other words, it

106. Trubek, Cottrell & Nance, *supra* note 90, at 15; Borra & Jacobsson, *supra* note 90, at 189.

107. Borra & Jacobsson, *supra* note 90, at 200.

108. P. SYRPIS, LEGITIMISING EUROPEAN GOVERNANCE: TAKING SUBSIDIARITY SERIOUSLY WITHIN THE OPEN METHOD OF CO-ORDINATION 16 (2002); Armstrong, *supra* note 97, at 757.

109. Borra & Jacobsson, *supra* note 90, at 202.

110. Trubek, Cottrell & Nance, *supra* note 90, at 15; Borra & Jacobsson, *supra* note 90, at 190.

111. Trubek, Cottrell & Nance, *supra* note 90, at 15; Borra & Jacobsson, *supra* note 90, at 190.

112. Jacobsson, *supra* note 80, at 367.

turned out that policy changes are possible in the absence of coercive mechanisms, which previously had been considered as essential.[113]

Notwithstanding the weaknesses of non-binding instruments,[114] the use of soft law is increasing,[115] because its application contributes to enhancing EU legitimacy, effectiveness and transparency.[116]

G. Need for Soft/Hard Law Constellation

The need for hard law acts is in fact difficult to deny;[117] hence the suggestion to transcend the "hard versus soft law" debate seems reasonable.[118] Perhaps the discussion on alternativeness of hard and soft regulation should be replaced by the deliberation on how it is possible to combine these two mechanisms to achieve the optimal results[119] The simultaneous presence of soft and hard measures in the same policies inspired scholars with an idea of "hybrid constellations"—the focus should be laid on the way of joining both methods in order to obtain synergic effects instead of endless debates on which one is more effective.[120] As noticed elsewhere, uniting soft and hard low may result in creating "responsive law", which constitutes a part of the program aiming at "the integration of law and society".[121] A legal order is truly responsive when it responds to the needs of social problems;[122] hence including soft law, particularly the OMC, which is based on the co-operation of all relevant parties can be perceived as adding a human face to the EC law. On the other hand, soft regulations need legal acts to regulate their nature.[123] Importantly, the need for a soft-hard law combination has been recognised by the Commission, which states that

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113. S. Velluti, *The European Employment Strategy and Enlargement*, *in* 1 EUROPEAN LAW FOR THE TWENTY-FIRST CENTURY: RETHINKING THE NEW LEGAL ORDER 424-25 (T. Tridimas & P. Nebbia eds., 2004).

114. For criticisms of soft law, see J. Arrowsmith, K. Sisson & P. Marginson, *What Can 'Benchmarking' Offer the Open Method of Co-ordination?*, 11 J. EUR. POL'Y 311-28 (2004); S. Borra & B. Greve, *Concluding Remarks: New Method or Just Cheap Talk?*, 11 J. EUR. POL'Y 331-32 (2004); Trubek, Cottrell & Nance, *supra* note 90, at 18.

115. SENDEN, *supra* note 76, at 376-78; Trubek, Cottrell & Nance, *supra* note 90, at 2.

116. SENDEN, *supra* note 76, at 3.

117. Harlow, *supra* note 77, at 276; Velluti, *supra* note 113, at 424-32; Trubek, Cottrell & Nance, *supra* note 90, at 12; SENDEN, *supra* note 76, at 106-262, 465-68; Borra & Jacobsson, *supra* note 90, at 189.

118. Trubek & Trubek, *supra* note 79, at 23-27.

119. *Id.*

120. *Id.*; Trubek, Cottrell & Nance, *supra* note 90, at 33-34.

121. W. Witteveen & B. Van Klink, Why Is Soft Law Really Law? A Communicative Approach to Legislation, *available at* http://rechten.uvt.nl/bartvanklink/softlaw.pdf.

122. *Id.*

123. Velluti, *supra* note 113, at 433-36; SENDEN, *supra* note 76, at 22, 107-08.

"legislation [understood as hard law] is often only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework".[124]

H. Second-Order Effects

Another important point, which needs underlining concerns second-order effects. As noted by Romanos, "it is acknowledged that political institutions can have a second order effect by shaping the preferences and ideas of collective actors."[125] Including this observation in the EU context, it is possible to state that the EU has the potential to induce amendments in national policies without any direct encouragement of the MS to do so. This phenomenon results from the growing interdependence of MS policies (described in the beginning of this Part), which indirectly leads numerous countries to revise their national legislations. So far national legislations of the MS have been amended because of two reasons: either a given country decided independently that the change was necessary, or it was strictly imposed by the Community law. The theory of reflexive harmonization, which relies on second-order effects, indicates a middle way. This may occur when MS notice a further need for amendments as a result of implementing obligatory changes. Although they are not required to go further, the states decide themselves to carry on the transformation, often to preserve coherence of MS law in the EU context, and prevent conflicts of philosophy, even if not of hard law. Interestingly, these changes are not always associated with original Community action, because the MS do not state explicitly that the reforms are due to former EU requirements. However, as it will be argued in the next Part, implementing amendments in some nationality policies can be linked to the fact of introducing Union citizenship, although formally the EU does not have power to interfere with the MS competence to define national citizenship.

I. Conclusions

To conclude, the European integration process has significantly increased the interdependence of MS national policies. The EU countries are now so closely linked that many decisions taken on the

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124. White Paper on Governance, COM (2001) 428, pp. 4, 20-22.

125. M. Romanos, Shipping, the State, and the Market: The Evolving Role of the European Union in International and Greek Shipping Policies, London School of Economics (2005), *available at* http://www.lse.ac.uk/collections.

national level have an international impact.[126] Due to the spillover effect (or externalities), the subsequent competences have been transferred from the national to the Community level. The expanding scope of "European areas of common concern" has resulted in the excessive use of hard law, which contributed to the legitimacy crises in the EU. In order to overcome the democratic deficit the EC legal system and decision-making processes need to be improved, so they respond better to the needs of the particular MS and all EU citizens. The major amendment can be observed through the increasing use of soft regulations, which do not use coercive mechanisms. Although soft law (deprived of legal force) cannot replace traditional legislation and the circumstances in which they should be used are highly discussable, they contribute significantly to enhancing legitimacy of the Community action. The increasing need for the use of soft law instruments cannot be denied, because in some spheres it has turned out to be more effective than hard law. As the studies of the influence tactics show, soft methods very often enhance targets to commitment, while hard methods usually evoke resistance.[127] Thus it becomes evident that instead of creating a rigid "European code" and imposing it on national legislations, the emphasis should be put on encouraging diverse, local-level approaches, which will lead to adjusting national rules to European standards.

However, the need for a decent number of hard law acts suggests that the most desirable is the hybrid constellation of hard and soft law. Moreover, the combination of different instruments is widely recognised to enhance effectiveness of decision making.[128] In other words, "an undeniable and legitimate function of soft law is to support and promote, *in accordance with legal means*, the goals of the Community in the process of integration."[129]

Soft law can be characterised by several, important features. Firstly, it has an entirely voluntary character. Secondly, it is consistent with the principle of subsidiarity (which is thought to be a solution to the heterogeneous character of Europe),[130] which means that it tends to allocate the competences in various policy fields to the most appropriate levels of governance. Thirdly, it focuses on establishing general guidelines, leaving the MS discretion in choosing the most suitable national strategy. Finally, soft law aims at mutual learning through peer

126. Jacobsson, *supra* note 80, at 358.
127. *Id.*
128. SYRPIS, *supra* note 108, at 24.
129. SENDEN, *supra* note 76, at 368.
130. SYRPIS, *supra* note 108, at 11.

reviews, where all relevant stakeholders discuss common concerns, exchange knowledge and experience that allows them to compile the best solutions to their regulatory problems. Therefore, soft law "may be viewed as a useful form of regulation, a means of co-ordinating relations among the MS and of balancing unity and diversity."[131]

Features of soft law provide excellent conditions to induce second-order effects. National authorities are stimulated to revise the adequacy of national policies in the light of the European integration process. Realising need for changes themselves will make them more willing to amend their legislations than the necessity to obey regulations issued by the Community institutions. These "decentralising tendencies", which can be described as a kind of "pluralist self-regulation",[132] encourage harmonisation of national policies without exerting direct influence by the EU bodies. This phenomenon indicates that the reflexivity may be noticed both in the EC law and in the EU mode of governance.

IV. RELATION BETWEEN UNION CITIZENSHIP AND MEMBER STATE NATIONALITY POLICIES

In this Part, the focus will be laid on the relationship between Union citizenship and distinct national citizenship legislations. Every EU country has "its own history, its own circumstances, its own political developments, its own conception of membership and what that entails";[133] thus their nationality laws differ, sometimes to a large extent. These discrepancies have resulted in a wide debate on the need for harmonisation. For now, according to the "acquis communautaire", the Member States are independent in granting the status of citizen. European law cannot interfere in this sphere, but the question arises whether the EU countries are in fact free from any pressures. Although from the legal point of view, no infringements were observed, the on-going changes in national legislations in some European countries are striking—do they in fact result from independent decisions of the Member States?

The previous Parts provide essential theoretical background for discussing this subject. The analysis of the general idea of citizenship followed by introducing the concept of Union citizenship, in Part II, allows for a thorough examination of the chosen MS nationality policies, which have experienced significant reforms. The discourse on reflexive

131. SNYDER, *supra* note 99, at 218.
132. G. TEUBNER, LAW AS AN AUTHOPOIETIC SYSTEM 67-68 (1993).
133. B. Ryan, *The Celtic Cubs*, 6 EUR. J. MIGRATION & LAW 173-93 (2004).

harmonisation, presented in Part III, is crucial for observation of the bonds between the amendments in discussed citizenship legislations and the fact of establishing Union citizenship.

The structure of this Part is as follows. Part IV.A will be devoted to a general assessment of in(ter)dependence of MS nationality legislations. Their formal independence will be emphasised. Then, however, the attention will be drawn to the spill-over effects, which contribute to their growing interdependence. Further Subparts focus on analyses of practical examples, namely the transformation of citizenship policies in Ireland, Spain and Germany as well as the meaning of the "Directive on the status of third-country nationals who are long-term residents" in the light of implementing Union citizenship.

A. In(ter)dependence of Member States Nationality Legislations

1. Legal Provisions Guarantying Independence

Union citizenship is conditional upon nationality of a Member State. Article 17 EC provides that "every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship". Further, according to EU law, it is the Member States who have the exclusive freedom to decide who can acquire the status of national citizen. This is made clear by the "Declaration on Nationality of a Member State" attached by the Treaty of Maastricht to the EC Treaty:

> Whenever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with Presidency and may amend any such declarations whenever necessary.[134]

By the monopoly in determining who qualifies as their nationals, the MS enjoy freedom in deciding who is going to be granted with the status of EU citizen.[135] In this sense, the MS are sovereign actors under international law; even if national legislations distinguish several categories of citizenship, the right to decide who is finally entitled to acquire Union citizenship lies in the hands of the Member States. This

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134. Declaration on the Nationality of a Member State, [1992] OJ C191/98; *see also* VERHOEVEN, *supra* note 23, at 172.

135. STAPLES, *supra* note 9, at 75-79.

was confirmed by the *Kaur* case,[136] in which Ms Kaur born in Kenya, in a family of Asian origin, became a "Citizen of the United Kingdom and Colonies" under the terms of The British Nationality Act 1948. After amending The British Nationality Act in 1981, she gained a status of a British Overseas Citizen, which does not entitle one to enter or reside within territory of the United Kingdom. Ms Kaur, as a "British Overseas Citizen", claimed such a right under the Union citizenship provisions.[137] However, the Court rejected her arguments by referring to the Declaration, submitted by the United Kingdom upon its accession to the Community, that considers "only those UK citizens who are entitled to reside on the UK territory or having a specified connection with Gibraltar"[138] as nationals.

