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Italian unlimited *ius sanguinis* and its proposal of amendment: an EU law perspective

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Summary: 1. The increasing demand of Italian citizenship from descendants of Italian emigrants and the proposal of amendment of Italian citizenship law; 2. EU citizenship and rights of individuals: the "horizontal" dimension of EU citizenship; 3. EU citizenship and Member States' interests: the "vertical" dimension of EU citizenship. 4. The impact of EU Law on Italian unlimited ius sanguinis principle and on its proposal of amendment. 5. Final remarks.

1. The increasing demand of Italian citizenship from descendants of Italian emigrants and the proposal of amendment of Italian citizenship law

Today, Italy is a country that is experiencing an increase in immigration, especially from the Middle East and North African countries[1]. However, Italy has not always been a country of immigration, but rather a country of massive emigration. From 1877 to 1975, it is calculated that around 25 million Italian citizens emigrated directly to the Americas[2] in one of the largest phenomenon of emigration of a population in modern times.

This phenomenon is intrinsically connected with Italian nationality law. Indeed, Italian nationality law[3] has traditionally rested on the unlimited *ius sanguinis* principle. The (first)

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[1] On the issue of the immigration from North Africa see B. NASCIMBENE, A. DI PASCALE, *The 'Arab Spring' and the Extraordinary Influx of People who Arrived in Italy from North Africa*, in *Eur. J. Migr. Law*, 13, 2011, p. 341.
[2] The official statistics of the Italian Ministry of Foreign Affairs are published in an interesting and the exhaustive work by A. NICOSIA, L. PRENCIPE, *Museo Nazionale Emigrazione Italiana*, Roma, 2009.
[3] For a description of both the current and the former Italian citizenship law, see R. CLERICI, *La cittadinanza italiana nell'ordinamento giuridico italiano,* Padova, 1993 and S. BARIATTI, *La disciplina giuridica della cittadinanza italiana,* Milano, 1996.

Italian Civil Code of 1865[4] as well as the Law No. 555/1912[5] clearly establish that principle (and also the current Law No. 91/1992 so provides)[6].

This means that, nowadays, a huge amount of potential Italian nationals live all around the world, especially in the American Continent. And the number of them looking for the recognition of Italian nationality *iure sanguinis* has increased over the last twenty years[7].

Moreover, according to Italian law, the emigration itself has never been a ground for the loss of Italian nationality[8]. Basically, an (adult) Italian national could lose the *status civitatis* only if he or she voluntarily and expressly acquired a foreign nationality or waived the Italian one.

It also happened that the countries of emigration obliged the Italian emigrants to acquire the local nationality through mechanisms of tacit *ex lege* naturalization. One of them, Brazil, where millions and millions of Italian nationals emigrated, was the protagonist of an important and recent ruling from the Italian Supreme Court in the so called *grande naturalização affaire*[9]. This case demonstrated how important and current is the discussion around the application of the *ius sanguinis* principle in Italy: as a matter of fact, the unprecedented judicial fight of the Italian Ministry for Internal affairs against recognition of nationality for Brazilian descendants[10] was clearly connected with the aim to reduce somehow the demand of Italian nationality for descendance, taking into account its possible impact not only on the Italian state, but also on the other EU countries.

In this respect, a recent and significative proposal of amendment of the *ius sanguinis* principle was filed with the Italian Parliament[11]: as it appears clear from its *preambule*, it aims to limit this demand of nationality (in particular, coming from descendants of the American

[4] Article 4 of the Italian Civil Code of 1865

[5] Article 1 of Italian Law No. 91 of 5 of February 1992.

[6] However, in the past only male citizens could transmit *iure sanguinis* the Italian nationality to their children. Such discrimination has been eliminated with retroactive effects by virtue of the combined effect of the ruling of the Italian Constitutional Court No. 30 in 1983 and of a ruling of the Italian Supreme Court No. 4466 and 4467 of 2009. For further details, see M. MELLONE, *Disciplina della cittadinanza italiana e donne cittadine: una discriminazione mai terminata*, Napoli, 2020. Therefore, it is licit to affirm that any birth both from *male* or *female* Italian ancestor, regardless *when* or *where* it occurred, may give right, *today*, to the Italian nationality *iure sanguinis*.

[7] It has been calculated that only between 1998 and 2007, 786.000 descendants of Italian emigrants were recognized Italian citizens *iure sanguinis*: see G. TINTORI, *Fardelli d'Italia, Conseguenze nazionali e transnazionali delle politiche di cittadinanza italiane*, Roma, 2009, p. 10.

[8] Emigrants always retained their Italian nationality: in addition to this, their children, born in the country of emigration, could have dual nationality from the birth (*iure sanguinis* and *iure soli*), with no obligations to waive one of them.

[9] Indeed, by Decree No. 58-A of 15 of December 1889 the Brazilian government ruled that all non-Brazilian people living in Brazil, who did not express their will to maintain their original nationality, would have acquired *ex lege* the Brazilian nationality. At that time, many Italian emigrants lived in Brazil and very few or even none of them filed that declaration (probably because they did not know about the existence of that mechanism of tacit naturalization). As a matter of fact, they were considered *ex lege* Brazilian nationals, although for the Italian Government that naturalization was ineffective. The matter was brought to the attention of the Italian Supreme Court (Corte di Cassazione – United Chambers "Sezioni Unite", rulings No. 25317 and 25318 of 24 of August 2022) which stated that only a voluntary and evident expression of will may lead to the loss of the Italian nationality.

[10] The Italian Ministry for Internal Affairs filed *hundreds and hundreds* of actions with the Italian Courts. See G. BONATO, R. DE SIMONE, *Analisi della doppia cittadinanza e della rinuncia espressa alla luce delle ultime sentenze della Corte d'Appello di Roma*, in *Judicium*, 11.7.2022 (www.judicium.it), p. 12 ff.

[11] *Disegno di legge* No. 752 filed with the Italian Senate on the 7th of June 2023.

continent) and to re-establish a *genuine link* between these descendants and the Italian nationality[12].

More precisely, the proposal seeks to introduce two kinds of conditions for the recognition of Italian nationality *iure sanguinis*. Descendants non-born in Italy whose Italian parent and grandparent were not born (or have never been resident) in Italy shall demonstrate an intermediate level of knowledge of Italian language[13]. Descendants non-born in Italy whose parent, grandparent and great-grandparent were not born (or have never been resident) in Italy shall prove not only an intermediate level of knowledge of Italian language, but shall also reside in Italy for at least one year.

In other words, the proposal addresses to those descendants non born in Italy and call them to prove that, despite their birth outside Italy, they still have a "genuine link" with Italy.

This article will not focus on the several technical and constitutional problems raised by this proposal[14], including its very unclear wording[15], but will rather investigate the relationship between this proposal - and, in general, Italian unlimited *ius sanguinis* principle - and EU law, with particular reference to EU citizenship. Indeed, many of these descendants of Italian emigrants do not hold any other Member State's nationality since they are nationals of non-EU countries: in other words, for them, being Italian nationals means also being EU citizens. Moreover, a part of them are currently residing in an European country or simply is willing to move to an EU country for work or family reasons. Therefore, they could be interested to exercise the rights stemming from EU law with particular regard to right to access, to reside and to work in EU.

