**In the Shadow of the Euro Crisis:**
**Foreign Direct Investment and Investment Migration Programmes in the European Union**

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## 1. Introduction

European Union (EU) Member States have long competed to attract Foreign Direct Investment (FDI) as well as other forms of foreign investment through a panoply of incentives targeted at companies, ranging from new infrastructure to worker training.[1] This form of regulatory competition, both against third countries and against other EU Member States, became fiercer in the wake of the global financial crisis and the subsequent Euro crisis, which have prompted a sharp drop of inward foreign investment in Europe, in a broader context of negative and low growth rates, a sovereign debt crisis, and a precipitous decline of outflows of FDI worldwide.[2]

This chapter examines the recent proliferation of European investment migration programmes from the investment, rather than the citizenship or residence, angle. Given the starkly reduced FDI inflows after the 2008 financial crisis and the subsequent Euro crisis, we explore the design of investment migration programmes as another investment incentive in the toolkit of EU Member States, albeit targeted at individuals instead of companies. We hypothesize, firstly, that investment migration programmes have flourished as a result of a match between supply – i.e. the goods which Member States can offer through investment migration programmes – and demand for these goods especially on the part of new investors from third countries. Secondly, the production of supply has been incentivized by the recent

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[1] See for instance L Oxelheim and PN Ghauri. *European Union and the Race for Foreign Direct Investment in Europe* (Emerald Group 2004).
[2] World Bank Data, at https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2018&locations=EU-1W&name_desc=false&start=1990.

great economic downturn which saw many EU Member States search for foreign capital inflow, while EU membership imposed constraints on them to incentivize FDI.[3]

Following Sumption, investment migration programmes may be defined as programmes in which residence status or citizenship is awarded to individuals, and in some cases their families, in exchange for a financial transaction, without strict requirements to be involved in the day-to-day operations of a business.[4]

Investment migration programmes include citizenship-by-investment (CBI) programmes, which grant citizenship in exchange for a required investment or donation, and residency-by-investment (RBI) programmes, which allow the investor to reside in the respective country for a certain period of time.[5] According to this definition, investment migration programmes thus should be distinguished from entrepreneurial and start-up residence programmes, which tend to focus on individual skills and knowledge rather than the financial transaction itself.[6] According the European Commission's report on RBI and CBI,[7] investment migration programmes are now offered by twenty out of twenty-seven EU Member States (Bulgaria, Croatia, Cyprus, Czechia, Estonia, Ireland, France, Greece, Hungary,[8] Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia and Spain) as well as the United Kingdom. Although this list may be criticized for being both over-inclusive and under-inclusive,[9] the categorization of borderline cases is not of great importance for our purposes.[10] In the remainder of this chapter, therefore, we rely on the Commission's categorisation because it is a widely available focal point in the discussion on the proliferation of investment migration programmes in the EU, and the list appears roughly accurate.

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[3] See section 2.2 below.

[4] See Sumption, in this volume.

[5] It should be noted that while 'residence' is the principal right which states offer to the investor, investors who make uses of investment migration programmes are not necessarily interested (primarily) in the legal right to reside physically in the respective country. Especially in regard of CBI, investors could for instance be primarily interested in the visa-free travel opportunities which a new nationality grants them as opposed to their current nationality, or the prestige associated with this new nationality. See also section 3 below.

[6] European Parliament Report, p. 13; Sumption, in this volume. See further L Patuzzi, 'Start-up Visas: A Passport for Innovation and Growth', *Migration Policy Institute* (July 2019).

[7] European Commission, 'Report on Investor Citizenship and Residence Schemes in the European Union', COM (2019) 12 final.

[8] Hungary's RBI programme is formally still in place, although it has been suspended since 2017.

[9] See K Surak, 'Who Wants to Buy a Visa? Comparing the Uptake of Residence by Investment Programs in the European Union' (2020) 28 *Journal of Contemporary European Studies*.

[10] Of course it is possible that the inclusion of some programmes which were not included by the Commission, or the exclusion of programmes which were included by the Commission, would alter conclusions as to, for instance, the degree of regulatory competition in RBI programmes, the alleged race to the bottom in that respect, or the average efficacy of investment migration programmes to compensate for reduced FDI inflow. Based on the available data, however, we have no reason to believe that such would be the case.