2. Increasing Interdependence Between the MS

For the purposes of the discourse presented in this Part, it must be noted that nationality policies are closely linked with the national immigration strategies. As Hansen and Weil observe, "throughout Europe the politics of immigration have become the politics of nationality."[139] In this context, attempts to separate these two areas cannot be successful in a long-term perspective. The EU, by its subsequent decisions concerning immigration and nationality (influenced by various, sometimes contradictory factors), prescribed competences in these two fields to different levels of governance, namely the latter remained in the MS discretion, while the former became (at least partly) coordinated at the supra- and intergovernmental level. The formal process of cooperation on common immigration procedures was launched by the Schengen Agreement in 1985.[140] Agreement on removing internal borders and strengthening external frontier controls was aimed at increasing security within the European Community.[141] The further step was made in Maastricht, where immigration and asylum were included into the third pillar of the EU.[142] However, in Amsterdam it was

136. Case C-192/99, The Queen v. Secretary of State for the Home Department *ex parte* Manjit Kaur, [2001] ECR I-1237.

137. Ms Kaur referred to articles 17 –18 of the EC Treaty.

138. VERHOEVEN, *supra* note 23, at 172.

139. R. Hansen & P. Weil, *Introduction: Citizenship, Immigration and Nationality: Towards a Convergence in Europe?*, *in* TOWARDS A EUROPEAN NATIONALITY: CITIZENSHIP, IMMIGRATION AND NATIONALITY LAW IN THE EU 1 (R. Hansen & P. Weil eds., 2001).

140. C. Lemke, *Citizenship Law in Germany: Traditional Concepts and Pressures to Modernize in the Context of European Integration*, HARVARD FOCUS EUROPE, Spring 2001, at 1-3, *available at* www.sociology.su.se.

141. *Id.*

142. EC Treaty arts. 61-69.

transferred into "the more integrated decision-making setting of the first pillar [to create] more options for common European policies on migration in the future."[143] The Amsterdam Treaty also incorporated the Schengen Agreement into the EC legislation, which (although not signed by all EU MS) showed that the regulations on immigration at the EU level were directed towards all EU citizens.

Coordination of immigration policies posed a challenge for nationality laws, which still belong to the exclusive MS competences. Even establishment of Union citizenship, which obviously bound all the MS nationals together, did not entail any official cooperation in this field. The MS expressed strong objections to the loss of their sovereignty in setting rules for acquisition of nationality, because nationality law is thought to belong to "the hard core of the identity and independence of the States."[144]

In fact, subordination of immigration policy to the EU level strengthened the will of the MS to retain independence in the field of granting nationality. This cause and effect relationship can be explained best through the example of the countries traditionally open to migrants, which do not want to make a 180-degree turn in their way of treating newcomers.[145] For these states adjusting their legislations to strict visa requirements for third-country citizens, imposed by the Schengen Agreement, is often against the general assumptions of their national strategies.[146] Therefore, trying to keep their course of actions consistent, they tend to facilitate access to national citizenship as a compensation for implemented restrictions concerning conditions of entry. To put it in more general terms, external obligations to limit immigration may lead to expanding nationality internally. In this sense, Spain provides an interesting study, in which all the regulations referring to immigrants are an outcome of the policy "driven by European harmonisation on the one hand, and local and national factors on the other."[147]

However, very diverse nationality laws resulted in clashing views of the status of citizen and of the common immigration policy. Despite MS

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143. Lemke, *supra* note 140, at 3.

144. D'Oliveira, *supra* note 34, at 410-12.

145. This will be described in more detail in the example of Spain, *infra* Part IV.B.

146. W. Cornelius, *Spain: The Uneasy Transition from Labor Exporter to Labor Importer*, *in* W. CORNELIUS, P. MARTIN & F. HOLLIFIELD, CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE 350-66 (1992).

147. J. Apap, *Citizenship Rights and Migration Policies: The Case of Maghrebi Migrants in Italy and Spain*, *in* THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION, *supra* note 28, at 105.

apprehension, a need for harmonisation has emerged.[148] In this situation, the only solution seems to be the voluntary reduction of the discrepancies between nationality regulations, which in fact is taking place. As Ryan pointed out, "the convergence of apparently polar cases . . . is revealing."[149] The current EU trend shows that states with strict nationality laws are relaxing their rules to facilitate including permanent non-national residents, while states whose nationality law is more open to migrants are tending to make it more restrictive.[150] It will be argued that these changes, although introduced through independent democratic processes of the particular MS, result from the pressure exerted by their co-members.

Although introducing Union citizenship formally left nationality policies untouched, it definitely contributed to their interdependence. "Once it is acknowledged that each Member State may autonomously fix the prerequisites, conditions, ways and means to acquire, forfeit and re-acquire their nationality, one must admit, however, that national regulations are often interdependent and linked one to another."[151] Granting national citizenship no longer concerns only one country, but also affects other members of the Community. Acquiring nationality of one Member State automatically entails adopting Union citizenship, and thus the right to move and reside freely within the territory of the whole EU. This liberty deserves special attention, because it entails numerous controversies, for instance, in the case of European (both present and former) colonies.

Countries possessing overseas territories are entitled to grant their subjects with nationality, and thus Union citizenship. This means that ascribing a resident of any colony with national citizenship of one MS gives them the right to enter every country belonging to the Community. For instance citizens of Canary Islands, Madeira and the Azores (being Portuguese citizens), or inhabitants of Guyana, Martinique, Reunion and Guadeloupe (holding French passports) can live and work in any MS exercising the freedom of movement inherent into Union citizenship. Moreover, countries, which do not grant their citizenship to inhabitants of their overseas territories, enjoy full freedom to confer them this status whenever they wish.

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148. *Id.* at 121-22.

149. B. Ryan, *Introduction: Current Issues in Nationality Law in Europe*, 6 EUR. J. MIGRATION & LAW 171 (2004).

150. The term "EU trends" used in the further part of this Article will hold this meaning; for detailed explanation of "trends toward convergence," see Hansen & Weil, *supra* note 139, at 10-20.

151. O'Leary, *supra* note 31, at 77.

Another example is that of Spain, which concluded an agreement on dual nationality with some South American countries.[152] Even if nationality of the Member State is the second one, it must be recognised by all the EU states regardless of their national rules. This was confirmed by the ruling of the European Court of Justice in the *Micheletti* case.[153] Although the case was decided before the establishment of Union citizenship, it illustrates very well the issue of dual nationality, at that time confined to workers, now applicable to all citizens. Mr Micheletti, who held two nationalities: Italian and Argentinean, lived in Argentina. After coming to Spain he was denied the rights ascribed to the nationals of the Community because Spanish law, in regards to dual nationality, takes into consideration the one of the country of residence. The Court decided that everyone possessing Member State nationality, even if he is at the same time a national of a non-member state, must be allowed to enjoy all the liberties inherent in the quality of Member State nationality. This judgement, from 1990, now can be interpreted as the entitlement of all individuals holding nationality of any Member State to acquire Union citizenship and benefit from all the rights included in it.

These examples show that decisions concerning nationality no longer have exclusively domestic meaning. On the contrary, they influence other countries by forcing them to accept new EU citizens. The growing number of the EU citizenship holders affects mostly the countries, which are the traditional destinations of immigration. Therefore, it may be argued that "a certain amount of harmonisation should be envisaged in the area of nationality legislation."[154] In fact some MS express the belief that there should be some limitations in conferring nationality to third-country residents, because they are afraid that such decisions may be taken regardless of the consequences for other EU countries. Also the Court, through the *Micheletti* case,[155] indicated that the regulation of citizenship laws should be in line with Community interests. It is emphasised by the statement that "Under international law, it is for each Member State, *having due regard to Community law*, to lay

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152. *Id.*

153. C-369/90, Mario Vinente Micheletti & Others v. Delegation del Gobierno en Cantabria.

154. K. Hailbronner, *European Union and Union Citizenship: Umbrella Terms?*, *in* THIRTY YEARS OF FREE MOVEMENT OF WORKERS IN EUROPE: PROCEEDINGS OF THE CONFERENCE, BRUSSELS, 17 TO 19 DEC. 1998, *supra* note 38, at 286.

155. C-369/90, Mario Vinente Micheletti & Others v. Delegation del Gobierno en Cantabria.

down the conditions for the acquisition and loss of nationality",[156] which suggests that the Member States should take EU law into consideration. This reference is not clear, because there are no explicit legal provisions on the coordination of national citizenship policies at the EU level. Besides, the intention itself can be described as confusing or even as contradictory to the Declaration appended to the Maastricht Treaty by the Member States.[157]

Recently, significant changes in national citizenship legislations of some EU Member States could have been observed. Were these new rules introduced exclusively because of the needs of a particular country? Or perhaps they were initiated due to (or maybe against) the pressure from other MS. The Irish, German and Spanish cases seem particularly worth analysing. While the first two represent adjustment to other MS demands (they follow the above-mentioned EU trends), the latter shows the opposite reaction to the European pressures.

B. Spanish Case

After joining the European Community and the Schengen Group, Spain inevitably (although unwillingly) amended its immigration legislation according to the Schengen Agreement criteria. Nevertheless, exercising its right of sovereignty in the field of granting nationality, it does not hesitate to conduct a lax policy concerning immigrants, particularly those from Latin America. In order to provide the background for understanding the Spanish resistance to the EU pressures, its traditional attitude towards migrants (with emphasis on Latin Americans) will be described. The Spanish example illustrates how the nationality and immigration policy of one EU country influences other MS. Introducing an amnesty for illegal immigrants in the first half of 2005 incurred criticism from some MS, which felt exposed to the (negative) effects of the Spanish government's decision. Therefore, the implications of the amnesty for other EU states will be analysed. It will be concluded that a lack of legal provisions made it impossible to prevent Spain from implementing the objectionable resolution. And Spain, without a formal obligation to consider arguments of other MS, simply ignored the demands to respect their interests.

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156. *Id.* para. 10.

157. D. Kochenov, *Pre-Accession, Naturalization, and 'Due regard to Community Law*,' 4 ROMANIAN J. POL. SCI. 74 (2004), *available at* www.ciaonet.org.