For this reason, it is appropriate to outline briefly the notion and the scope of EU citizenship and the different approaches that EU law may have on the basis of the specific EU value invoked in nationality matters (paragraph 2 and 3)[16]. After that, it will be possible to assess how such EU approaches may impact on Italian *ius sanguinis* principle and on the

[12] The preamble underlines that many descendants of Italian emigrants would not have any current and concrete connection with Italy and would rather obtain the recognition of Italian nationality to exercise the rights stemming from that *status*.

[13] More precisely, the proposal of amendment of Italian nationality law would impose a duly certified B1 level of knowledge of Italian language, under the Common European Framework of Reference for Languages (CEFR).

[14] *Ex multis*, the proposal is not likely to have any retroactive effects, with particular reference to those descendants non-born in Italy who are already considered Italian nationals at birth by the current law. As a matter of fact, they acquired the Italian nationality *from the birth* and no subsequent laws can impact retroactively on that *status acquired from birth*. In this respect, in 2000 Germany amended its nationality law to limit the scope of *ius sanguinis* principle: see *Gesetz zur Reform des Staatsangehörigkeit* (*STAG Reform*). The new rules, however, applied to births from German parent occurred *after* the entry into force of the amendment. In other words, any limitation of the Italian *ius sanguinis* for "already born" descendants should be carried out through a new case of *loss* of citizenship, such as other EU national laws did (i.e. Denmark, Netherlands, see *infra*). For an overview of the impact of the Italian Constitutional principles on the Italian nationality, see S. LABRIOLA, *Status civitatis e norme costituzionali*, in *Riv. trim. dir. proc. civ.*, 1977, p. 137 and ff

[15] Among others, the proposal does not clarify how exactly the "generations of descendants" shall be counted. It just mentions that the count should start from the last ascendant born or resident in Italy. However, it is not clear, for instance, if an even short period of residence in Italy of one of the ascendants is sufficient to restart the count. Moreover, the proposal does not clarify if the recognition of Italian nationality for a second or third or fourth generation-descendant (after complying with language and residence requirements) makes the count start again.

[16] The aim of this article is not to question whether the ECJ is invading the prerogatives of Member States in the field of nationality or whether the relationship between European and national citizenships shall be reassessed, but rather assessing the impact of EU law in citizenship matter on the specific "Italian case".

referred proposal seeking to amend it (paragraph 4) and to make some final remarks (paragraph 5).

2. EU citizenship and rights of individuals: the "horizontal" dimension of EU citizenship

According to article 20 of TFEU[17], nationals of the Members States are also citizens of the European Union[18] and they enjoy the rights provided for in the EU Law[19]. In other words, being national of a State, which is part of the EU, gives access to a number of rights conferred directly by the EU law[20].

The conditions to access (or to lose such access) to European citizenship's rights are laid down directly by the Member States[21]. Indeed, nationality is an exclusive Member State's competence and, under the EU Treaties, the EU has no explicit powers to interfere with national choices in this field. This peculiar and, for some Authors even illogical[22], cohabitation unavoidably raised some issues[23].

On the one hand, according to a general and undisputed principle of international law, Member States are exclusively competent to determine who is and who is not a national[24]. On

[17] It has also been questioned the added value given by the European citizenship in relation with rights – such as the free circulation within the European territory – which were already exercised before the institution of European citizenship. See H. OOSTEROM STAPLES, *The triangular relationship between nationality, EU citizenship and migration in EU law: a tale of competing competences*, in *NILR*, 2018, 65, pp. 431-461, in particular p. 437 and M. VAN DEN BRINK, *A qualified defence of the primacy of nationality over European Union citizenship*, in *ICLQ* , Volume 69 , 1, 2020 , pp. 177-202, who notes "*little would change if EU citizenship was abolished tomorrow. If EU were abolished, nationals of member states would still retain their rights and entitlements*".

[18] L.S. ROSSI, *La cittadinanza dell'Unione europea*, in A. TIZZANO (a cura di) *Il processo di integrazione europea: un bilancio di 50 anni dopo i Trattati di Roma*, Torino, 2008, pp. 69-85; G. DI FEDERICO, L. CECCHETTI, *The European citizenship as a factor of integration*, in A. P. SONCINI FRATTA (a cura di), *L'Europa in divenire*, Città di Castello, 2020, p. 83.

[19] AG Maduro in *Rottmann* (cited below), para. 23 underlined that the European citizenship is not technically a *legal citizenship* that is to say that particular legal bond between an individual and a State, based on common values, principles, culture and history. See on this: L. BOSNIAK, *Denationalizing citizenship*, in T. ALEINIKOFF D. KLUSMEYER (Eds.), *Citizenship today; global perspectives and practices*, in *Carnegie Endowment for International Peace*, Washington, 2001, p. 237 and J. WEILER, *The Constitution of Europe*, Cambridge, 1999, p. 344, who noted in a very expressive way: "*the Union belongs to, is composed of, citizens who by definition do not share the same nationality*". For an historical a conceptual reconstruction of the notion of nationality, under international law and under the law of regional organizations, including European Union law, see the recent work of B. NASCIMBENE, *Nationality Law and the Law of Regional Integration Organisation, Towards New Residence Status?*, The Hague, 2022.

[20] ECJ (Grand Chamber), 2 March 2010, case C-135/08, *Janko Rottman v Freistaat Bayern*, para. 44: "*Article 17(2) EC attaches to that status the rights and duties laid down by the Treaty, including the right to rely on Article 12 EC in all situations falling within the scope ratione materiae of Union law*". See also ECJ, 12 May 1986, case C-85/96, *Martínez Sala*, para. 62.

[21] B. NASCIMBENE, *Nationality laws in the European union*, Milano, 1996.

[22] See A. EVANS, *Nationality law and European integration*, in *ELR*, 16, pp. 190-215, who underlined that is illogical if Member States can determine the beneficiaries of rights stemming from EU law unilaterally through their domestic rules on citizenship if the contents of such rights are to be determined unilaterally by the EU law. H. OOSTEROM STAPLES, *The triangular relationship between nationality, EU citizenship and migration in EU law: a tale of competing competences*, in *NILR*, 2018, 65, pp. 431-461, defines the relationship between EU and national citizenships as a "paradox".

[23] B. NASCIMBENE, *Cittadinanza dell'Unione: competenze nazionali e comunitarie*, in *Dir. imm. e citt.*, 1999, 2, pp. 58-65.

[24] It must be remembered that Member States, when Treaty of Maastricht entered into force, annexed a Declaration to stress the attention on their undisputed sovereignty in the field of nationality: see Declaration No. 2 on Nationality of a Member State, annexed to the Treaty on European Union by the Treaty of Maastricht.

the other, the *effects* of such domestic choices may have an impact on another and autonomous "juridical system", that is to say the EU law, which is based on its values and principles[25]. And in such autonomous juridical system, EU citizenship is intended to be, to use ECJ's words, as "*the fundamental status of nationals of the Member States*"[26].

More precisely, ECJ built progressively an autonomous and "modern" approach in nationality matters, more oriented to the protection of those EU rights (especially those fundamental ones) deriving from the acquisition or the loss of a national citizenship. In other words, in ECJ's view, a person shall not be seen only as "citizen or non-citizen" of a State, but rather as an "human being"[27] who lives within an open (especially in EU) and globalized community and who has its personal and private life.