The proliferation of European investment migration programmes in the face of the Eurozone financial crisis[11] does raise questions about the extent to which this trend is a direct response to specific circumstances and specific economic problems. In other words, our aim is to scrutinize whether European investment migration programmes can be conceived as a *responsive* phenomenon in the economic context of a worldwide crisis of the economic system, severe financial and economic problems in some EU Member States, and starkly reduced FDI inflows in Europe.[12]

This chapter is structured as follows. In section 2, we briefly revisit some of the major themes of the financial and economic crisis in Europe, and the Eurozone in particular,[13] including FDI inflows, showing how EU membership constrains the options for the Member State's attempts to attract foreign investment. This section aims to situate the proliferation of European investment migration programmes in this political and economic context. In section 3, we provide a brief overview of the main types of European investment migration programmes and show to the extent that they may be regarded as an additional tool in the EU Member States' toolkit to attract foreign capital. In section 4, we situate the proliferation of investment migration programmes in the context of the Euro crisis. Section 5 concludes.

## 2. Foreign Direct Investment after the Financial Crisis

In the wake of the American financial crisis and Great Recession that erupted in the fall of 2008, several European countries experienced their own economic crisis.[14] Both the timing and the nature of these individual crises, however, varied by country, presenting a complex picture of the so-called Euro crisis.[15]. Among the most severely hit Member States was, first and most consequentially, Greece. Following the revelation in October 2009 that the Greek budget

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[11] As we will show later on in this chapter, some European CBI and RBI programmes were already introduced before the start of the worldwide financial and economic crisis. It is clear, therefore, that such investment migration programmes are not a new phenomenon and that the crisis did not 'create' them. However, investment migration programmes – in particular RBI programmes – have spread significantly since the start of the Euro crisis, especially after 2011.

[12] See section 2.1 below.

[13] The Eurozone comprises EU Member States whose currency is the Euro. These are Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia and Spain. Among the Eurozone countries, Cyprus, Estonia, France, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia and Spain are offering RBI and/or CBI programmes.

[14] For an analysis in a broader historical context, see e.g. A Solimano, *A History of Big Recessions in the Long Twentieth Century* (Cambridge University Press 2020) chs 5–6.

[15] A Mody, *Euro Tragedy: A Drama in Nine Acts* (Oxford University Press 2018); PA Hall, 'Varieties of Capitalism and the Euro Crisis' (2014) 27 *West European Politics* 1223; CR Henning, *Tangled Governance: International Regime Complexity, the Troika, and the Euro Crisis* (Oxford University Press 2017).

deficit would be much higher than anticipated, Eurozone countries and the International Monetary Fund agreed the following year to give financial assistance to Greece to help repay its private lenders, which further exacerbated its debt, forced drastic austerity measures, and deepened the crisis.[16]

Meanwhile, Ireland had fallen into recession in 2008 and was the next in line after Greece to experience a financial crisis, coupled with a property bubble. It was severely hit by the collapse of its two largest banks and a crash of its real estate market. In November 2010 the EU and the IMF provided some financial assistance to Ireland, with the remainder coming from Irish cash reserves and other liquid assets, leading in turn to a sovereign debt crisis.[17]

Portugal, which had not experienced rapid growth over the preceding decade, was also severely hit by the general economic downturn, and the country plunged into a sovereign debt crisis, for which it received financial assistance from the EU and the IMF in April 2011.[18] Spain started to show signs of crisis by August 2011, when its long economic boom, underpinned by a housing bubble that had been financed by cheap loans to builders and homebuyers, came to an end. Economic growth shrunk, property prices collapsed, unemployment skyrocketed, and the government borrowed heavily as a result, leading to the announcement of financial assistance to stabilize Spanish banks in June 2012.[19] The economy of Cyprus was next hit by a severe financial crisis, partly as a result of the exposure of Cypriot banks to Greek debt.[20] Cyprus received a bailout in March 2013.[21] In Italy, the financial crisis has developed more slowly and its severe public debt problem has been getting worse for a decade.[22]

Outside of the Eurozone, the Great Recession first spread to Hungary, which suffered from a severe economic crisis in 2008, leading to a rescue package by the EU and the IMF that year.[23] However, the economic uncertainty and instability led to a decrease in investment and