1. Spanish Attitude Towards Migrants

Immigration policy in Spain has been always shaped with more latitude than in any other EC country. Dealing with serious economic problems it provided more emigrants than attracted immigrants. Numerous incomers from Northern Africa and Latin America treated Spain (before it joined the EU) as a temporary place of residence before final move to northern European countries, which were perceived as much better off and therefore more attractive as an immigration destination.[158] Only in the mid 1980s, due to a sudden economic growth, which coincided with entry into the European Community, did Spain start to experience substantial immigration—it very quickly transformed from a "labour exporter" to "labour importer".[159] The newcomers, however, "have not over-whelmed social services, nor have they increased unemployment appreciably by competing against native-born Spaniards for desirable, formal-sector jobs."[160] Lack of fear before danger of massive migration, which bothered most of the EU countries, would probably have not led Spain to tighten visa control if not influenced by other MS, especially the Schengen requirements. Under the pressure of the EC it abandoned its traditional policy of allowing entry by citizens of Maghreb[161] and most Latin American countries[162] without visas in 1991 and 1992, respectively.[163] Especially imposing visa requirements on the latter was considered as a politically sensitive step, "contrary to the policy followed by every Spanish government from Franco to the present Socialist Government".[164] For years many Latin American countries had dual-nationality agreements with Spain, which enabled their citizens to move to Spain and be recognised there as nationals (as Spain in case of dual nationality recognises the one of place of residence). Special ties are undoubtedly based on the shared language and culture.[165] Interestingly, the results of many national surveys on integration of various nationalities into the Spanish society show the highest acceptance for integration of Latin Americans.[166]

Nevertheless, Spain, as one of the countries responsible for controlling an external EU border, had to adjust its policy to the common

158. Cornelius, *supra* note 146, at 331-35.
159. *Id.*
160. *Id.* at 333.
161. Algeria, Morocco, and Tunisia.
162. All Latin American countries except from Brazil, Guyana, and Suriname.
163. Cornelius, *supra* note 146, at 362-68.
164. D. Nicolas, *quoted in* Cornelius, *supra* note 146, at 350.
165. Cornelius, *supra* note 146, at 350-51.
166. *Id.* at 358-62.

interest. "Spanish officials anticipate[d] continuing pressure from other members of the European Community as well as the Schengen Group",[167] what led to the establishment of stricter entry conditions even for Latin Americans.

2. Implications of 2005 Amnesty for Illegal Immigrants

Despite the imposed restrictions, Spanish immigration policy is still characterised by laxity in comparison with other MS. The most recent evidence of its tolerance is the amnesty for illegal immigrants working in Spain, which was launched on 7 February 2005 and lasted for three months.[168] Everyone who possessed an identity card, was able to prove that they lived in Spain before August, had a job contract for next six months and had no criminal record, was eligible to apply for a permanent residence permit.[169] The government expected to receive around 1,025,000 applications from around the world,[170] and predicted that 800,000 immigrants might qualify.[171] Finally 700,000 illegal immigrants were granted legal status.[172]

The whole action provoked very negative reactions in the EU. The immediate response of France showed that Spanish policy was unacceptable for some of the MS. The French government has banned the beneficiaries of the amnesty from working in France.[173] Many of those people who were granted the right to stay in Spain were believed to be illegal immigrants from France, but also from Germany and Italy. Apparently, they hoped that this would enable them to go back to these countries, where they would finally have a right to work. However, as the French government emphasised, a non-EU citizen who has gained residence status in a particular EU country would not in most cases be able to work in another EU country. The entitlement to move and reside freely refers only to those who managed to obtain nationality of one of the MS, and therefore Union citizenship.

This brings us to the most interesting and significant aspect of the Spanish amnesty in the EU view of citizenship. Taking into consideration the fact that most of the immigrants who benefited from

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167. *Id.* at 362.

168. T. Drago, Immigration-Europe: Opening Doors to Lock Them Tighter, *available at* www.ipsnews.net.

169. *Id.*

170. C. Wyatt, Immigration Target Spanish Amnesty, *available at* http://news.bbc.co.uk/.

171. Drago, *supra* note 168.

172. www.workpermit.com/news.

173. This paragraph is mostly based on *id.*

the amnesty were from Equator and Columbia (along with Romanians and Moroccans),[174] and the lenient conditions for conferring the status of national citizen to a "national of *Ibero-America*, Andorra, the Philippines, Equatorial Guinea, or a Sephardic Jew",[175] it may be argued to be a first step towards granting Community citizenship. Assigning them the right to reside gives them the possibility to acquire Spanish nationality after only two years.[176] This is of course tantamount to gaining the status of EU citizen with all the liberties included in it. In this case, obviously the right to move and reside freely is of the greatest concern, because it opens the way to all the EU countries. Providing that the above-mentioned scenario takes place, in 2007 France will have to recognise all the immigrants who benefited from the Spanish amnesty (and due to their roots acquired Spanish citizenship within two years) as EU citizens. Even those who used to work illegally in France, but managed to get to Spain and fulfilled all the necessary conditions (first for obtaining resident status, and then Spanish nationality), will have a full right to come back to France and exercise all the liberties inherent in Union citizenship. To put it in more general terms, the establishment of EU citizenship entails "stronger commonality and reciprocity of rights in different member states".[177]

3. Conclusions

As a result of its lenient immigration and nationality policy Spain is perceived as a "backdoor to citizenship in the European Community".[178] In fact this example illustrates an EU-wide impact of decisions upon nationality and immigration of the particular MS. Union citizenship, particularly by the freedom of movement inherent into the status of EU citizen, links all MS into an "interactive organism".[179] In this context, Spain is accused of ignoring the situation in other European countries in the field of national citizenship, which used to have only domestic effect, but due to introducing Union citizenship has an impact on other MS.

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174. *Id.*

175. F. Fuentes, *Migration and Spanish Nationality Law*, *in* TOWARDS A EUROPEAN NATIONALITY: CITIZENSHIP, IMMIGRATION AND NATIONALITY LAW IN THE EU, *supra* note 139, at 138-39.

176. *Id.*

177. Meehan, *supra* note 44, at 169-72.

178. V. Lewis, *Become a Citizen of Sunny Spain and Open a Back Door to the European Union*, INT'L LIVING MAG., *available at* http://www.escapeartist.com/. See also the similar questions raised regarding allegedly overgenerous and "illegal" naturalisation in Greece, [2003] OJ C155E/36 and [2002] OJ C160E/167.

179. VERHOEVEN, *supra* note 23, at 302.

Many countries would expect Spain (as any other European state) to consider and respect the problems and needs of all the Community Members before implementation of any significant reforms. However, the lack of legal provisions on harmonisation of grounds for acquisition and loss of nationality at the Community level, gives Spain freedom in this area. It had a full legal right to introduce the amnesty for illegal immigrants in 2005. By doing so, Spain proved that it was not interested in listening to the arguments of other MS and did not buckle under the pressure of their criticism; it simply carried on its own path. For now, countries, which do not agree with its decisions, can do nothing but express their outrage.

C. Irish Case

Ireland is another country with liberal nationality legislation, but, contrary to Spain, it is responding to the EU trends of converging MS policies in this field. Although the impact of Community Membership on the reform of Irish citizenship law may not be widely recognised, it will be argued that there are evident signals of indirect influence on it. In the beginning, a short outline of shaping Irish nationality legislation will be provided as the basis for the better understanding of the meaning of the 2004 citizenship reform, which was introduced in the form of constitutional amendment, preceded by the national referendum. Then, the hot debate, which took place during the referendum campaign, will be presented to indicate all the potential reasons for the reform and most of all show the role of the EU/MS pressures on the Irish government.

1. Essence of Former Irish Nationality Law

Until 2005, Ireland was the only country in the EU to grant citizenship automatically at the moment of birth to all those born on its territory, or even on the territory of the Northern Ireland, formally part of the United Kingdom, but part of the physical island of Ireland.[180] The principle of unconditional *ius soli* was central to nationality law from 1922, when the Irish state came into being.[181] According to the Irish Nationality and Citizenship Act from 1935, "all those born in the Irish Free State on or after 1922 were classed as "natural-born citizens"."[182] This right was extended to those born in Northern Ireland through the

180. http://news.bbc.co.uk.
181. Ryan, *supra* note 133, at 175.
182. *Id.*

Irish Nationality and Citizenship Act in 1956.[183] The birthright citizenship, applied for 83 years, reflected the territorial conception of the Irish people, which did not dictate their status by who their parents were, but treated all children equal at birth. The significance of this rule was confirmed by the 1998 referendum, when the Irish "voted overwhelmingly to enshrine the right of everyone born in Ireland to membership of the Irish nation as a *constitutional* right".[184] Although it was already an ultimate legal provision, the Irish government validated this rule by issuing the Nationality and Citizenship Act 2001.[185]

As concerns naturalisation, conditions of acquiring Irish citizenship in this way have been also very lenient in comparison with other EU countries. After implementing the Maastricht Treaty only 5 years of residence qualified for naturalisation in Ireland compared to 6 years in Portugal, 7 in Denmark, 10 in Italy and 15 in Germany.[186] Despite some changes in the required time of residence, Ireland remained one of the most "open to immigrant" countries. Even British and Dutch nationality legislations, which also demanded 5 years residence, posed stricter conditions in other aspects of qualifying for national citizenship, such as giving up the first nationality (in case of the Netherlands), or at least intention to have the principal residence in the host country (in case of the United Kingdom).[187] Only in Spain has adopting national citizenship been easier.[188]

2. Controversies Around Unconditional *Ius Soli*

Before joining the EU, Ireland was definitely more emigrant than immigrant state; hence, its immigrant-friendly policy did not result in any significant inflows of newcomers. However, entering the Community in 1985, which was followed by almost immediate boost in the Irish economy (the 1990s were called the "Celtic Tiger" era of rapid growth)[189] attracted a large number of job-seekers, also from non-EU countries. The increasing number of third-country nationals, who could quite easily obtain Irish citizenship for themselves and automatically for their

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183. *Id.*

184. www.activelink.ie.

185. *Id.*

186. LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 30, at 117.

187. British Nationality Act 1981, § 2(f), *available at* www.ind.homeoffice.gov.uk; Netherlands Nationality Act of 19 December 1984, as amended, *available at* http://wetten.overheid.nl.

188. *See infra* Part IV.B.

189. J. Helm, Ireland Struggles with Immigration Issue (2004), *available at* http://news.bbc.co.uk.

children born in Ireland, entailed some controversies. Birthright citizenship was especially criticised, because, as some argued, it was excessively abused. The most controversial consequence of the unconditional *ius soli* principle was the fact that the families of children born in Ireland, and therefore Irish citizens, could "make a legal claim to remain in the state on the basis of their connection to an Irish citizen."[190] That line of argumentation was really strong in the context of Ireland—a country particularly involved in providing pro-family law. The Irish Constitution in Article 41 recognises "the family as the natural primary and fundamental unit group of Society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."[191] Thus, in most cases families of Irish citizen children were allowed to stay in the country.[192] In 2002, for instance, more than 4,000 non-EU immigrants were granted residency because they were parents of babies born in Ireland.[193] Nevertheless, the parents of Irish-born children did not enjoy the direct right to national citizenship; this was confirmed in January 2003 by the Irish Supreme Court, which ruled that the parents and the siblings of Irish children citizens do not automatically qualify for Irish citizenship.[194] It remained relatively easy for them to acquire it. Ireland was one of the most liberal countries in this regard.

This lenient citizenship policy is perceived to have been a cause of a "foreign baby boom"; in the beginning of the twenty first century the number of babies born to non-nationals sky-rocketed from 2% in 1999 to almost 20% in 2004.[195] Significantly, 70% of the non-Irish mothers came from sub-Saharan Africa. They were thought to travel to Dublin expressly to give birth, putting their health at risk in order to obtain Irish citizenship for their babies.[196] Some women arrived heavily pregnant, sometimes in their last week, gave birth and then immediately claimed asylum.[197] Hence, the Irish Prime Minister Bertie Ahern stated that the birthright citizenship was being "rampantly abused", with 60% of all asylum seekers being pregnant when they made their applications.[198]

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190. Ryan, *supra* note 133, at 179.

191. CONSTITUTION OF IRELAND art. 41, *available at* www.taoiseach.gov.ie.

192. H. Levinson, Immigrants Transform the Emerald Isle (2001), *available at* http://news.bbc.co.uk.

193. *Id.*

194. www.activelink.ie.