This new approach in nationality matters is visible in the first case in which ECJ was called to intervene in nationality matters. The fate wanted that it involved exactly a descendant of an Italian citizen emigrated to South America[28]. Mr. Micheletti was both an Italian (*iure sanguinis*) and Argentinean (*iure soli*) national and he was born and resident in Argentina. His application for permanent residence in Spain, as Italian (and hence European) citizen, was rejected under the ground that his Italian nationality was *less effective* than Argentinean one.[29]

The ECJ did not share that approach and refused the idea that the access to rights stemming from EU Law shall be conditioned to a "genuine link" with EU territory[30]. Indeed, in ECJ's view, Member States' competence to lay down the conditions for the acquisition and loss of their nationalities shall be exercised "*having due regard to Community law*"[31].

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[25] See once again AG Maduro in his opinion in *Rottmann*, para. 23.

[26] ECJ, 20 September 2001, case C-184/99, *Grzelczyk*, para. 31; 17 September 2022, case C-413/99, *Baumbast and R* . This quite emphatic expression "*fundamental status of nationals of the Member States*" can be interpreted as a way to undermine national law in some grand "United States of Europe" project. However, it rather aims to stress the attention on the importance of this status within EU law and on the need it to interpret it a general principle of EU law.

[27] S. FORLATI, *Nationality as a Human Right*, in S. FORLATI, A. ANNONI (Eds), *The Changing Role of Nationality in International Law,* London, 2013, pp. 18-36.

[28] ECJ, 7 August 1992, case C-369/90, *Micheletti*.

[29] Indeed, Spanish Authorities refused the application of Mr. Micheletti for permanent residence in Spain as European citizen on the ground that, before moving to Spain, he was resident in Argentina. Therefore, at the eyes of the Spanish State, he was considered as an Argentinean rather than an Italian citizen.

[30] ECJ, *Micheletti*, cit., para. 11. By doing so, it did not follow the approach of the International Court of Justice (further: ICJ) in its famous case *Nottebohm* (International Court of Justice, 6 April 1955, *Nottebohm*, ICJ Reports 1955, p. 4). Besides, that doctrine was not followed by the International Court of Justice in other rulings and today is considered as a "jurisprudential illusion" (see. P. SPIRO, *Nottebohm and genuine link: anatomy of a jurisprudential illusion*, 2019, IMC working papers, 2019/01) or a "romantic" approach (see the opinion of AG TESAURO in *Micheletti*, para. 5) or even a "dead letter" (R. THWAITES, *The life and times of the genuine link*, in *VUWLR*, 2018, pp. p. 655*).* On the contrary, other Authors point out that in *Nottebohm* ICJ decided that the conferral of citizenship should depend on the existence of a genuine link with the conferring state: S. BESSON, *Investment Citizenship and Democracy in a Global Age. Towards a Democratic Interpretation of International Nationality Law*, in *SRIEL*, 2019, p. 525-547; O. AMMAN, *Passports for Sale: How (Un)Meritocratic Are Citizenship by Investment Programmes?,* in *Eur. J. Migr. Law*, 2020, pp. 327–328.

[31] ECJ, *Micheletti*, cit., para. 10. See also, *inter alia*, ECJ, 11 November 1999, case C-179/98, *Mesbah*, para. 29 and 19 October 2004 (Grande Chambre), case C-200/02, *Zhu and Chen*, para. 37. M. VAN DEN BRINK, *A qualified defence* , cit., underlines that the impact of the criterion of "*having due regard to EU law*" may excessively impact on the sovereignty of member states in the field of nationality.

This concept was strengthened with another famous ruling concerning the loss of the German citizenship acquired through naturalization by a former Austrian citizen, Mr. Janko Rottmann[32].

In *Rottmann*, the ECJ questioned the *effects* of German Authorities' decision to withdraw the nationality of Mr. Rottmann, since this caused its stateless. More precisely, the ECJ underlined that any decision in citizenship matters which could impact "*by reason of its nature and its consequences*" on the rights conferred in virtue of European citizenship[33] may be "*amenable to judicial review carried out in the light of European Union law*"[34], with particular reference to the principle of proportionality[35].

In *JY* case[36] the ECJ went even further and not only reaffirmed that article 20 of the TFEU shall apply in all those situations in which *the effects* of a national decision or law may directly or indirectly affect European citizenship's rights[37], but provided itself the proportionality test, reaching the conclusion that the national decision was disproportionated[38].

Rottmann and *JY* are two quite peculiar cases since, even if for different reasons, the national decision led to the statelessness of the individual.

As two other recent cases show, *Tjebbes*[39] and *X*[40], EU Law is also relevant whether an individual does not become stateless as a consequence of an adverse national decision (or law), but simply does not hold anymore any nationality of an EU country. The above-mentioned cases are particularly interesting because they do not refer to citizenships acquired (*Rottmann*)

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[32] ECJ, 2 March 2010, case C-135/08, *Janko Rottmann v Freistaat Bayern*.

[33] See ECJ, *Rottmann*, cit., para. 42.

[34] See ECJ, *Rottmann*, cit., para. 48. AG Maduro in his Opinion (para. 28) underlined that in theory "*any rule of the Community legal order may be invoked if the conditions for the acquisition and loss of nationality laid down by a Member State are incompatible with it*". The ECJ did not take a clear position on this matter.

[35] See ECJ, *Rottmann*, cit., para. 58. In particularly, the ECJ suggested that Mr. Rottmann should have right to a reasonable period of time in order to try to recover the nationality of his Member State of origin.

[36] ECJ (Grand Chamber), 18 January 2022, case C-118/20, *JY v Wiener Landesregierung*. See the comments of F. JAULT-SESEKE, *Refus de naturalisation et citoyenneté européenne*, in *JDI*, 2022, pp. 925 and ff.; I. GAMBARDELLA, *JY v Wiener Landesregierung: Adding Another Stone to the Case Law Built Up by the CJEU on Nationality and EU Citizenship*, *European papers*, 2022, pp. 399-408; E. PATAUT, *L'extension du domaine du juge européen: contrôle de proportionalité et double nationalité*, in *RCDIP*, 2022, 2, pp. 331-349; K. HYLTÉN-CAVALLIUS, *Stateless Union Citizens in a nationality conundrum: EU Law safeguarding against broken promises*, in *Eur. Const. Law Rev.,* 2022, pp. 1-16; D.V. KOCHENOV, D. DE GROOT, *Curing the Symptoms but not the Disease: CJEU's Myopic Advances in the Field of EU Citizenship in JY,* in *VerfBlog, https://verfassungsblog.de/curing-the-symptoms-but-not-the-disease/*.

[37] Austria refused the naturalization of an Estonian citizen, Mrs. JY, because she had committed some administrative offences (more precisely, traffic offences). However, such offences were realized in an *interim* period of two years in which Austrian Authorities had assured that Mrs. JY would have obtained Austrian nationality if she had definitely waived her Estonian nationality. Mrs. Jy actually waived her nationality and, since she never acquired Austrian nationality, remained stateless.

[38] More precisely, the ECJ found that Austrian decision to refuse naturalization for 'public policy' and 'public security' reasons was not considered proportionated in so far as "*traffic offences (...) cannot be regarded as capable of demonstrating that the person responsible for those offences is a threat to public policy and public security which may justify the permanent loss of his or her status of citizen of the Union*", ECJ, *JY*, cit., para. 71. The AG had adopted the same approach: see para. 109 and ff. of his opinion.