[16] For an overview, see Mody, *Euro Tragedy*, 232–267.
[17] For an overview, see Mody, *Euro Tragedy*, 267–282.
[18] See for instance O Blanchard and P Portugal, 'Boom, Slump, Sudden Stops, Recovery, and Policy Options: Portugal and the Euro' (2017) 16 *Portuguese Economic Journal* 149.
[19] See for instance L Neal and M Concepción García-Iglesias, 'The Economy of Spain in the Euro-Zone before and after the Crisis of 2008' (2013) 53 *Quarterly Review of Economics and Finance* 336.
[20] International Monetary Fund, *Letter of Intent of the government of Cyprus* (29 April 2013), https://www.imf.org/external/np/loi/2013/cyp/042913.pdf.
[21] See for instance S Lütz, S Hilgers and S Schneider, 'Games Borrower Governments Play: The Implementation of Economic Adjustment Programmes in Cyprus and Portugal' (2019) 42 *West European Politics* 1443.
[22] See for instance LS Talani, *The Political Economy of Italy in the Euro: Between Credibility and Competitiveness* (Springer 2017).
[23] IMF, 'IMF Survey: IMF Agrees $15.7 Billion Loan to Bolster Hungary's Finances' (6 November 2008), https://www.imf.org/en/News/Articles/2015/09/28/04/53/socar110608a.

a major political transformation.[24] Similarly, the crisis immediately had repercussions in Latvia (which joined the Eurozone in 2014), whose booming economy came to a sudden halt, leading to a sharp rise in unemployment, a banking crisis, and an emergency bailout from the EU and the IMF in 2009.[25] Estonia and Lithuania (which adopted the Euro in 2011 and 2015 respectively) likewise experienced a dramatic collapse of the housing market, necessitating several years of austerity measures.[26] Meanwhile, virtually all other Member States were, to a greater or lesser extent, also affected by a lack of economic growth and great uncertainty on the markets, which in many countries necessitated government austerity measures.[27] One of the key indicators of this worldwide systemic shock to the economy were the dramatically dropping FDI flows in 2008–2009 and, after a short recovery in 2010, again from 2011 onwards. As will be discussed in more detail below, this decline was especially prominent in the EU, where aggregate FDI inflows plunged by 41 per cent in 2012, which accounted for two-thirds of the global FDI decline.

### 2.1. Dwindling flows of Foreign Direct Investment[28]

FDI is recognized as a key driver of global economic integration, which promotes economic growth for both the home and the host economies. For the host economy, policy-makers widely consider the influx of foreign capital to improve overall national economic performance because it can lead to job creation in the short term and spillovers of technology and know-how in the long term.[29] The academic literature has identified many possible effects of FDI inflow, positive and negative.[30] Even if countries may restrict the inflow of foreign capital under some circumstances (for instance related to national security or culture), they mostly

[24] See e.g. D Piroska, 'Funding Hungary: Competing Crisis Management Priorities of Troika Institutions' (2017) 2 *Third World Thematics* 805; W Kickert and E Ongaro, 'Influence of the EU (and the IMF) on Domestic Cutback Management: A Nine-Country Comparative Analysis' (2019) 21 *Public Management Review* 1348.
[25] See for instance K Staehr, 'Austerity in the Baltic States During the Global Financial Crisis' (2013) 48 *Intereconomics* 293.
[26] Ibid.
[27] For an overview, see e.g. M Burton, *The Politics of Austerity: A Recent History* (Palgrave Macmillan 2016) 135–155.
[28] This section draws on S Meunier, '"Beggars Can't Be Choosers": The European Crisis and Chinese Direct Investment in the European Union' (2014) 36 *Journal of European Integration* 283.
[29] RE Lipsey and F Sjöholm, 'Host Country Impacts of Inward FDI: Why Such Different Answers?', *EIJS Working Papers Series* No 192 (May 2004); S Pandya, *Trading Spaces: Foreign Direct Investment Regulation 1970–2000* (Cambridge University Press 2013).
[30] Lipsey and Sjöholm, 'Host Country Impacts of Inward FDI: Why Such Different Answers?'.

compete to attract FDI through a variety of incentives because the benefits of hosting FDI are usually thought to be superior to its costs.[31]

According to the OECD's standard definition, FDI refers to 'a cross-border investment made by a resident in one economy with the objective of establishing a lasting interest in an enterprise that is resident in an economy other than that of the direct investor'.[32] Such 'lasting interest' is evidenced by the acquisition of at least 10% of the voting power of the direct investment enterprise, and distinguishes direct investment from portfolio investments where investors do not generally expect to influence the management of the enterprise.[33] FDI comes in two major forms of mode of entry into the host economy: cross-border Mergers and Acquisitions (M&A), whereby the investor acquires existing assets abroad, either through mergers or full takeovers, and 'greenfield investment', whereby the investor creates new facilities, for instance an assembly plant or distribution centre, in the host country.