195. Irish Baby Laws Attract Africans (2003), *available at* http://news.bbc.co.uk.

196. *Id.*

197. Levinson, *supra* note 192.

198. Helm, *supra* note 189.

Therefore, he saw a need for reform of the Irish nationality law. As the *ius soli* rule was enshrined in the Irish constitution, change of nationality law required amendment in the constitution, which in turn could have been done only through a referendum.[199]

The possibility of the constitutional referendum to remove unconditional *ius soli* was considered by the Irish Government already in 2001 (interestingly it became public knowledge only during the 2004 referendum campaign).[200] Then the issue was brought up by the Fiana Fail-Progressive Democrat coalition, which claimed that they would "keep under review the number of applications from non-nationals to remain in the State on the basis of parentage of an Irish born child."[201] The coalition considered introducing a clause to the constitution forbidding conferring the right of residence to these parents, but finally did not realise the idea.

3. Proposal for a Constitutional Amendment—Debate on the Need of Nationality Reform

It was in March 2004 when the government announced the proposal to restrict the grant of Irish citizenship to non-national children born in Ireland. The amendment suggested inserting into Article 9 of the Constitution the following sections:

> 1 Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and its seas, who does not have, at the time of his or her birth, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless otherwise provided for by law.
>
> 2 This section shall not apply to persons born before the date of the enactment of this section.[202]

The debate before the referendum, planned for June 2004, was very active, raising issues connected with domestic problems caused by the high number of births to non-national mothers, the Irish national heritage as well as adjusting to laws of other MS.

One of the main government's arguments was above-mentioned high birth-rate to the non-national parents and numerous problems posed

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199. Ryan, *supra* note 133, at 186.

200. *Id.* at 187.

201. *Quoted in* Ryan, *id.*

202. Twenty-seventh Amendment of the Constitution Act 2004, pt. 2, *available at* www.oireachtas.ie.

by non-nationals giving birth in the Dublin Maternity hospital.[203] As the Minister for Justice, Michael McDowell put it: "Our maternity services come under pressure because they have to deal at short notice with women who may have communications difficulties, about whom no previous history of pregnancy or of mother's health is known . . . ."[204]

However, the figures provided during the campaign did not refer to all hospitals and they counted all non-nationals together.[205] As the opponents of the constitutional amendment emphasised, a thorough birth analysis was missing—the partial information blurred the real image of the situation.[206] They reminded that non-Irish women giving birth in Ireland, came there for many different reasons, which were not recognised by the government; hence it was not correct that one fifth of all births in the Dublin Maternity hospital were associated with women arriving "hotfoot from airport or ferry port".[207] Besides, they underlined that a large percentage of the women presenting late in pregnancy were Irish, which also excluded the presumption that the expecting mothers who arrived at late stages in hospitals were delayed coming through customs in Irish airports or ferry ports.[208]

The adversaries of the proposed amendment argued that the number of children born to non-national mothers was "in line with what you would expect". Because migrant communities have always higher birth rates, this ratio should not shock anyone.[209] The number might have only seemed high, because Ireland's birth rate was below the repopulation rate. In their opinion, this fact should have led everyone to the same conclusion, namely that it would be "both illogical and against the national interest to send out a signal that we do not welcome foreign-born children here, becoming members of and contributing to our society."[210]

However, the possibility to explain high figures of the non-Irish children acquiring Irish citizenship, usually followed by granting this status also to their parents, did not reassure other EU countries. As it was already mentioned, after introducing Union citizenship, all MS' nationality policies became highly interdependent. Therefore, they started to pay attention to particular citizenship legislations. Ireland, with

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203. Ryan, *supra* note 133, at 176.
204. SUNDAY INDEPENDENT, 14 Mar. 2004.
205. Ryan, *supra* note 133, at 176.
206. www.activelink.ie.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

its lenient policy, was especially observed by the countries with strict nationality and migration laws, protecting carefully their borders from significant inflows of non-EU nationals. But Union citizenship, in a way, limited the effects of their efforts, because third-country citizens can gain access to their countries, exercising the right to free movement inherent in EU citizenship, which can be acquired by adopting nationality of any MS. In this context, easiness to obtain Irish citizenship caused apprehension among other EU states.

These worries were reinforced by the ECJ's ruling in *Chen* case. Catherine Zhu, a Chinese child, was born in Northern Ireland, formally part of the United Kingdom, but falling within the territorial scope of the Irish nationality laws, because part of the island of Ireland. As a result she automatically became an Irish national. Her mother wanted to stay in the United Kingdom, relying on her daughter's status as a migrant EU citizen (an Irish citizen in the United Kingdom). EU law gives all EU citizens the right to reside in all other MS. The United Kingdom attempted to deny both mother and baby residence rights, and the case came before the Court of Justice. The Court's decision was as follows:

> In circumstances like those of the main proceedings, Article 18 EC and Council Directive 90/364/EEC of 28 June 1990 on the right of residence confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.[211]

This judgement meant that a child born on Irish soil acquires an EU-wide right of residence for itself and its primary carer, even if the carer does not have EU citizenship. Normally this right only applies outside Ireland, since an Irish citizen within Ireland falls outside the scope of EU law. However, in recent years the ECJ has extended the rights of citizens and their families to the situation where they return home after a period abroad.[212] Thus Catherine Zhu might be able to take her mother to live with her in Ireland, even though domestic Irish law would not automatically grant the non-European parent residence rights. Therefore, Ireland, by granting nationality to the children born on its territory, is

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211. Case C-200/02, Kunqian Catherine Zhu & Man Lavette Chen, [2004] ECR I-09925.

212. Case C-413/99, Baumbast, [2002] ECR I-7091; Case C-370/90, Singh, [1992] ECR I-4265; Case C-109/01, Akrich, [2003] ECR I-9607.

moving towards an obligation to allow their parents long-term residence, which, in turn, makes acquiring citizenship easier, because people with "Irish associations" are usually considered for naturalisation after 3 years (instead of 5) of legal residence in the state.[213] This fact results from the right ascribed to the Minister for Justice, Equality and Law Reform, namely the power to waive one or more of the conditions for naturalisation in certain circumstances, for instance due to "Irish associations".[214]

The Irish government realised that its unconditional *ius soli* principle in the view of the above-mentioned Court's decision made access to EU citizenship even easier. It admitted that this situation could be abused by people coming to Ireland solely to obtain Irish citizenship for their children, which would give them the whole EU. This in turn could "cause difficulties in Ireland's relations with other member states."[215] Hence, the transformation of nationality law was proposed.

Nevertheless, the opponents of the suggested amendment denied the need to change their citizenship legislation due to the EU membership.[216] They emphasised that there had never been a formal request from Europe, or any pressure to alter their nationality law.[217] While the former is definitely true, the latter is disputable. Indeed, according to Community law, citizenship legislations are the sole preserve of the Member States,[218] and the status of EU membership cannot be treated officially as a factor determining basis for Irish citizenship. However, informal pressures exist. No one can prevent the MS from assessing other nationality laws and expressing their wishes about desirable trends of changes in the light of their own interests. The point is that due to the numerous bonds among all EU countries, some of them prefer not to ignore the opinions of their co-members, because they are aware that constituting one structure they should maintain good relationships. Even if it is simply because they may need help of another country, which will be undoubtedly more willing to lend a hand, knowing that the country asking for a favour voluntarily followed their "advice" earlier. These are most simple, one could say even primitive, rules of reciprocal relations,

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213. Irish Nationality and Citizenship Act 1956. As amended by the Irish Nationality and Citizenship Act 1986 (No. 23 of 1986), the Irish Nationality and Citizenship Act 1994 (No. 9 of 1994) and the Irish Nationality and Citizenship Act 2001 (No. 15 of 2001), pt. III, para. 15c and 16a-e, *available at* www.justice.ie.

214. *Id.* pt. III, para. 16.

215. Ryan, *supra* note 133, at 188.

216. www.activelink.ie.

217. *Id.*; www.iccl.ie.

218. *See supra* Part IV.A.1.

but the truth is that the rule "one good turn deserves another" still functions in the modern world.[219] Thus, although there are no legal provisions to harmonise citizenship legislations, some of the MS may choose to align them with current EU trends. The Irish case can be viewed as an example of this.

Another controversial point about the proposed amendment was the impact on the integration of non-nationals into the Irish society. The government was convinced that the "integrity" of Irish citizenship would be preserved, while its abuse would be prevented.[220] As the ministers argued, not the excessive number of immigrants was worrisome, but the fact that the constitutional provisions were used in another way that they intended.[221] This argument was attacked by the opposition. First of all, the attention was drawn to the fact that the proposed amendment was aimed at children—they were the ones deprived of adopting nationality at birth, not at their parents, whose right to residency or citizenship was not altered.[222] The proposal meant classifying children according to their parents' status, which would violate the principle (deeply rooted in Irish law) that all children are born equal and should be cherished equally.[223] But the truth is that limiting the number of children entitled to Irish citizenship reduced the number of third-country citizens applying for Irish nationality, because the process of naturalisation lasts longer when no "association" to an Irish citizen can be shown.[224]

Moreover, the government is accused of undermining the integrity of the constitution itself, because according to the proposed amendment a new distinction would have to be introduced, namely between members of the Irish nation and Irish citizen nationals.[225] This is undoubtedly confusing, but necessary, because Article 2 of the Irish Constitution, saying that everyone has a birthright to be part of the nation, would still guarantee all children born in Ireland to be members of the Irish nation. Yet according to the amendment, the children, whose parents are not Irish, would not acquire citizenship or nationality automatically. Their parents would be required to prove their genuine link to Ireland. This might be established by being a legal resident in Ireland for three out of

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219. M. LEWICKA, PSYCHOLOGIA SPOSTRZEGANIA SPOŁECZNEGO 23-31 (1985); A. ELIOT, PSYCHOLOGIA SPOŁECZNA: SERCE I UMYSŁ 40-49 (1997).

220. Ryan, *supra* note 133.

221. *Id.*

222. A. REIDY, IRISH TIMES (2005), *available at* www.ireland.com.

223. *See* www.iccl.ie.

224. Irish Nationality and Citizenship Act 1956, pt. III, para. 16.

225. www.activelink.ie.

the previous four years immediately before the birth of the child.[226] In other words, introducing Article 9.2.1 may be described as devaluing the Irish Constitution by making Article 2 meaningless, because the membership of the nation became, in practice, a completely empty notion, since no longer attached to nationality.[227] This requirement of connection with Ireland was indicated as an example of inconsistency, given the possibility of adopting nationality through descent for at least two generations.[228] In fact, third-generation Irish descendants from various places all over the world have claimed their Irish citizenship, which enabled them to travel and work in the whole EU, even though they did not have any personal connection with Ireland.[229] This, however, did not worry other MS so much, because their citizenship legislations are mostly based on the *ius sanguinis* principle. So, for them it is natural that even third-generation descendants, usually with no connection to the country of origin, will still possess their passports.