[39] ECJ (Grand Chamber), 12 March 2019, case C-221/17, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*.

[40] ECJ (Grand Chamber), 5 September 2023, case C-689/21, *X v. Udlændinge- og Integrationsministeriet*. See: C. NOTA, *La perdita ipso iure della cittadinanza nazionale e dell'Unione e il test di proporzionalità alla luce della sentenza X della Corte di giustizia*, in *Quaderni Aisdue*, 2024, p. 1 and ff.; see also M. FERRI, *Il sindacato della Corte di Giustizia in materia di cittadinanza nazionale*, in *Riv. dir. internaz.*, 2024, p. 179 and ff.

or to be acquired (*JY*) through naturalization, but to the loss of a nationality acquired *from the birth* (which would be also the case of Italian descendants if one day Italian law will so provide).

In *Tjebbes* Dutch authorities denied the application for renewal of Dutch passport to a Dutch (*iure sanguinis*) and Canadian (*iure soli*) national, residing in Canada,[41] on the ground that she would have lost *ex lege* her Dutch nationality for a number of factors (including a 10 years of residence out of Dutch territory)[42].

X refers to a both Danish (*iure sanguinis*) and United States (*iure soli* and *iure sanguinis*) national, residing in the U.S., whose application to retain her Danish nationaltiy was rejected because, according to Danish law, Danish nationals "*born abroad who has never lived in the Kingdom of Denmark and who has not resided there in circumstances that suggest a close attachment to Denmark*" are not any more Danish nationals[43].

In both cases, the rationale of these national approaches was to prevent persons not having any more a link with the State to maintain their nationality. It is interesting to note that neither Mrs. Tjebbes and Ms. X had never substantially lived in EU and, therefore, they did not concretely invoke the exercise of a specific right stemming from EU law: in other words, they invoked the *possibility* to exercise in the future their rights related to European citizenship[44].

In *Tjebbes*[45], the ECJ underlined that article 20 of the TFEU offers a protection also to those *static* situations in which an European citizen has not exercised (or has not exercised yet) the right to free movement within the European territory[46] or any other right stemming from

[41] The position of the other three plaintiffs did not differ substantially from the one of Mrs. Tjebbes, although one of them was not Dutch national from birth. Moreover, one of them, Ms. Duboux, was a minor of age at the time of rejection of her mother's application for renewal of Dutch passport.

[42] More precisely, the refusal was based on the ground that she also held a foreign nationality and that, after attaining her majority, she has had her principal residence for an uninterrupted period of 10 years outside the Netherlands and outside European Union. The goal of Dutch law was precluding persons from obtaining or retaining Netherlands nationality where they do not, or no longer have, any link with Netherlands. See Article 6(1)(f), paragraph 15, of the *Rijkswet op het Nederlanderschap* (Law on Netherlands Nationality) applicable *ratione temporis*.

[43] The loss takes place "*on reaching the age of 22, unless he or she would thereby become stateless*" but upon application submitted before that date, the Danish State may allow nationality to be retained: see para. 8 of the Consolidated Law on Danish nationality (Law No 422 of 7 June 2004).

[44] The AG MENGOZZI shared this view. See para. 37-41 and ff. of his opinion.

[45] See E. PATAUT, *Citoyenneté de l'UE - Quand la Cour s'empare de l'effectivité - Effectivité de la nationalité*, *RTD eur.*, 2019, n° 3, p. 709-716 ; K. SWIDER, *Legitimizing precarity of EU citizenship: Tjebbes*, in *Common Mark. Law Rev*., 2020, p. 1163-1182 ; A. CAIOLA, *Est modus in rebus : la perte de la citoyenneté de l'Union européenne, le principe de proportionnalité et la nécessité de l'examen individuel des conséquences*, in *RAE*, 2019, p.153-161 ; X. MINY, F. BOUHON, *Nationalité et citoyenneté, les deux visages du Janus européen - La conformité de la perte de plein droit de la nationalité d'un État membre au regard du droit européen*, in *RTDH*, 2019, p.719-741 ; H. EIJKEN, *Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights*, in *Eur. Const. Law Rev,* 2019, p.714-730 ; C. VLIEKS, *Tjebbes and others v Minister van Buitenlandse Zaken: A next step in European Union case law on nationality matters*, in *TiLR*, 2019, pp. 142-146 ; L. GYENEY, *Challenges Arising from the multi-level character of EU Citizenship : the legal analysis of the Delvigne and Tjebbes Cases*, in *Hung. Yearbook of Internat. Law and Eur. Law*, 2020, 8, pp. 276-298; D.V. KOCHENOV, *The Tjebbes Fail*, in *European Papers*, 2019, pp. 319-336; M. BORRACCETTI, *Le misure di revoca della cittadinanza nazionale e il controllo di proporzionalità: la prospettiva europea*, in *Dir. imm. e citt.*, 3/2019, pp. 189-206.

[46] B. NASCIMBENE, M. CONDINANZI, A. LANG*, Citizenship of the Union and free movement of persons,* Leiden, 2008.

EU citizenship[47] (by doing so, following the same approach adopted in *Ruiz Zambrano*[48] and *Garcia Avello*[49]). In other words, the ECJ did not exclude that even a *potential*[50] violation of European citizenship's rights, under Article 20 TFEU[51], shall be relevant under EU law (the so called "*substance of rights test*")[52].

The ECJ acknowledged that Member states can provide for the loss of national citizenships for reasons of public policy[53], including preventing persons having any more a link

[47] See, in particular, the opinion of AG Sharpston in *Ruiz Zambrano*, who argued that accepting an artificial distinction between "cross border" and "purely internal" situations would make that '*lottery rather than logic would seem to be governing the exercise of EU citizenship rights*' (para. 88). This approach raised many discussions as for the delimitation of the scope of application of European Union Law. See, amongst others, N. NIC SHUIBHNE, *Seven Questions for Seven Paragraphs*, *Eur. Law Rev*., 2011, 2, p. 161; See also some recent comments which, ten years after Ruiz Zambrano, try to give an answer to some of the open points raised by such ruling: H. KROEZE, *Revisiting Ruiz Zambrano: a never ending story?*, in *Eur. JIL*, 2021, 23, pp. 1-12 and H. VAN EIJKEN, *Connecting the Dots Backwards, What Did Ruiz Zambrano Mean for EU Citizenship and Fundamental Rights in EU Law?*, in *Eur. JIL*, 2021, 23*,* pp. 48-67.

[48] ECJ, 8 March 2011, case C-34/09, *Ruiz Zambrano* (in particularly, para. 42). The ECJ confirmed the same approach even recently: see 5 May 2022, case C-451/19 and case C-532/19, *XU, QP*). The literature on *Ruiz Zambrano* is huge: among others, K. HAILBRONNER, D. THYM, *Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011*, in *Common Mark. Law Rev.*, 2011, 48, p. 1253; P. VAN ELSUWEGE, *Shifting the Boundaries-European Union Citizenship and the Scope of Application of EU Law*, in *Legal Issues of Economic Integration,* 2011, 38, p. 263; H. VAN EIJKEN, S.A. DE VRIES, *A new route into the promised land? Being a European citizen after Ruiz Zambrano*, in *Eur. Law Rev.*, 2011, 5, p. 704; D.V. KOCHENOV, *A real European citizenship: a new jurisdiction test: a novel chapter in the development of the Union in Europe*, in *Columbian Journal of European Law*, 2011, 18, p. 55; M. VAN DEN BRINK, *EU citizenship and EU fundamental rights: taking EU citizenship rights seriously*, in *Legal Issues of Economic Integration*, 2012, 39, p. 273.