From the 1990s to 2007, the amount of FDI that countries receive exploded worldwide as a result of two major developments. First, many countries implemented changes to their national regulatory environments in order to welcome further foreign investment. Second, the number of Bilateral Investment Treaties (BITs) jumped from only a few hundreds to 2608.[34]

The Great Recession of 2008 suddenly and severely affected these flows for several reasons: the financial crisis impacted negatively the world's GDP, which is correlated positively with demand for FDI; access to credit dried up; and the uncertainty and instability led risk-averse potential investors to wait and see. As a result, global FDI flows were down 20% in 2008 compared to the previous year and took over seven years to get back to their pre-crisis levels. By 2010, the cross-border Mergers and Acquisitions deals of developed country companies were down 67% compared to 2007.[35]

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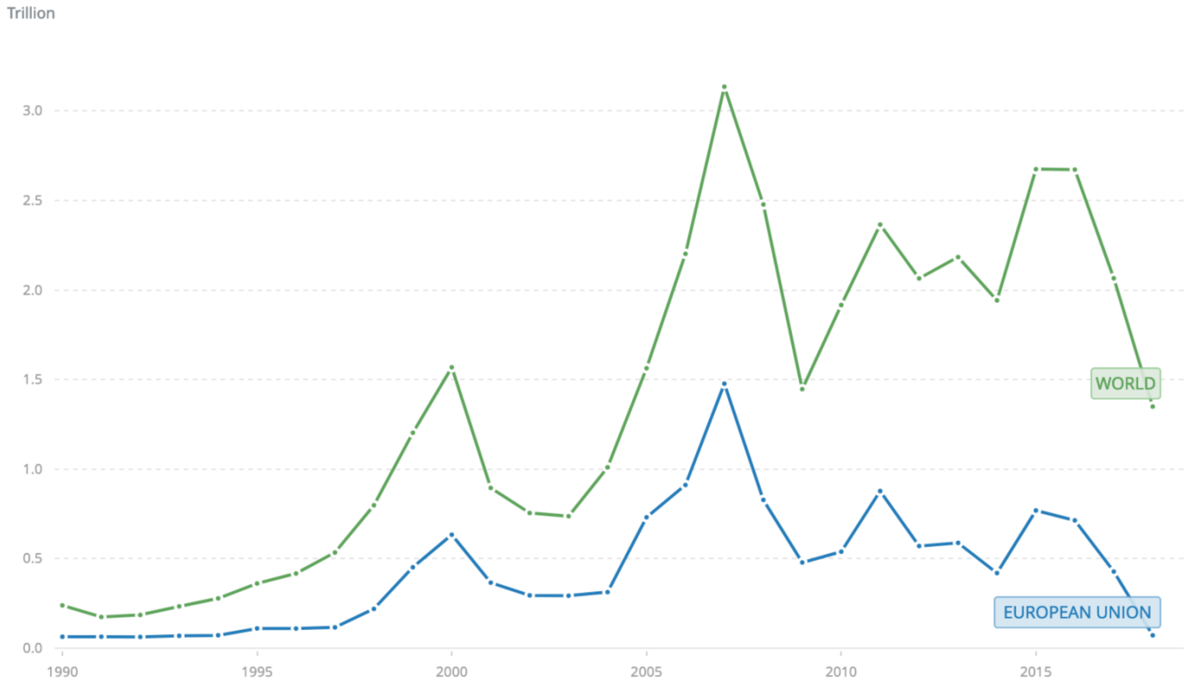
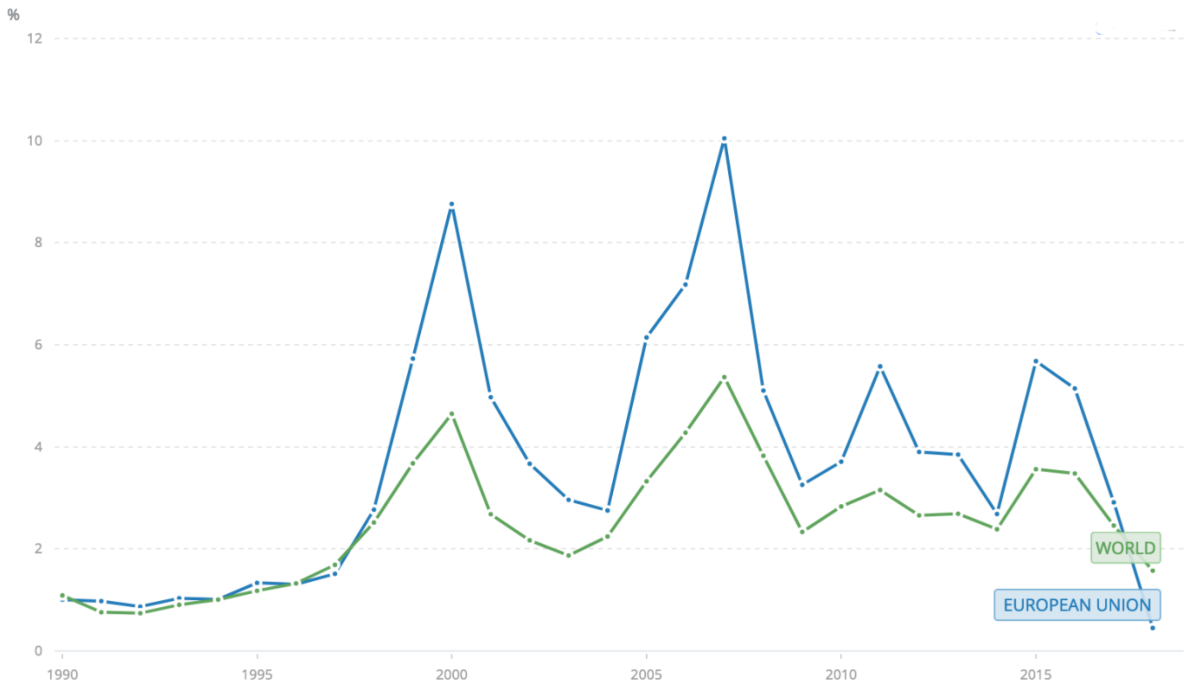
[31] But for a nuanced view on the possible benefits of FDI inflow, see ibid.