Another issue, which divided the proponents and the adversaries of the proposed amendment was the meaning of the reform for Ireland and the Irish people. The government claimed it was simply closing a loophole, preventing the abuse of birthright citizenship.[230] This argument could not be accepted by the opposition—the proposed reform could not be treated as a technical amendment.[231] On the contrary, it was to completely reverse the traditional, republican basis on which citizenship of the country had been bestowed since the foundation of the state.[232] The prohibition to assign equal rights to every child at birth, guaranteed by the Article 2 of the Irish Constitution, was considered by the opposition to be the most significant change to nationality legislation ever.[233] Restricting the right to acquire Irish citizenship only to children who have at least one parent meant switching from *ius soli* to *ius sanguinis* principle. The opposition questioned the need for the proposed 180-degree change in Irish citizenship law, particularly in the light of the 2000 Supreme Court ruling that "the constitution should be blind to pedigree", while the analysed constitutional amendment would introduce

226. www.oasis.gov.ie.
227. www.iccl.ie.
228. Ryan, *supra* note 133, at 189.
229. www.activelink.ie and www.iccl.ie.
230. Helm, *supra* note 189.
231. REIDY, *supra* note 222.
232. *Id.*
233. www.iccl.ie.

the bloodline criterion as the basis of granting Irish nationality.[234] The adversaries of the reform also strongly criticised the rush to implement it.[235] They argued that changing the constitution, by removing the basis on which Ireland had granted citizenship since 1922, entailed deep implications for the Irish heritage and identity.[236] Therefore, it should not be done in a hurry, especially that there was no emergency to justify the haste.[237] Such a fundamental reform deserved a thorough process of consultation and discussion on the whole subject, not an immediate call for the referendum.[238]

Finally, the constitutional amendment was approved on 11 June 2004 through a referendum, by an overwhelming majority (79% to 21%).[239] This fact was quite surprising in the light of the 1998 referendum, where the Irish people, also by a vast majority, voted for the inclusion of unconditional *ius soli* into the Irish Constitution.[240] Only six years later they invalidated their own decision. Accepting the constitutional amendment was followed by adopting the new "Irish Nationality and Citizenship Act 2004", which confirmed that the children born of non-national parents, on or after the 1 January 2005, would no longer acquire Irish nationality automatically.[241]

4. Conclusions

In Ireland, until the end of 2004, all children born on its territory were entitled to Irish nationality. As the result of the constitutional amendment proposed by the Irish government and approved by the Irish people in the national referendum, the principle of unconditional *ius soli* ceased to exist. New nationality laws imposed certain restrictions on acquiring Irish citizenship at birth, namely forced non-national parents to prove their genuine link to Ireland.

As it was shown, the government presented several reasons for the need of transforming nationality law. Although all of them were seriously undermined by the opposition, the constitutional amendment was finally approved. Even though some people may not be convinced why the Irish voted "yes" in the referendum, the facts are striking. The

234. *Id.*; B. Morrison, There Is Nothing To Justify Citizenship Panic, *available at* www.ireland.com.
235. Morrison, *supra* note 234.
236. www.activelink.ie.
237. *Id.*
238. Ryan, *supra* note 133, at 189.
239. *Id.* at 190.
240. www.activelink.ie.
241. www.oasis.gov.ie.

government failed to provide the exact numbers of the non-national children born to the parents, who on this bases were granted residence or citizenship. The negative impact on integration of non-nationals into the Irish society was widely emphasised. Introducing this amendment into the constitution undoubtedly conflicted with the traditional Irish citizenship legislation. In these circumstances, the significance of the pressure from other MS comes to the fore.

The transformation of Irish nationality law was obviously not imposed by EU law—it was definitely the result of the democratic process, carried in the country, which holds legal sovereignty in the field of citizenship policy. Nevertheless, the whole debate before the referendum indicates that it was a response to some indirect pressures from other MS, concerned about ease of acquisition of Union citizenship through the principle of unconditional *ius soli* applied in Ireland. Moreover, the *Chen* case showed how secondary EU law (in a form of an ECJ ruling) could encourage, even thought it did not require, the amendment of national legislation in one of the Member States.

D. German Case

Germany has always been characterised by very restrictive nationality laws. Despite being a common immigration destination, it was applying an exclusive policy, based on an ethno-cultural model,[242] for most of the twentieth century. However, the recent liberalisation of certain conditions under which German citizenship can be acquired, shows Germany adjusting to the European mainstream.[243] It will be argued that this reform was underpinned by the deteriorating relative position of long-term third-country nationals after the creation of Union citizenship. To prove this thesis, the way in which non-EU nationals were affected by establishment of European citizenship will be described. This will be followed by a presentation of the main assumptions of German nationality law before the 1990s amendments in order to emphasise the transformation it has experienced. Then, particular attention will be given to the reform approved in 1999. Thorough examination of the changes introduced will show that the process of European integration informally contributed to improving the situation of German immigrants by facilitating acquisition of German citizenship and hence reducing the discrepancies within German society.

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242. Lemke, *supra* note 140, at 1.
243. Hansen & Weil, *supra* note 139, at 14.

1. Impact of EU Citizenship on Third-Country Nationals

The effect which introducing Union citizenship had on the situation of third-country nationals, can be best explained through the example of Germany, where immigrants constitute 10% of the population of which 75% come from non-EU countries,[244] and for whom access to German nationality (and therefore EU citizenship) was at that time the most difficult among all the MS. Union citizenship with all its entitlements increased the discrepancies between MS nationals and non-EU citizens. As O'Leary and Tiilikainen put it, "the distinction between citizens of the Union and third country nationals has become sharper . . . since Union citizenship has acquired the form of a discriminating landmark for the purpose of difference in treatment".[245] Indeed, European citizenship, which was designed to foster the integration process, definitely undermined the status of non-EU citizens within the Community.[246] This became particularly visible between EU and non-EU migrants residing in one of the MS. Every new privilege enshrined in EU citizenship (one must bear in mind it is a dynamic concept)[247] puts non-EU migrants in a worse position.[248] The negative impact of European citizenship on third-country residents was neglected while creating the notion of EU citizenship.[249] This weakness of Community citizenship drew attention to the access of non-EU nationals to citizenships of particular MS. If Community citizenship was reserved only for EU nationals, then for the purpose of the real integrity of the EU societies, relative ease of acquisition of national citizenship by long-term residents became important. As Hansen and Weil noted, "states are generally unwilling to tolerate, generation after generation, large numbers of non-citizens without an entitlement to citizenship."[250]

In this context, strict German nationality law obviously came under criticism, in particular with reference to the position of long-term residents from third countries. Attention was drawn to the fact that they contributed to the welfare of the Community and therefore should enjoy the same liberties as EU citizens.[251] Especially, the right to participate in

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244. Figures from 1999 provided by Lemke, *supra* note 140, at 1.

245. O'LEARY & TIILIKAINEN, *supra* note 31, at 69-70.

246. *See also* Meehan, *supra* note 44, at 166-69.

247. *See supra* Part II.B.

248. C. JOPPKE, IMMIGRATION AND THE NATION-STATE: THE UNITED STATES, GERMANY, AND GREAT BRITAIN 191 (1999).

249. *Id.*

250. Hansen & Weil, *supra* note 139, at 12.

251. LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 30, at 104.

political life was stressed, because this makes an individual a real participant in the polity.[252]

Full inclusion becomes particularly important in the case of second- and third-generation immigrants, when "individuals are raised in the society and subject to socialising influences of language, school, peers, and so on."[253] In Germany millions of Turks, who lived there for two or three generations, were denied the right to become German citizens. Maintaining the status of these immigrants as "foreigners" and refusing them citizenship seemed to be unjust. "The prospect of a self-perpetuating minority forever closed out of majority society" can be perceived as a threat to the future relationship between these groups. A lack of attempts to improve their position as long-term residents (e.g., by conferring full civil and social rights) will result in their exclusion from full membership in society. John states that "the quest for "special group status" for foreigners was "socially divisive".[254] Instead of creating separate groups and ascribing them with certain privileges, efforts should be directed towards facilitating acquisition of German citizenship with all the liberties and responsibilities it entails.

2. Essence of Former Nationality Law in Germany

Where does this reserved attitude towards immigrants in Germany stem from? The restrictive nationality law dates back to 1913, when it was introduced for the first time at the national level.[255] As Lemke phrased it, "the reality of the imperial state outflanked the republican notion of citizenship."[256] At that time, the main goal of citizenship legislation was to include all Germans living abroad and exclude the increasing number of immigrants.[257] Hence, the German notion of citizenship was based on the principle *ius sanguinis*. This law remained in force until 1999. The Naturalisation Rules, introduced in 1977, which prescribed absolute state discretion in naturalising foreigners,[258] only confirmed unwillingness of the German state to ascribe even permanent residents with German citizenship. The provisions that "the granting of German citizenship can be only considered if there is a public interest in [it]" and "in German legal system resident aliens enjoy far-reaching

252. *See supra* Part II.A.2.
253. Hansen & Weil, *supra* note 139, at 4-5.
254. *Cited in* JOPPKE, *supra* note 248, at 199.
255. Lemke, *supra* note 140, at 1-7.
256. *Id.* at 3.
257. *Id.* at 4.
258. JOPPKE, *supra* note 248, at 201.

rights and liberties anyway",[259] which resulted in the lowest naturalisation rate in Europe,[260] explain the German position in this matter.

Only after the collapse of communism and unification of German state, did a more liberal reform movement emerge.[261] The unsuccessful attempts to integrate millions of immigrants, by preserving their "alien" status, finally led to a different discourse on citizenship and migration.[262] The need for more liberal concept of citizenship was widely recognised. The quest for transforming nationality law was also stipulated by introducing EU citizenship,[263] which entailed mutual comparison of citizenship legislations. Although they remained in the MS' discretion, Germany received evident signals that it should liberate its restrictive policy. The pressures urging Germany to "modernise" their nationality legislation was the result of the natural need to harmonise these laws. In response, the German government in 1998 admitted that too many German inhabitants were not entitled to German citizenship and started to prepare a "substantial reform".[264]

3. Implications of the 1999 Citizenship Reform

After several years of controversy and debate, a new law on citizenship was finally introduced on 1 January 2000. The most significant changes included departure from relying solely on the *ius sanguinis* principle and softening conditions for naturalisation.

As concerns children of foreign nationals born in Germany, they gained the right to acquire German citizenship automatically at birth under certain restrictions. First, at least one parent must have resided lawfully in Germany for at least eight years. Secondly, that parent must have possessed an unlimited residence permit or special residence permission for at least three years prior to the child's birth. These provisions applied to the children born after 31 December 1999, but special rules for the children born in the 1990s were provided in a transition agreement, allowing the granting of citizenship to them if application was submitted before 31 December 1999.

This is obviously a remarkable step towards facilitating access to German citizenship—to illustrate its significance it is enough to mention

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259. *Id.*
260. *Id.* at 202.
261. Lemke, *supra* note 140, at 5.
262. Hansen & Weil, *supra* note 139, at 4.
263. Lemke, *supra* note 140, at 4; VERHOEVEN, *supra* note 23, at 302.
264. H. Hoffman, *The Reform of the Law Citizenship in Germany: Political Aims, Legal Concepts and Provisional Results*, 6 EUR. J. MIGRATION & LAW 197 (2004).

that for over a million Turkish immigrants the door to German nationality stood open. One must bear in mind, however, that the requirements concerning the residence permit at the moment of introducing the new law could not be fulfilled by a half of the Turkish immigrants. The limited effects of the new law, which undoubtedly improved the position of long-term residents, indicate the need for the future changes to ensure the full integration of German society. This, however, requires acceptance of ethnic and cultural plurality as a civil political norm,[265] which seems still to be a problem for many Germans.