[49] ECJ, 2 October 2003, case C-148/02, *Garcia Avello*.

[50] In this respect, the ECJ had already extended the scope of article 20 TFEU to those situations in which a person did not have yet European Union citizenship but *aspired* to obtain it. See ECJ, 20 February 2001, case Case C-192/99, *Kaur*.

[51] The reference to article 20 TFEU as such and not in connection with article 21 TFEU has raised the question about the scope of these two rules. In this respect, it has been argued that article 21 TFEU only applies in cross-border situations whereas article 20 TFEU has a wider scope of application since it applies to any possible situation affecting the rights deriving from European citizenship: see P. VAN ELSUWEGE, D.V. KOCHENOV, *On the limits of judicial intervention: EU Citizenship and family reunification rights*, in *Eur. J. Migr. Law*, 2011, 13, pp. 443 and ff. It has also been argued that article 21 TFEU provides a sufficient legal basis for the protection of rights stemming from European citizenship and therefore a "substance of rights' test", under article 20 TFEU, is unnecessary and even misleading: M. VAN DE BRINK, *Is It Time to Abolish the Substance of EU Citizenship Rights Test?*, in *Eur. J. Migr. Law*, 2021, 23, pp. 13-28. On the other hand, other Authors do not completely agree with the automatic equivalence between article 20 and 21 of TFEU: see in particular S. COUTTS, *Expulsions and Article 20 TFEU: some practical and conceptual issues*, in *Eur. J. Migr. Law*, 2021, 23, pp. 29-47. In this respect, the ECJ in several occasions clarified that Union citizens' residence rights in a host Member state are primarily to be governed by Article 21(1) TFEU, rather than by Article 20 TFEU, which is intended to protect the enjoyment of the status of EU citizenship itself: see ECJ, 10 October 2013, case C-86/12, *Alokpa and Moudoulou*, para. 32 and ECJ, 30 June 2016, case C-115/15, para. 73-74. See also ECJ, 14 November 2017, case C-165/16, *Lounes,* in which the Court used Article 21 of TFEU to protect the derived rights of a family member of an European citizen who had already exercised the rights conferred by Article 21 of TFEU to move to another EU country and acquire its nationality.

[52] See, in particular, ECJ, *Tjebbes*, cit., para. 46.

[53] Public policy, such as public security, is a ground accepted by the ECJ also in relation with national approaches restricting residence rights under European Union Law. However, such restrictions shall take account of fundamental right to protect family life and the best interest of child (art. 7 and 24.2 of the EU Charter of fundamental rights): see case C-165/14 *Alfredo Rendón Marín v Administración del Estado*, para 81. On this ruling, see the comment of P.J. NEUVONEN, *EU citizenship and its "very specific" essence: Rendon Marin and CS*, in *Common Mark. Law Rev*., 2017, 54(4), p. 1201.

with the State from maintaining the citizenship[54]. However, it added that any loss of national and European citizenship shall require an individual assessment on the impact that such loss may have on the private life of the person and of his or her family[55].

In *X* the ECJ added further important points. First, the individual citizen shall be duly informed about the risk to lose its European citizenship if it does not match with the requirements provided for by the national citizenship law[56]. Second, the individual shall also have a reasonable period of time to file any pertinent argumentation or documentation showing the impact of the loss of national and European citizenship on its life[57].

In both the referred cases, the ECJ highlighted the importance to protect fundamental rights of citizens such as enshrined in the EU Charter of Fundamental rights[58] and more precisely at article 7 ("Respect for private and family life")[59].

The above principles have been confirmed by the ECJ in *Stadt Duisburg*[60] which refers to a case of loss *ipso iure* of a Member State's nationality (the German one) because of acquisition of a third country's nationality. Once again, the Plateau of Kirchberg stressed the importance that, under articles 20 TFUE and 7 and 24 of EU Charter of Fundamental Rights, the loss of the nationality of a Member State (and therefore of the EU citizenship's rights) shall be conditioned to the principle of proportionality, with particular reference to the consequences of such loss "*from the point of view of EU law*"[61]. In other words, each Member State shall assess whether the *input* of the national law or decision (in *Stadt Duisburg*, the objective to prevent persons from holding multiple nationalities) is proportionated to its *output* that is to say "*the normal development of* (the individual's) *family and professional life from the point of view of EU*"[62]. For this reason, the ECJ invoked the need for a preliminary assessment which

[54] See ECJ, *Tjebbes*, cit., para. 36 and 39.
[55] See ECJ, *Tjebbes*, cit., para. 44-46.
[56] See ECJ, *Tjebbes*, cit., para. 51.
[57] See ECJ, *X*, cit., para 59. Moreover, the loss of citizenship without any specific assessment cannot be compensated for by the possibility to recover that citizenship, regardless of the conditions (possibly favourable) under which that naturalization may be obtained (See ECJ, *Tjebbes*, cit., para. 57).
[58] L. S. ROSSI (Ed.), *Carta dei diritti fondamentali e diritto dell'Unione europea*, Milano, 2002 and *La protezione dei diritti fondamentali. Carta dei Diritti UE e standards internazionali*, Napoli, 2011; G. DI FEDERICO (Ed.), *The EU charter of Fundamental Rights : from declaration to binding instrument*, Dordrecth, 2011. C. AMALFITANO, *General principles of EU law and the protection of fundamental rights*, Cheltenham, 2018.
[59] See ECJ, *Tjebbes*, cit. para. 45, 47, 48 and ECJ, X, cit., para. 55. In this respect, it must be underlined that the link between citizenship and the fundamental rights of a person has been already pointed out by the European Court of Human Rights (further, ECHR) in several occasions. More precisely, the European Convention on Human Rights - as well as the European Charter of fundamental rights - do not provide any specific protection in relation with the right to a citizenship (in this respect, it must be remembered that judge Pinto de Albuquerque in its dissenting opinion in *Ramadan v. Malta*, proposed the adding to the European Convention on Human Rights of a protocol focusing on the right of people to have a citizenship). However, according to ECHR, the loss (or the non-acquisition, depending on the case) of a *status civitatis* may have an impact on the right to respect for private and family life, especially if a State adopts domestic rules or decisions which are arbitrary or which lead to situations of statelessness or which prevent a person from having any civil right. See European Court of Human Rights, *Ramadan v. Malta*, 17 October 2016, case No. 76136/2012; *K2 v. United Kingdom*, 7 February 2017, case No. 42387/2013; *Kuric and others v. Slovenia*, 26 June 2012, case No. 26828/2006; *Karassev v. Finland*, 12 January 1999, case No. 31414/1996.
[60] ECJ, joined cases C-684/22, 685/22 and 686/22, 25 April 2024, *Stadt Duisburg*.
[61] See *Stadt Duisburg*, cit., para. 42.
[62] See *Stadt Duisburg*, cit., para. 50.

gives to the person concerned the possibility to illustrate its specific situation before Member State determines the loss of national citizenship[63].