[32] *OECD Benchmark Definition of Foreign Direct Investment*, 4th edn (OECD 2008), 17. For a similar definition, see *Balance of Payments and International Investment Position Manual*, 6th edn (International Monetary Fund 2013) 100, defining FDI as a 'cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy'
[33] *OECD Benchmark Definition*, 17
[34] UNCTAD, *World Investment Report 2008* (2008), 'Part I: Record Flows in 2007, But Set to Decline', at https://worldinvestmentreport.unctad.org/wir2008/part-1-record-flows-in-2007-but-set-to-decline/#:~:text=After%20four%20consecutive%20years%20of,time%20high%20set%20in%202000.&text=In%20developing%20countries%2C%20FDI%20inflows,a%2021%25%20increae%20over%202006.
[35] UNCTAD, *World Investment Report 2014: Investing in the SDGs* (2014), at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf; L Skovgaard Poulsen and GC Hufbauer, 'Foreign Direct Investment in Times of Crisis' (2011) 20 *Transnational Corporations* 20.

Figure 1: Net inflows of FDI in the World and the EU 1990 – 2018 in current US dollars




Source: World Bank[36]

Figure 2 : Net inflows of FDI in the World and the EU 1990–2018 in %GDP




36 https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2018&locations=EU-1W&name_desc=false&start=1990.