Importantly, the children, who benefit from the *ius soli* principle, simultaneously acquiring nationality of their parents, between 18 and 23 have to opt for one of their nationalities, because the principle of avoiding dual nationality is still applicable. Although general acceptance of dual citizenship was envisaged in the first draft of the new legislation, it was refused by the CDU/CSU coalition, which gained advantage over the SPD at the stage of approving it in the parliamentary institutions. Holding two nationalities is possible only as an exception. Although the scope of exemptions was moderately extended, plural nationality is still not a legal right. Because the possibility to hold dual nationality has beneficial effects on naturalization and integration process, its prohibition "raises the strongest doubts over the capability of the new provisions to effectively depart from the ethno-cultural notion of citizenship."[266]

Turning to naturalization, an obligatory resident period was reduced from fifteen to eight years, again under certain conditions. One of them refers to the necessity of renunciation of other nationalities (analogically to the *ius soli* requirement described above). Other prerequisites are, for instance, the sufficient knowledge of German language and acceptance of free democratic basic order laid down by the German Constitution. Although the term "sufficient" may be disapproved due to its ambiguity, and in many cases it turned out to be the main obstacle in obtaining citizenship, the demand to possess a communicative command of German, in terms of integrating foreigners into the German society, cannot be criticised. Similarly, loyalty to the constitution of the country where one aspires to become a citizen cannot raise any objections. What is also worth mentioning is that the new law reduced fees for naturalization and made the whole procedure easier.[267] Also the conditions for the spouses of German citizens were relaxed—the

265. Lemke, *supra* note 140, at 5.
266. *Id.*
267. *Id.*

(foreign) spouse must have lived in Germany for at least three years (instead of five), and the couple must have been married for at least two years (instead of three). Moreover, in special cases, even people who have lived in Germany for a shorter period than eight years may try to obtain German citizenship on a discretionary basis. Significantly, when the new legislation came into force, in some towns the number of applications for naturalization doubled or even tripled,[268] leading to an average raise of naturalization rate of almost 30%.[269] Interestingly, in nearly every second case new German citizens were allowed to retain nationality of their country of origin.[270]

The new naturalization rules still place Germany among the countries relatively closed to immigrants. Strong national voices to protect German society from including high numbers of third-country nationals reveal an attachment to the ethno-cultural model of citizenship. However, adopting the new law should be viewed as a remarkable step to liberalization resulting from following the EU trends.

4. Conclusions

In conclusion it has to be noted that Germany, as a home to the largest immigration population in the EU and a country with the most restrictive nationality legislation, was put under pressure to relax citizenship regulations due to the establishment of Union citizenship, which, by ascribing MS nationals with the new privileges, deteriorated the relative situation of all non-EU residents residing in the European Community. Despite strong attachment to the ethno-cultural notion of citizenship, the German government managed to adopt more inclusive provisions concerning nationality. The new citizenship law, which came into effect on 1 January 2000 marked a move towards approaching more liberal legislations in the EU.

Introducing the *ius soli* principle in German nationality law for the first time combined with significant relaxation of naturalisation rules signalled a landmark decision in the country's history. By adopting a more inclusive concept of citizenship, the German authorities contributed to integrating millions of immigrants living in Germany. According to the new law, a large part of the Germany's population "now has the opportunity to participate in and help shape social and political issues with all inherent rights and obligations."[271] The proponents of the reform

268. www.german-embassy.org.uk.
269. Hoffman, *supra* note 264, at 202.
270. *Id.*
271. www.german-embassy.org.uk.

have been under the strong influence of the MS with more tolerant citizenship legislations, especially concerned with the problem of integrating long-term residents into the EU societies. Quite meaningful in this respect is the fact that on the official website of the German embassy the reform of Germany's citizenship is described as "harmonisation with European standards",[272] which clearly indicates that a national law was amended to fulfil "unwritten" requirements of the European Community.

E. Directive on Third-Country Long-Term Residents

As was shown in the previous Parts, formally independent national citizenship policies may be indirectly and unofficially affected by the other MS. However, it is not only the MS' governments who attempt to influence legal provisions concerning acquiring national citizenship in different EU countries. We can also observe some pressures on amending the nationality laws from the EU level. This phenomenon can be very well explained through the example of the "Directive on the status of third-country nationals who are long-term residents" issued by the Council in 2003.[273] This act obliges all the EU states to harmonise the conditions of granting non-EU nationals with the status of long-term residents. By determining the rights of third-country citizens, admitted mainly on the basis of the length of residence, the EU indirectly interferes with MS nationality policies. As it will be argued, imposing the common rules applying to the long-term residents can be perceived as an attempt to deprive the national authorities of their autonomy in this sphere. Importantly, the fact of implementing Union citizenship considerably contributed to adopting the above-mentioned Directive. Does it mean that the independence of the MS in deciding who can become their nationals, guaranteed by the EC Treaty,[274] is about to cease?

This Part aims to draw attention to the fact that the EU institutions indirectly influence MS' rules on obtaining national citizenship. Firstly, the relation between Union citizenship and the "Directive on the status of third-country nationals who are long-term residents" will be shown. Then, the main provisions of the Directive will be described, followed by presenting the different positions on harmonising the immigration and nationality laws represented by the EU states. Finally, it will be argued that the Directive's aim of approximating the rights of non-EU and EU

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272. *Id.*

273. Council Directive 2003/109/EC of 25 Nov. 2003 (concerning the status of third-country nationals who are long-term residents).

274. *See supra* Part IV.A.1.

citizens may be interpreted as a way to exert pressure on the countries with restrictive nationality policies to relax their legislation in order to foster full integration of their societies.

1. The Directive as a Response to Union Citizenship

Union citizenship, aimed at facilitating migrant integration, resulted in approximating the rights of MS nationals living in another EU country to the rights enjoyed by the citizens of the host country, whilst at the same time it deepened the gulf between all EU citizens and third-country residents.[275] The institution of EU citizenship was widely criticised for undermining the status of non-EU migrants. Perchinig drew attention to its hierarchical character, which he perceives as the significant weakness.[276] This aspect was also brought up by Withol de Wenden, who described the situation after implementing Community citizenship as follows:

> At the centre we find the national of the State where he is living, then the Europeans whose rights are reciprocal with those given to foreigners in other European states, then the long term non-European residents, the non-European non-residents, the refugees, and at the margins, the asylum seekers and the illegals.[277]

This description faithfully rendered the real situation. At the same time, however, it raised controversies concerning such a state of matters. Was it unfair and therefore should the situation be improved by eliminating the discrepancies between inhabitants of the EU holding different status, or on the contrary, was it just and should be accepted? The opinions were divided—some countries believed that this situation required "a deep reconsideration of European policy on immigration",[278] whilst others, especially those described as "old guest-workers states",[279] expressed resolute opposition to harmonise this sphere at the EU level. The widest debate has been on the relation between MS citizens and third-country *long-term* residents. Although this issue was at stake since the very beginning of the European Community,[280] the discussion flared up after the establishment of Union citizenship. The distinct cacophony

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275. *See supra* Part IV.D.1.

276. B. Perchinig, *EU Citizenship and the Status of Third Countries Nationals* 11 (EIF Working Paper Series), www.europa.eu.int.

277. As quoted by Perchinig, *id.*

278. An open letter "About the Green Paper on Immigration" signed by numerous human rights and immigration organizations, available at www.coordeurop.org.

279. Perchinig, *supra* note 276, at 9.

280. BARNARD, *supra* note 15, at 433.

between the EU members' positions seemed to prevent a compromise,[281] especially given that some of them were not even willing to take part in negotiations.

The advocates of equalising the position of EU and non-EU citizens proclaimed the need for a legal act, which would grant third-country nationals with the rights so far enjoyed exclusively by the MS nationals. This issue was raised during the Tampere Summit, where the Council stressed that the decisions on "the approximation of national legislation on the conditions for admission and residence of third country nationals"[282] should be taken immediately. What is more, it endorsed the objective that "long-term legally resident third country nationals [should] be offered the opportunity to obtain the nationality of the Member State in which they are resident."[283] That clearly implied the will to influence conferral of national citizenship, which is incompatible with provisions of the EC Treaty and the Declaration on Nationality. These decisions also indicate a strategic advantage gained by the proponents of harmonisation of immigration and nationality legislations. Despite the objections of some MS, the Commission managed to issue a Communication on Union immigration and integration policy in accordance with the attitudes which dominated the Tampere Summit.

The Communication acknowledged the demographic need for immigration and proposed establishing common rules on admitting labour migrants on the territory of the EU.[284] Moreover, it proposed the approximation of their legal status with those of EU nationals by introducing the concept of civic citizenship.

> The legal status granted to third country nationals would be based on the principle of providing sets of rights and responsibilities on a basis of equality with those of nationals but differentiated according to the length of stay while providing for progression to permanent status. In the longer term this could extend to offering a form of civic citizenship, based on the EC Treaty and inspired by the Charter of Fundamental Rights consisting of a set of rights and duties offered to third country nationals.[285]

Notwithstanding the positive atmosphere of Tampere Summit, which resulted in the issuing the above-mentioned Communication, the Council failed to adopt any hard law acts. Several proposals for Council

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281. Perchinig, *supra* note 276, at 6.

282. Tampere Presidency Conclusions, 15 and 16 Oct. 1999

283. *Id.* para. 21.

284. Perchinig, *supra* note 276, at 9.

285. Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy, COM (2000) 757 final: 21, http://www.europa.eu.int.

Directives on third-country citizens published by the Commission between 1999 and 2001 were significantly watered down in the subsequent negotiations.[286] The directive on entry for employment was finally abandoned as the result of the strong opposition of Austria and Germany.[287] However, those regarding the status of long-term residents and the right to family reunification were finally approved in 2003, which means that the MS managed to agree that common immigration rules, at least to a certain extent, are necessary.

2. Provisions of the Directive

The Council directive on third-country nationals who are long-term residents aims at achieving a goal set during the Tampere Summit, namely approximating their status to that of MS nationals by granting them a set of uniform rights, which should be as close as possible to those designed to EU citizens.[288] In the situation of non-EU immigrants it should contribute to their integration into host societies, which is indispensable in "promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty."[289] The truth is that the position of non-EU long-term residents had varied enormously among the MS, which had been believed to have a negative impact on their political and social integration in Europe.[290] Importantly, harmonisation of the rules concerning acquisition of long-term resident status cannot hinder the access to it, because the MS who apply more favourable conditions are allowed to retain them.[291]

The main prerequisite for the status of long-term resident is the length of stay in a given MS—non-EU immigrants must "have resided legally and continuously within its [EU] territory for five years immediately prior to the submission of the relevant application."[292] Another condition concerns the "adequate resources", which allow to support oneself and their family as well as possessing the sickness insurance, which is hold by the citizens of the host MS.[293] Third-country nationals wishing to acquire the status of long-term residents must also prove that they do "not constitute a threat to public policy or public

286. J. Apap & S. Carrera, *Towards a Proactive Immigration Policy for the EU?* (CEPS Working Document No. 198, 2003), http://www.ceps.be

287. *Id.*

288. Council Directive 2003/109/EC of 25 Nov. 2003, para. 2.

289. *Id.* paras. 4, 12.

290. Perchinig, *supra* note 276, at 5.

291. Council Directive 2003/109/EC of 25 Nov. 2003, para. 17.

292. *Id.* para. 6 and art. 4(1); for derogations, see article 4(2-3).

293. *Id.* para. 7 and art. 5(1).

security."[294] What is worth mentioning, the application cannot be refused on economic grounds.[295] The Directive also contains detailed procedures for the assessment of the applications and issuing the long-term residence permits.[296] It also defines the cases in which the status might be withdrawn.[297]

Attention should be drawn to the fact that the above conditions apply not only to the immigrant who is employed or self employed.[298] Parallel to Union citizenship, which recognised all MS nationals regardless of their economic status, the Directive refers to all migrants even if they do not exercise any economic activity.