3. EU citizenship and Member States' interests: the "vertical" dimension of EU citizenship

EU citizenship may impact not only on the life of the individuals, but also on the relationship between the EU and the Member States, especially if the interest of the latter is in conflict with the interest of the EU.

Reference is to the recent growing trend in investor citizenship (or investor residence) which aim to attract investment by granting citizenship (or residence rights) of the country concerned[64]: such schemes involved, in particular, some Member States like Bulgaria, Cyprus and Malta.

For this reason, in 2014 the European Parliament expressed concern that national schemes involving the "*direct or indirect outright sale*" of EU citizenship undermined the very concept of it[65]. Three years later, the Commission released a report on national schemes granting EU citizenship to investors on the basis of a study on the legislation and practice of all relevant Member States related to "golden passports" or "golden visa"[66]. After another report released in 2019[67] and despite any attempt to cause a spontaneous change of the relevant national laws and practices[68], the Commission took the initiative and in October 2020 launched an infringement procedure against Cyprus and Malta through a notice letter[69]. The non-satisfactory replies of the Maltese government led the Commission in late 2022 to refer this country to the ECJ under article 258(2) of TFEU[70].

It is interesting to note that Commission based its action exactly on Article 20 of TFEU claiming that the integrity of European citizenship would be undermined by a national scheme

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[63] In the specific case, the German competent Authority (under request or *ex officio*) had the power to avoid the loss of the citizenship, but for reasons other than the individual's specific situation (essentially, for public interests like the relationships with a specific country).

[64] F. CASOLARI, *EU Citizenship and money: a liaison dangereuse? International and EU legal issues concerning the selling of EU citizenship*, in *Biblioteca della libertà*, 2015, pp. 45-60. See also Y. PETIT, *Passeports et visas "dores": des programmes de citoynneté aux risques multiples pour l'Union Européenne !*, in *OIDU*, 2019, pp. 872-885 ; S. CARRERA, *The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters*", in *MJECL*, 2014, pp. 406-427; C. CIPOLLETTI, *Cittadinanza statale e cittadinanza europea: il caso della legge maltese*, in *Riv. dir. Internaz.*, 2014, pp. 463-485; J. SHAW, *Citizenship for sale: Could and Should the EU Intervene?*, in A. SHACHAR, R. BAILBOCK (Eds.), *EUI Working Papers* , 2014, p. 33.

[65] European Parliament Resolution of 16 January 2014 on EU citizenship for sale (2013/2995(RSP)).

[66] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Strengthening Citizens' Rights in a Union of Democratic Change: EU Citizenship Report 2017, COM/2017/030 final.

[67] Report from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions: investor citizenship and residence schemes in the European Union, COM (2019) 12 final.

[68] European Parliament Resolution of 10 July 2020 on a comprehensive Union policy on preventing money laundering and terrorist financing: the Commission's Action Plan and other recent developments (2020/2686(RSP)).

[69] Another notice was sent to Malta on the 9 of June 2021. The position of the other country concerned, Cyprus, is, at state, still under investigation. The third country in question, Bulgaria, formally abolished its scheme starting from April 2022.

[70] ECJ, case C-181/23.

using European citizenship as a "tradable commodity"[71] in absence of any *genuine link* with national and European territory.

As we can see, the approach (at least of the Commission and of the European Parliament) differs from *Micheletti, Tjebbes* and other previously mentioned rulings[72]. More precisely, here, the aim of the EU is not to protect EU's rights conferred to individuals and their families, but rather to protect EU's interest against the risk of money laundering, tax evasion, terrorism, corruption and other crimes.

It is even more interesting to highlight that Commission invoked also the principle of sincere cooperation between Member States enshrined in Article 4(3) of the TFEU[73]. As is well known, this principle is a milestone of the EU integration process[74] and its application is not necessarily dependant on whether EU's competence is exclusive. This means that it shall apply also in domains where Member States retain monopoly of action, such as nationality. It entails for Member States a number of duties for the correct and full application of EU law and objectives[75], namely the duty to adopt all appropriate measures to ensure the fulfilment of EU obligations, the duty to assist EU institutions and facilitate their action in carrying out EU tasks, the duty to abstain from measures that may jeopardize EU objectives, and the duty of mutual assistance.

In Commission's view, such duties are not consistent with an approach of a Member State which encourages the idea that access to (national and European) citizenship's rights is based (exclusively) on economic criteria[76]: such vision breaches the EU values such as enshrined at article 2 of TEU[77] and jeopardizes EU objective to establish a society based on the principles of solidarity and equality.

4. The impact of EU Law on Italian unlimited *ius sanguinis* principle and on its proposal of amendment

In light of the foregoing EU law principles in nationality matters, it is now possible to investigate their impact on the Italian unlimited *ius sanguinis* principle and on its proposal of amendment.

For this purpose, it must be preliminarily underlined that the Italian case is quite peculiar since no other EU country has tens of millions of potential citizens living outside the EU. In

[71] European Parliament Resolution of 16 January 2014 on EU citizenship for sale, cit., para. 8.

[72] The reference to the "genuine link" in nationality matters shall be not taken as a "*return to Nottebohm*" or as an application "*à géométrie variable*" of the genuine link doctrine within EU law. Genuine link, *rectius* the absence of any genuine link, is simply invoked to avoid arbitrary or artificial situations of naturalization, where there are effects on EU law.

[73] M. KLAMERT, *The Principle of Loyalty in EU Law*, Oxford, 2014; G. MARTINICO, *What Lies Behind Article 4(2) TEU?*", in A. SAIZ ARNAIZ, C. ALCOBERRO LLIVINA (Eds.), *National Constitutional Identity and European Integration*, Cambridge-Antwerp-Portland, 2013, pp. 93-108.

[74] ECJ, 10 December 1969, case C- 6/69 and C-11/69, *Commission v. France*, para. 16; see also ECJ, 8 April 1976, case C-43/75, *Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena*, para. 28.

[75] More precisely, the duty to adopt all appropriate measures to ensure the fulfilment of EU obligations, the duty to assist EU institutions and facilitate their action in carrying out EU tasks, the duty to abstain from measures that may jeopardize EU objectives, and the duty of mutual assistance.

[76] In this respect, it is curious that no reference have been made to the possibility to activate the procedure of article 7 TEU, as F. CASOLARI, *Eu citizenship*, cit., correctly points out.

[77] See ECJ, 19 September 2018, case C-327-18 PPU, para. 34.

this respect, the *Maltese affaire* certified that Member States' choices in nationality matters may have an impact on EU and other Member States' interests, especially if such choices lead to the attribution of national and European citizenship for a *huge number* of third countries' nationals whose *genuine link* with EU could be questionable. Also, AG Maduro in his opinion in *Rottman*[78]*,* did not exclude that a domestic law which impacts *massively* on national and European citizenship may be relevant under EU principle of loyalty.

However, it must be highlighted that Italy has not adopted any measure to encourage *naturalization* of nationals of third countries. Italian descendants are entitled to Italian citizenship *from the birth*. They do not seek for any "new citizenship": this seems to be the crucial difference with the scenario suggested by AG Maduro. Furthermore, the Italian unlimited *ius sanguinis* is not a tool to attract "investors" like in *Maltese affaire*: it is rather an "horizontal" mechanism of attribution of nationality which does not depend on any economic or patrimonial condition.