Source : World Bank[37]

European countries were hit particularly hard by the downturn in global FDI flows and took longer to recover than the rest of the world. Before 2008, the EU was the main recipient of global FDI and attracted, on average between 2000 and 2007, 43.1% of the world's FDI.[38] The majority of EU countries underwent significant drops in inward FDI flows – both from other Member States and from third countries – as a result of the joint sovereign debt crisis and general economic crisis. Some EU Member States, such as Belgium and Germany, saw large declines in FDI inflows in 2011. In the Southern European countries hit by the crisis, the FDI flows were more than halved from 2011 to 2012; Italy even experienced sizable divestment. Between 2008 and 2016, the EU attracted, on average, only 26.7% of the world's FDI. As of writing, FDI inflows have still not reached pre-crisis level in the EU.[39]

### 2.2. EU constraints on incentivizing FDI

At the turn of the decade, the abovementioned crisis in FDI inflows had caused foreign capital to become a scarce resource over which many countries, both inside and outside the EU, were competing. Some EU Member States were better placed than others in this competition because their national economies include assets typically coveted by foreign investors – such as Small and Medium Sized Enterprises producing machinery in the German *Mittelstand*. But the countries hardest hit by the crisis were also the ones with few desirable assets, especially for the rising foreign investor at that time, China, whose companies were more interested in making technology-intensive acquisitions in Europe.[40]

In non-EU countries, including the United States, local and national governments try to influence the location decisions of foreign firms and attract FDI through the use of incentives. These usually fall into three categories: financial incentives (such as grants and loans); fiscal incentives (such as tax breaks); and other incentives (such as infrastructure and worker training). EU membership, however, limits the tools available for competition in attracting investments because of constraints imposed on government incentives. These constraints are

[37] https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?end=2018&locations=EU-1W&name_desc=false&start=1990.

[38] F Carril-Caccia and E Pavlova, 'Foreign direct investment and its drivers: a global and EU perspective', ECB Economic Bulletin 4/2018, at https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201804_01.en.html#toc1.

[39] https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2018&name_desc=false&start=1990.

[40] Meunier, '"Beggars Can't Be Choosers"'.

found in particular in EU State Aid rules and, after the Treaty of Lisbon,[41] the EU's newly acquired exclusive competence on FDI.[42]

The most constraining EU rules for individual states' attempt to incentivize foreign investment are the State Aid rules, which prohibit Member States from giving selective aid to companies, which distort competition in the Single Market.[43] While the EU State Aid rules do not prevent Member States from taking measures of general economic policy that do not give a selective advantage to certain companies (such as certain general taxation cuts), recent case law of the CJEU has confirmed that even seemingly general taxation rules can violate EU law.[44] Following this trend, investment promoting measures run the risk of violating state aid law as well, including, but not limited to, tax rulings.[45]

As for FDI itself, the Lisbon Treaty transferred the competence for FDI from the Member States to the Union by subsuming it under the Common Commercial Policy.[46] Up to that point, the Member States had negotiated more than 1200 Bilateral Investment Treaties (BITs) – including both FDI and portfolio investments – with both other EU Member States and third countries.[47] This massive competence transfer arguably occurred 'by stealth' as a result of both neo-functionalist entrepreneurship by the Commission and historical accident.[48] The transfer caused longstanding ambiguity about the true extent of the EU's authority and

[41] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

[42] See e.g. F Ortino and P Eeckhout, 'Towards an EU Policy on Foreign Direct Investment' in A Biondi, P Eeckhout and S Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012); S Meunier, 'Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment' (2017) 55 *Journal of Common Market Studies* 593; both with further references.

[43] Art 107 TFEU. On state aid law, see e.g. JJP López, *The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond* (Oxford University Press 2015) and HCH Hofmann and C Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016).

[44] Case C-20/15, *European Commission v World Duty Free Group SA and Others*, EU:C:2016:981. For commentary see P Nicolaides, 'Excessive Widening of the Concept of Selectivity' (2017) *European State Aid Law Quarterly* 62. For earlier examples, see e.g. Case C-106/09, *Commission and Spain v Government of Gibraltar and United Kingdom*, EU:C:2011:732; Case C-143/99. *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, EU:C:2001:598.

[45] European Commission, Decision SA.38373, Ireland/Apple tax ruling; European Commission, Decision SA.34914, Gibraltar tax exemption scheme; European Commission, Decision SA.51284, Netherlands/Starbucks tax ruling. On 15 July 2020, the General Court annulled Commission Decision SA/38373 (Ireland/Apple) on the ground that the Commission had not shown that Ireland's tax ruling had given Apple a 'selective advantage' in the meaning of Art. 107 TFEU (Cases T-778/16 and T-892/16, *Ireland and Others v European Commission*, EU:T:2020:338). The consequences of this judgment on the scope of state aid law are still unclear.