As mentioned earlier, the provisions enshrined in the Directive should create favourable conditions for social and economic cohesion. The rights accorded to the long-term residents ensure them equal treatment with the nationals of the particular EU country in a wide range of cases.[299] The most meaningful is freedom of movement within the whole European Community, which allows to settle in any MS and assures closer position to that hold by migrants from other EU countries. Applying similar conditions to EU and non-EU migrants undoubtedly forges a relationship between them. Besides, the conferred entitlements are believed to foster the "attainment of the internal market" and stimulate desirable mobility on the Community's employment market.[300]

3. Implications of the Directive

The Directive, as the whole process of harmonisation, has its advocates and adversaries. Approximating the position of third-country residents to that of MS nationals is obviously supported by the proponents of the concept of Union citizenship based on the place of residence. Moreover, the countries which lead open immigrant policies also welcomed the decision of the EU, which improved the situation of non-EU citizens in the countries with restrictive immigration laws. Ireland, for instance, recognizes the need for "a flexible system, balancing the interests and requirements of Member States on one hand

294. *Id.* para. 8 and art. 6.
295. *Id.* para. 9.
296. *Id.* paras. 10-11 and arts. 7-8.
297. *Id.* arts. 9-10.
298. *Id.* para. 19.
299. *Id.* art. 11.
300. *Id.* para. 18.

and recognising and protecting the rights and interests of migrants."[301] The Immigrant Council of Ireland (ICI) argues that all MS should admit that the EU has always been and will be a place of immigration,[302] and this fact should not be treated as a threat, but as the normal course of events. Recognising the inevitability of the considerable flows of immigrants in the forthcoming decades should automatically lead to considering the regularisation of those who already reside in the EU as highly desirable.[303] The ICI supports the Commission's opinion that coherent immigration policy and "synergies between immigration, integration and employment policies at all levels and across all disciplines"[304] are indispensable as far as the full integration of the EU societies is concerned.

Although this line of argumentation is difficult to undermine, the fact of harmonisation of the rules concerning third-country nationals in all MS raises controversies. Some EU countries, especially those with strict immigration laws, are not willing to comply with common rules. Why do they object? Because they perceive the Directive as an attempt to violate their sovereignty in shaping national citizenship policies. It will be argued that the Directive indirectly interferes with the MS autonomy in establishing nationality legislations.

First and foremost, the Directive introduces a set length of duration, which entitles non-EU citizens to the status of long-term residents. Before that, according a particular status to immigrants fell completely under national authorities' competence. In this aspect, the Directive has deprived the MS of the right to decide about the position of third-country nationals. What is more, the obligation to recognise them as long-term residents after five years of residence indirectly influences decisions concerning national citizenship. In some MS access to national citizenship is contingent on a long-term residence permit. Foreigners who aspire to nationality, e.g., in Germany, the Netherlands or the United Kingdom may be naturalised only if they possess a permanent residence permit.[305] However, even in the countries which do not require this document to grant national citizenship, it will undoubtedly increase creditability of candidates for naturalisation. Holding a long-term residence permit signifies a 5-year stay in the given country, which

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301. *European Commission Green Paper on an EU Approach to Managing Economic Migration, Submissions on Behalf of the Immigrant Council of Ireland*, Dublin 15th Apr. 2005, at 2, *available at* www.europa.eu.int [hereinafter EC GREEN PAPER].

302. *Id.* at 16.

303. *Id.*

304. *Id.* at 13.

305. www.nrc.nl; www.zuwanderung.de; www.workpermit.com/uk.

facilitates proving a given period of duration indispensable for acquiring national citizenship. Besides, long-term residents often enjoy rights very close to those exercised by the nationals, so conferring the status of a citizen on them does not entail as significant changes in their position as in the case of non-long-term residents. This fact gains importance when we take into consideration the objections of some MS nationals to improving the situation of third-country nationals too radically. In other words, the chances of becoming a MS citizen increase with the fact of acquiring the status of long-term resident.

This regularity is supported by the ICI, which claims that permanent residence should be followed by "access to citizenship of the Member States in which a (labour) migrant has been legally resident for a significant length of time."[306] Ireland considers harmonising the periods of residence enabling application for citizenship in all MS as crucial. They clearly state that it is the duty of the EU to develop European immigration policy by taking over some of the competences enjoyed by the national authorities, and the countries should acknowledge that the whole Community is a region of immigration; therefore, they should not insist on maintaining national sovereignty in this area.[307] However, if we take into consideration the agreement achieved in Maastricht, does the EU have a right to put forward such a demand? This Article will not try to answer this question. Its emergence, however, shows that the Directive exerts some influence on amending national citizenship regulations.

Another hint suggesting the desirable attitude towards immigrants that all MS should adopt can be seen through emphasising the fact that "economical and social cohesion" cannot be achieved without integration of long-term residents.[308] With such a statement the Council indicates that the EU countries, which aim at economical prosperity and care about fully integrated societies, should follow its guidelines. Obviously the receivers of this hidden message are those MS who lead restrictive nationality policies. The EU indirectly tries to convince them that relaxing strict regulations will bring them the benefits. Apart from the "economical and social cohesion" it will contribute to promoting "mutual confidence" between the MS.[309] Thus, the "anti-immigrant" states should no longer resist general EU trends.[310]

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306. EC GREEN PAPER, *supra* note 301, at 9.
307. *Id.* at 4, 12.
308. Council Directive 2003/109/EC of 25 Nov. 2003, para. 7.
309. *Id.* para. 17.
310. *See supra* Part IV.A.2.

4. Conclusions

The "Directive on the status of third-country nationals who are long-term residents" introduces uniform conditions for granting immigrants with this status, ensuring them equal treatment throughout the whole European Community. The issuing of this act may be interpreted as compensation for implementing Union citizenship, which by conferring certain entitlements on MS nationals, deteriorated the relative position of non-EU nationals. The Directive aims at forging links between Union citizens and third-country immigrants.

Harmonisation of the rules concerning long-term residents has exerted an impact on MS nationality legislations. One may wonder whether the EU Council had such an intention while adopting the Directive, or was it perhaps focused exclusively on improving the position of third-country nationals. However, it seems highly improbable that the Council did not realise the consequences, the Directive could have on granting national (and therefore Union) citizenship. On the bases of the above discourse it may be claimed that the EU was not satisfied with endowing long-term residents with a set of rights enshrined in the Directive; hence it indirectly pressured the MS to facilitate permanent migrants access to national citizenship. This action suggests that the EU aims at ensuring long-term residents the status of Union citizenship, but is aware that it does not hold the adequate competence.

Therefore, the Council put such a strong emphasis on the significance of non-EU nationals' presence in the Community (as they contribute to the common wealth), and the Directive can be seen as a signal that including permanent residents into societies as the full members is required. Notwithstanding the provisions agreed on in Maastricht, the EU aspires to gain control over the setting of conditions determining access to national citizenship. Although no official recommendations have been issued, the implicit hints do not leave any doubts about the desirable effects that the Council seeks to achieve: the MS with restrictive citizenship policies should facilitate integration of permanent non-EU residents. Adjusting to the EU trends is presented as a golden means to ensure better functioning of the nationally diverse societies as well as the whole Union. For the first time an official Community act has clear implications for the desirable amendments in nationality legislations of some MS.

These indirect, but clear suggestions were recognised by both advocates and adversaries of the harmonisation of immigration and

nationality regulations. An attempt to trigger a redesign of national citizenship policies was welcomed and supported by the countries traditionally open to migrants and highly criticised by the states attached to national homogeneity. The reaction of both sides confirms the awareness of all MS that the EU institutions are becoming more and more involved in shaping citizenship policies. The question arises whether they will continue sending hidden messages, which can be either followed or neglected by MS authorities, or they will begin using more explicit means.

V. CONCLUSIONS

At the outset it must be stressed that the essence of the European Union lies in a permanently ongoing process of integration. The European Economic Community, set by six countries in order to create an internal market, evolved to the Union of the twenty-seven Member States cooperating in a number of various domains. In other words, coordination of the economic sphere, due to "spillover effects",[311] entailed the need to harmonise further areas. The expanding scope of "European areas of common concern" resulted in transferring consequent competences from the national to the EU level, which in turn led to the increasing interdependence of MS national policies. As subsequent areas are losing an exclusively national character, Europe is becoming a more and more consolidated polity.

A meaningful moment in European integration process was introducing Union citizenship by the Maastricht Treaty in 1992. Notwithstanding the attempts to regard the institution of EU citizenship "as so slight as . . . almost meaningless",[312] it in fact stays at the heart of upheavals reshaping European politics.[313] As shown in the beginning of Part IV,[314] the idea of Community citizenship, which is conditional upon MS nationality, contributed to the growing interdependence of MS national citizenship policies. The Spanish case illustrates perfectly that the decisions concerning citizenship taken by one EU country, due to the freedom of movement inherent in Union citizenship, affect other members of the Community.[315] This situation created a need to harmonise national legislations, but most of the MS strongly opposed delegation of powers in this domain to the EU, because nationality policy is associated

311. *See supra* Part III.A.
312. Meehan, *supra* note 44, at 172.
313. *See supra* Part II.B.2.
314. *See supra* Part IV.A.
315. *See supra* Part IV.B.

with state sovereignty. In this regard, evolution of citizenship at the EU level interfered with the traditional understanding of this notion. For centuries citizenship belonged to the hard core of state sovereignty. Indeed, as Maas pointed out, "*modern* citizenship would have no meaning without the existence of states; conversely, states would not be states without citizens."[316] Hence, the MS retained the autonomy in conferring national citizenship, and the status of EU citizen remained strictly bound to MS nationality.

Nevertheless, the debate on citizenship was launched and different proposals on *post-modern* concept of citizenship emerged. As Soysal suggested, "it is essential to recognise that national citizenship is no longer an adequate concept upon which to base a perceptive narrative of membership".[317] Although the relationship observed between citizenship and identity[318] may indicate the simplicity of enhancing collective identity in any group just by granting a set of certain rights, the reality proves to be much more complex. The main obstacle is the fact that the status of citizen is by many still perceived as reserved exclusively for a member of the nation-state, which remains the main level of political affiliation. Hence, the notion of Union citizenship itself caused general apprehension among the Member States.[319] Despite legal provisions, acquiring EU citizenship is believed to interfere with national citizenship. Therefore, if national citizenship is considered equivalent to national identity, then adopting European citizenship appears as a necessity to replace it with European one, which could produce a conceptual conflict within the individual. However, the latest surveys on sharing several layers of identity imply that a concept of citizenship will be no longer be associated mainly with national identity. In other words, the increasing awareness of belonging to two different political communities may eliminate apprehensions to combine two levels of identities, one corresponding to the nation-state and another to the European Union.

These gradual changes in understanding the notion of citizenship constitute the essence of a post-modern "ethic of citizenship", which is "an expression of pluralism, and of participatory democracy, complemented by a conception of identity."[320] As the boundaries of identification in Europe remain fluid, the European Union appears to be

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316. W. Maas, *Extending Politics: Enfranchising Non-Resident European Citizens*, Working Papers, www.ciaonet.org (emphasis added).

317. Y. SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 167 (1994).

318. *See supra* Part II.A.2.

319. *See supra* Part II.B.3.

320. HEATER, *supra* note 13, at 23.

an archetypal post-modern polity.[321] To recapitulate, the EU as a post-national formation of membership provoked the discussion about redefining the idea of citizenship. Introducing the notion of Union citizenship turned out to be a next step in the integration process, which shows clearly that the general concept of citizenship is likely to evolve beyond the nation state and beyond modernism.