In other words, the principle of sincere cooperation is not likely to be invokable in this case. As a matter of fact, Italy adopted the unlimited *ius sanguinis* principle since its "birth" more than one hundred and sixty years ago and it never abolished or amended it. Therefore, at the time of foundation of European Community (and then of the European Union), all the other Member States were (or should have been) aware of the approach of Italian nationality law, of the dimension and of the characteristics of the Italian emigration and of the possible effects that the combination of the foregoing factors could one day have, including in an EU perspective[79]. In light of that, it is hard to conceive that, today, Member States or the EU institutions can invoke duties of loyalty or sincerity to challenge something that they accepted or at least never contested in the past[80].

One may even query that the recent and significant increase of demand of Italian nationality from descendants of Italian descendants is something that never occurred before and which may have an unexpected "European" impact from an economic, social and even political point of view. However, even this argument does not go so far. Indeed, this recent phenomenon is not related to any concrete massive emigration to Europe of Italian descendants from a specific third country[81]. Finally, it must be remembered that a passport of a country may

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[78] AG Maduro in his opinion in *Rottmann* (para. 30) observes that the principle of sincere cooperation "*could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalization of nationals of non-member States*". He expressly makes reference to naturalization and not to recognition from the birth.

[79] See also the approach on this matter of H.U. JESSURUN D'OLIVEIRA, *Nationality and the European Union after Amsterdam*, in D. OKEEFF, P. TWOMEY, *Legal Issues of the Amsterdam Treaty*, Hart, 1999, pp. 395-412, in particular, p. 405.

[80] No formal inquiries, protests, questions or other formal initiatives from Member States or from one of the EU institutions related to Italian unlimited *ius sanguinis* principle have been registered so far. Generally speaking, nationality laws have never sparked many debates within EU law. In this field, we register a written question without answer (No. 1674/87 on OJ No. C 53/23 of 24 February 1988) by a Parliamentarian (Mr Luis Perinat Elio) on 12 November 1987 by which the Commission was asked to make a survey about the national approaches in nationality matters and to take a position on the legal instruments to propose in that field.

[81] As a confirmation of this, one of the main countries of origin of such descendants are the United States of America which is the country having the largest number of immigrants (and not emigrants) in the world. Moreover, the main countries where U.S. nationals migrate are non-EU countries (Mexico, Canada and UK). See World Bank's World Development Report 2023. Also, the other main non-EU countries of origin of such descendants (Brazil, Argentina) are not in the list of the 20 countries in the world having the highest number of emigrants. See

facilitate the access and the permanence in such a country, but does not guarantee itself any improve of the quality of life, which is what usually leads someone to migrate.

Having said that, it cannot be excluded that the European (and not only) dimension of this matter may persuade the Italian Parliament to consider a possible review of the Italian unlimited *ius sanguinis*.

This leads to analyse, under an EU law perspective, the referred proposal of amendment of the Italian nationality law. As we have seen before, this proposal basically seeks to mitigate the *ius sanguinis* principle with elements of *ius soli*, of *ius domicilii* and of *ius culturae*. Indeed, according to the proposal, descendants non born in Italy shall comply with a language test and, in some cases, shall also reside at least one year in Italy.

However, such approach does not seem in line with EU Law for several reasons.

First of all, it would infringe EU law with regard to the position of those *already born-descendants* of Italian nationals. Pursuant to Italian nationality law, they acquired, instantly and automatically, the *status* of Italian nationals *from the birth*. Therefore, the proposal cannot impact retroactively on their *status*. For them, the proposal may be just interpreted in the sense that, if they do not fulfil with the new conditions, they may *lose* their *status acquired from birth*[82].

However, as the ECJ establishes, any loss of Member states' nationality requires a specific and individual assessment for the purposes of EU law. Indeed, the decision to deprive someone from rights stemming from EU law, even if based on a reasonable ground, shall take into consideration the specific effects that it may have on the private life of the citizen. And the above-mentioned proposal of amendment of the Italian nationality law, as well as all others previously filed with the Italian Parliament[83], do not face this matter.

What the ECJ suggests seems to be particularly pertinent with regard to the "Italian case": indeed, most of these millions of descendants entitled to Italian nationality are non-EU citizens. Therefore, depriving them from Italian nationality would also mean depriving them from European citizenship's rights. And a part of them may have a specific and concrete interest to exercise these rights, especially considering that they could be already resident in an EU country (as non-EU citizens) or that they could have interest to move to an EU country[84].

World Migration Report 2022, International Organization for Migration (file:///C:/Users/user/Downloads/wmr_2022_book_eng.pdf).

[82] On the contrary, the proposal shall impact on the attribution of the citizenship for non-already born descendants. They will be required to fulfil with the conditions provided for by the law to obtain the recognition of the status.

[83] Amongst others, Disegno di legge No. 2269 of 25 November 2019 filed with the Camera dei Deputati.

[84] In this regard, it must be remembered that the assessment of the impact of depriving a citizen from exercising EU citizenship's rights may be very broad since it shall take into account all relevant circumstances under EU law. See AG MENGOZZI in his opinion in *Tjebbes*, paragraph No. 84. More precisely, based on the ECJ's case law, such "European citizenship's rights-assessment" should, *inter alia*, investigate whether the descendant of an Italian emigrant (entitled to Italian nationality): (i) holds another EU citizenship; (ii) enjoys indirectly EU rights (i.e. as spouse of another EU citizen); (iii) has already exercised or has been exercising any right deriving from European citizenship and, if so, which ones and for which period of time; (iv) even not acting as European citizen, has lived or has been living in any EU Member State and, if so, for how long; (v) has been living in a non-EU country and the loss of European citizenship may affect its private life and family; (vi) is willing to exercise rights deriving from EU citizenship; (vii) is familiar of an EU citizen who may be affected by the loss of European citizenship, especially if such EU citizen is a child (for instance, EU citizens living in a non-EU country may have the need to exercise the right to diplomatic protection: see ECJ, *Tjebbes*, cit., para. 46). One may even argue that such approach may lead citizens to systematically challenge, under EU law, any national decision (or law) related to the loss (or non-acquisition) of national (and European) citizenship. See AG MENGOZZI in his opinion in *Tjebbes*, para. 106.

Secondly, the proposal would infringe EU law with regard to the position of those *not yet born- descendants* of Italian nationals. In this regard, the proposal presumes *iuris et de iure* that descendants non-born in Italy have not a sufficient *genuine link* with the nation and, therefore, shall fulfil with supplementary conditions to obtain the *attribution* of their *status civitatis*.

In this regard, it must be highlighted that the ECJ has not dealt yet with a case of *attribution from birth* of a Member State's nationality. However, nothing prevents from applying the principles stemming from the ECJ's case law also to this kind of cases[85].

First of all, the proposal of amendment of Italian nationality law may lead to the statelessness of the descendant. As a matter of fact, if the descendant is born in a country which does not attribute its citizenship for right of soil and if the descendant is not able to obtain through the other parent (or in another way) a citizenship of a country[86], then it will be stateless from the birth. To make matters worse, such descendant will be likely to remain stateless for a long time (until it is able to fulfil with language or residence requirements). It is evident that such scenario may not be in line with the rationale of *Rottmann* and *JY* (among others) as well as with the case law of ECHR.[87] Moreover, it would clearly infringe article 24, para. 2, of the EU Charter of fundamental rights which protects the best interest of a child[88]: as a matter of fact, the statelessness from the birth may seriously affect the normal development of the life of a child.

Secondly, the non-attribution of Italian nationality to a descendant in reason of its birth outside the national territory does not appear proportionated and reasonable. The mere birth outside the territory may represent a completely occasional event which should not prevent a descendant of a citizen (of a country applying *ius sanguinis*) from being attributed at birth the *status civitatis*[89]. In particularly, the descendant would not have any chance to demonstrate that, despite its birth outside Italy, it has an effective and current link with Italy in reason of its Italian ascendance. The principle of proportionality in nationality matters, following the ECJ's case law from *Rottmann* to *Stadt Duisburg*, may play a role here, especially considering that the non-attribution at birth of Italian nationality shall prevent not only that descendant from exercising any rights stemming from European Union, but also its parents from being the indirect

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The increasing number of preliminary references to the ECJ in nationality matters confirms this concern (among others, see ECJ, 15 March 2022, case C-85/21, *WY v Steiermärkische Landesregierung*).

[85] According to K. HYLTÉN-CAVALLIUS, *Stateless Union Citizens*, cit., p. 16, should the ECJ intervene also in a case of *attribution from the birth* of a Member State's nationality, then it "*would truly open the door to a new phase in the case law on the effect of Union citizenship on member states' nationality laws*". F. JAULT-SESEKE, *Refus de naturalisation*, cit., p. 935, does not any see any substantial difference in the approach of EU law concerning the loss of a nationality or the non-acquisition of nationality in so far as, in both cases, the relevant effect for EU law is that the individual is *not* an European citizen.

[86] For instance, this may happen if both parents are Italian or if the other parent is national of a country which does not provide the transmission of the nationality for right of blood.

[87] See footnote No. 59.

[88] According to the ECJ's case law, the best interest of a child shall be taken into consideration if its rights are directly (see, *Tjebbes*, cit., para. 47) or indirectly (*Zambrano*) undermined by unlawful national choices in nationality matters. See on this E. NISSEN, *A Children's Rights Perspective to Ruiz Zambrano and Chavez-Vilchez: An Examination in Light of Theory, Practice and Child Development Research*, in *Eur. J. Migr. Law*, 2021, 23, pp. 68-101). See also the considerations of AG MENGOZZI in his opinion to *Tjebbes* (para. 129 and ff.) and of A. P. VAN DER MEI, *Member State Nationality, EU Citizenship and Associate European Citizenship*, in N. CAMBIEN, D.V. KOCHENOV, E. MUIR, *European Citizenship under Stress*, Leiden, 2020, pp. 441-456, in particular p. 448.

[89] Here, paradoxically, there will be the reverse situation of *Chen*.

beneficiaries of such rights. *Zambrano and Chen* (among others) are clear examples of how such scenario is relevant under EU law and may imply the infringement of individual rights.

Finally, for both *already born-descendants* and *not yet born-descendants*, the proposal of amendment of Italian nationality law may appear disproportionated since it shall not provide for any transitional arrangements. As a matter of fact, a such drastic *reformatio in peius* of the conditions to be recognized as a national should give to the persons concerned the effective chance to fulfil with the new conditions before the new law be applied. In this respect, the ECJ in *X* and, more clearly, in *Stadt Duisburg* underlined this aspect[90]. Member States shall place the individual in a position to effectively fulfil with any law requirement which may cause, directly or indirectly, the loss of its nationality. The foregoing is *a fortiori* valid when a Member State for the first time in more than 160 years modifies its main criterion of attribution of the national citizenship, providing for new conditions which require time to be fulfilled.

5. Final remarks

The foregoing analysis shows that while the current Italian unlimited *ius sanguinis* principle (whose possible effects are undoubtedly remarkable) is consistent with EU law, its possible amendment may infringe several rights of individuals under EU law. Therefore, the Italian Parliament, in its initiative of possible amendment of the *ius sanguinis* principle, is called to take in due consideration the principles stemming from the ECJ's case law.

In this respect, it must be remembered that other Member States had to amend their nationality laws or practices in light of the ECJ's case law on nationality matters. For instance, Spain did it after *Micheletti*[91]; Netherlands[92] and Denmark[93] did it after *Tjebbes*; Cyprus and Bulgaria did it after Commission's inquiry on "golden passports and visa"; and even Belgium and Ireland did it after *Ruiz Zambrano* and *Chen* respectively, although they did it with a different purpose[94].

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[90] See *Stadt Duisburg*, cit., para. 60: "*in view of the serious consequences pertaining to the loss of German nationality, which entails loss of citizenship of the Union, for the effective exercise of the rights which a Union citizen derives from Article 20 TFEU, the applicants in the main proceedings should have been placed in a position, possibly under transitional arrangements, effectively to initiate the advance permission procedure provided for in Paragraph 25(2) of the StAG, in order to retain German nationality*". See also the opinion of AG SZPUNAR, para. 71.

[91] More precisely, Spain amended its treaties with Latin-American States which were based on the notion of 'dormant' nationality which did not allow Latin-American nationals to use all the rights related to Spanish (and therefore European) citizenship.

[92] More precisely, on the 12nd of February 2020, some months after *Tjebbes*, the *Raad Van State* (Council of State of the Netherlands, sitting as Supreme Administrative Court of the Netherlands) adopted a decision by which annulled the decision(s) of withdrawn of citizenship(s) and ordered to the Dutch Minister of Foreign Affairs to make a new assessment pursuant to principles laid down by the ECJ.

[93] More precisely, Danish Ministry of Immigration and Integration considered proposed an amendment of Danish Nationality Law in October 2019. The amendment was approved by Law No. L 63 of 28 January 2020. It is curious to note that the Kingdom of Denmark was among the more sceptical Member States about the distinction between "European citizenship" and national citizenships: see the Decision of the Heads of State and Government, Meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union, Annex I [1992] OJ C 348/2, Section A and the unilateral declarations of Denmark, to be associated to the Danish Act of ratification of the Treaty on European Union and of which the eleven other Member States will take cognizance [1992] OJ C 348/4.

[94] The reaction of Belgium to *Ruiz Zambrano* was to amend domestic rules in order not to confer nationality to the child born in Belgium from parents who did not register it with the competent authorities of the State of which the

Should the Italian Parliament adopt a new nationality law not in line with EU law, it is not excluded that Italy may be the protagonist of the next ECJ's ruling in nationality matters. In this regard, it must be underlined that (almost) the whole case-law of the ECJ in this field refers to preliminary rulings under article 267 TFEU. Outside of the *Maltese affaire* (which is, as we have seen, a peculiar case involving different interests), the Commission has never started an infringement procedure alleging that a Member State's nationality law is not in line with EU law and, in particularly, with the ECJ's case-law in nationality matters. However, nothing prevents that this one day may occur exactly with the Italian case, by doing so opening new unexplored scenarios in the relationship between EU and Member states in nationality matters.

child is entitled to its nationality through the *ius sanguinis* principle. After *Chen* (ECJ, 19 October 2004, case C-200/02), Ireland amended its *ius soli* principle in order to avoid third countries' nationals to give light to their children on the Irish territory with the exclusive purpose to obtain for the latter the Irish (and therefore European) citizenship and to enjoy, as parents of an EU citizen, EU rights.