The above has important implications for the loyalty of individuals to states and the EU. It may be claimed that Union citizenship should contribute to enhancing attachment to the EU at the same time leaving the allegiance to the nation state intact. Adopting the status of Union citizen is very unlikely to entail a transfer of loyalty from the state to the EU level. The present situation allows to predict that EU citizens will treat the EU as an additional level of polity (after local, regional and national), which does not interfere with the previous ones. In other words, the broadened notion of citizenship develops a new sense of belonging, but does not weaken the existing ones.

Coming back to the reluctance of the MS to entitle the EU with the right to regulate their national citizenship legislation, attention must be also drawn to the general tiredness of the MS with adopting new regulations continuously added to EC law. An ever increasing scope and quantity of harmonising rules has not always respected the diversity of legal cultures represented by the different MS; rules have sometimes been overdetailed and intrusive. In this case, the need that presents itself is for a new way of encouraging the MS to converge their legislation, which also implies a call for a new method of governance.[322] As revealed in Part III, the concept of reflexive harmonisation appears, for some areas, to be an optimal compromise between the urge to unify and the need to respect national sovereignty and diversity. According to the reflexive approach, the most effective regulatory interventions are those that seek to obtain their goals indirectly instead of providing the direct prescription. The MS should be given some autonomy allowing them to figure out their own solutions to regulatory problems, which should obviously be consistent with common goals. In other words, at the current stage of European integration, the most desirable is a combination of self-regulation with common external rules.

These considerations indicate the need for soft law instruments, which are deprived of coercive mechanisms. Having examined the role of influence tactics in enhancing targets to commitment, it may be stated

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321. *Id.* at 26.

322. *See supra* Part III.

that the soft methods are usually encouraging, while hard methods very often evoke resistance.[323] Moreover, as Bothe pointed out, soft law often serves as "a compromise between sovereignty and order".[324] Therefore, soft law is used more frequently nowadays; especially the Open Method of Co-ordination (OMC), which is simultaneously a soft law instrument and a new form of governance, is gaining popularity. Due to its voluntary character and consistence with the principle of subsidiarity, it is accepted in an increasing number of EU areas of responsibility. The OMC focuses on establishing general guidelines, leaving MS discretion in choosing the most suitable national strategy, and promotes mutual learning through peer reviews,[325] which means it fulfils all the assumptions of (desirable) reflexive harmonisation. It is held up as an answer to the problems concerning multi-level governance puzzling the EU nowadays. Therefore, it may be speculated that the OMC could be applied even in such a sensitive domain as national citizenship policy. However, the objections of the MS to subordinate this area to the EU were so strong that formally this option is still not considered.

Nevertheless, as the notion of European citizenship with its unique entitlements and allegiances takes hold, citizenship regimes in Europe are being reassessed. The rights and duties attached to national citizenship are increasingly compared and contrasted between the Member States, and the most extreme differences are slowly eased out. The convergence is occurring—the general EU trend reveals that states whose nationality law is relatively closed to migrants tend to relax their regulations, while states where the status of citizen is comparatively easy to acquire tend to make the rules stricter.[326] This trend of decreasing discrepancies is very well visible through the new citizenship regulations, which have been applied in Germany since 2000,[327] and in Ireland since 2005.[328] These examples show perfectly how extremely different citizenship legislations are becoming more similar due to the EU pressures. Although the decisions about the reforms were taken during sovereign democratic processes at the national level, both German and Irish governments admitted the need for transforming their regulations to the "EU average". The substantial changes in conditions of granting national citizenship are

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323. *See supra* Part III.B.

324. M. Bothe, *Legal and Non-Legal Norms: A Meaningful Distinction in International Relations in Netherlands*, 11 Y.B. INT'L L. 90 (1980).

325. *See supra* Part III.

326. Ryan, *supra* note 149, at 171.

327. *See supra* Part IV.D.

328. *See supra* Part IV.C.

undoubtedly the response to the unofficial demands of other MS and the indirect requirements of the "acquis communautaire".

What is worth emphasizing in both cases is that the authorities had to struggle with a very strong opposition, which tried to object to following the emerging EU trend. Despite these obstacles the amendments were implemented, but as the German example revealed, the transformation, in the absence of its adversaries, could have been even more significant. To recapitulate, the reforms introduced into nationality policies in Ireland and Germany show consideration of the interests of other MS as well as EU law.

Quite unusual in this situation is the position taken by Spain, which did not hesitate to oppose the EU trend.[329] The Spanish government, by introducing amnesty for illegal immigrants in 2005, simply ignored the critical voices from other EU countries. It refused to consider the problems and needs of the co members, while implementing changes that had the EU-wide effects.

Another interesting point to be made concerns the general principle of adopting national citizenship. One may ask whether there are tendencies to condition the status of citizen upon blood or soil. Definitely the most desirable solution lies between these two rules. Criticism on unconditional *ius soli* in Irish case and strict *ius sanguinis* in German case reveal that the EU needs a middle solution. On the one hand, apprehension about making access to Union citizenship for third-country nationals too easy caused has made sheer birthright citizenship no longer acceptable. On the other hand, excluding long-term residents by applying an ethno-cultural model is not tolerable neither. Although the visions of particular MS on the best compromise between these two principles still differ, it may be claimed that the agreement on the general trend has been reached. The convergence of national citizenship legislations is taking place, and is expected to continue, even though a full unification is highly unlikely. The fact that this EU trend resulted from the voluntary reforms shows the importance of indirect impact of other MS. Amending nationality laws, as a second-order effect of European integration (which is yet not widely recognised), should be taken more seriously. It could be used, for instance, to convince the MS (although it should be done extremely carefully) to go a step further and adopt the OMC, which could help to develop a more organised (but still voluntary) coordination in the area nationality policy.

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329. *See supra* Part IV.B.; Hansen & Weil, *supra* note 139, at 7.

However, it must be kept in mind that the voluntary character of applying soft law instruments does not guarantee achievement of a common goal, even if set by all relevant actors taking part in the whole process. Lack of formal sanctions enables every MS to withdraw from the cooperation at any time. This ever-open way out implies that the beginnings of convergence of nationality legislations do not necessarily establish a firm foundation for the common policy. Although many EU countries have amended their regulations concerning granting the status of citizen erasing the most vivid differences, one may wonder whether it is a genuine trend or a temporary tendency. On the basis of the presented discourse one may only speculate that the on-going changes will continue. However, the democratic deficit, which the EU faces nowadays, indicates an incomplete commitment of the MS to the whole integration process. On the other hand, the lack of credibility the EC has been suffering since 1980 has not prevented numerous countries from voluntarily adjusting their legislations to the self-emerging common standard. This fact supports the assumption that it is a long-term process rather than a momentary trend.

Another important conclusion to be drawn from this Article concerns the position of long-term non-EU residents after establishment of Union citizenship. Having examined the concept of citizenship, it may be stated that assigning individuals with certain rights enhances the feeling of belonging to a given community. Thus, third-country nationals have always felt undervalued in comparison with the nationals of their host MS. Significantly, introducing Union citizenship (with all liberties attached to it), which can be granted only to MS nationals, deteriorated the situation of non-EU residents. In particular, ascribing EU citizens with freedom of movement and transnational political rights (which created a new link between EU citizens and the authorities of other MS)[330] deepened the gulf between MS nationals and third-country nationals residing in one MS. This distinction may be viewed as discrimination, taking into consideration that permanent foreign residents contribute to the common welfare but are deprived of privileges. They are subjected to the EC legislation, but cannot participate in shaping the EU polity, which means they remained to be treated only in economic terms. This situation contributed to the debate on the general concept of citizenship by suggesting the need to revise the assumptions of EU citizenship. It must be noted that several concepts of citizenship have

330. *See supra* Part II.B.

coexisted in the EU since the start of political integration.[331] Recently the idea of linking Community citizenship to the place of residence reappeared. The proponents of decoupling the idea of Union citizenship from MS nationality argue that domicile is the relevant factor, which allows for more justifiable access to the status of EU citizen. They believe that "the subjective standard of nationality will gradually yield its place to the objective standard of residence or domicile."[332] In fact, accepting country of residence as a criterion qualifying for EU citizenship could be interpreted as the logical consequence of leaving aside the ethno-cultural model of citizenship. On the other hand, labelling countries with lax national legislations as the "backdoor to Union citizenship" indicates unwillingness to grant foreign residents this status. Hence, the chances of acquiring Union citizenship without becoming a citizen of one of the MS (which would undermine the basic assumption of the whole concept adopted in Maastricht) at least in the near future seem to be small.

Therefore, the EU Council issued the "Directive on the status of third-country nationals who are long-term residents" aimed at improving their position in the Community. By implementing the uniform conditions for acquiring this status and guaranteeing them equal rights in all MS, the Directive has decreased the discrepancies between EU and non-EU citizens. However, the outcome of this EU legal act has a much wider scope; it indirectly pressures the MS with restrictive nationality policies to facilitate the access to national citizenship. Although the Community does not hold a competence to regulate conditions of acquiring national citizenship, it may be stated that the Council, through the provisions enshrined in this Directive, has given an implicit hint that conferring EU citizenship on long-term residents is required due to their contribution to the common wealth. Because it is difficult to believe that such a signal might have been sent unintentionally, the attitude of the EU on equalizing the position of third-country nationals permanently residing in the EU with that hold by Union citizens becomes clear. This deliberately hidden massage is the first official attempt to induce certain amendments in MS independent nationality laws. Can we expect further actions of the EU institutions aiming at transforming national citizenship rules so they would help to obtain this Community goal?

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331. C. De Wenden, *European Citizenship and Freedom of Movement*, *in* THIRTY YEARS OF FREE MOVEMENT OF WORKERS IN EUROPE: PROCEEDINGS OF THE CONFERENCE, BRUSSELS, 17 TO 19 DEC. 1998, *supra* note 38, at 259.

332. Nascimbene, *supra* note 51, at 72.

The aspiration of the EU to endow long-term residents with the same entitlements as those enjoyed by EU citizens shows two ways of achieving this target. The first possibility is to include them into societies of particular MS as nationals, automatically granting them the status of European citizen. Support for such an action expressed by the EU shows that it is an advocate of post-national concept of citizenship. Through the implications of the above-mentioned Directive, it points out the need to move beyond nationalism and to accept a post-modern idea of citizenship. However, because the decision on endowing the status of Union citizen lies exclusively in MS discretion, the EU can only try to indirectly influence the MS, counting on their voluntary cooperation. Taking into consideration the attachment of some European countries to the nationalist model of citizenship, the collaboration in this field seems highly unlikely. On the other hand, the directive means that rights and position of long-term residents are protected and defined by EU law. Since long-term residence is one of the main criteria for nationality in the MS, we can say that EU law now directly facilitates passage to national citizenship for third-country nationals, and so to EU citizenship. The autonomy of the MS over who becomes a national citizen is no longer complete.

However, apprehensions of some MS to let foreign permanent residents gain the status of EU citizen shows that the concept of Union citizenship is treated as sacred and the EU is perceived as the fortress, which should not be too easy to access. In this case, the EU may refer to another option, namely to consequently equip long-term residents with the entitlements as close as possible to those enjoyed by Community citizens. Nevertheless, even if it managed to grant them with the rights identical with those accorded to EU citizens, they would never be equal. As Weiler pointed out, "one cannot, conceptually and psychologically (let alone legally) be a European citizen without being a Member State national."[333] In other words, the willingness of the MS is essential to ensure long-term residents the position of full members of the European Community. Hence, their situation depends on whether the nationalist attitude will dominate the process of European integration for the nearest future or perhaps there will be turning to a post-national vision of Union citizenship.

333. Weiler, *supra* note 2, at 459-519.