[46] Art 207 TFEU. On this change, see the references in n 42 above.

[47] European Commission, 'Q&A: Commission launches comprehensive European international investment policy', MEMO/10/303 (Brussels, 7 July 2010), at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_10_303.

[48] S Meunier, 'Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment' (2017) 55 *Journal of Common Market Studies* 593.

competences.[49] Questions unresolved by the Treaty amendment itself, and which have created ample discussion in the 2010s, included the exact legal status of already existing BITs among Member States and between Member States and third countries, to what extent Art 207 TFEU pre-empted any future negotiations between individual Member States and third countries, and the exact scope of the EU's newly acquired competence.[50]

In Regulation 1219/2012, the power of EU Member States to negotiate new BITs and renegotiate existing ones became subject to Commission supervision in order to ensure compliance with EU law and policy.[51] Grounds for refusal for authorization by the Commission include, for instance, the Commission's decision to recommend the Union to start negotiations with the third country in question itself,[52] in line with the Regulation's objective to progressively replace all Member State BITs with EU ones.[53] While not immediately pre-empted the Member States' ability to maintain their specific FDI and other capital investment arrangements, the Regulation did constrain their ability to freely determine their investment policies with a view to fostering foreign capital inflow. Only in 2018, the ECJ provided (controversial) clarity in its *Achmea* judgment as to the legality of intra-EU BITs by *de facto* outlawing all BITs between EU Member States.[54] Following *Achmea*, on 5 May 2020 23 Member States agreed on the termination of intra-EU BITs.[55] For multiple years, therefore, the scope of EU restrictions on FDI incentives by Member States has remained unclear, a time precisely during which Member States increasingly started to employ investment migration programmes to bring in additional capital.

## 3. Investment migration programmes: Another tool in the toolkit?

[49] See eg, A Reinisch, 'The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements' (2014) 12 *Santa Clara Journal of International Law* 111, 115.
[50] See eg, W Shan and S Zhang, 'The Treaty of Lisbon: Half Way toward a Common Investment Policy' (2010) 21 *European Journal of International Law* 1049.
[51] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40.
[52] Art 9(1)(b) of Regulation 1219/2012.
[53] Recital 6 of Regulation 1219/2012.
[54] Case C-284/16, *Slowakische Republik v Achmea BV*, EU:C:2018:158. For critical commentary, see e.g. CI Nagy, 'Intra-EU Bilateral Investment Treaties and EU Law after *Achmea*: "Know Well What Leads You Forward and What Hold You Back"' (2018) 19 *German Law Journal* 981; S Gáspár-Szilágyi, 'It Is Not Just about Investor-State Arbitration: A Look at Case C-284/16, *Achmea BV*' (2018) 3(1) *European Papers* 357; P.Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (2019) *Nordic Journal of International Law* 41.
[55] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1.

While RBI programmes have been around for many decades, the number of RBI programmes offered by EU Member States has increased considerably in recent years.[56] In this section, we look at the typical characteristics of such programmes in more detail to inquire whether they could be perceived as an effective means of attracting foreign capital in addition to 'traditional' FDI inflow incentives.

Both inside and outside Europe, investment migration programmes may require a wide variety of financial transactions. Most programmes require investments of some sort, although in some cases a cash transaction to a bank account in the respective country suffices.[57] The European Commission distinguishes between (1) capital investments in a company or financial institutions instruments; (2) investment in immovable property; (3) investment in government bonds; (4) donations contributing to the public good; and (5) one-time contributions to the state budget.[58] Sumption likewise identifies (1) investments in private-sector business, and (2) real-estate investments, and further distinguishes between (3) non-refundable cash payments to either some 'worthy cause' (i.e. the public good) or to the state budget, the latter including special, zero-interest government bonds; and (4) display of wealth in the form of purchasing ordinary government bonds or transfer of funds to a bank account.[59]

### 3.1. Investment migration programmes as a means to attract foreign capital

As noted in the introduction, investment migration programmes should be distinguished from entrepreneurial and start-up residence programmes, which tend to focus on individual skills and knowledge rather than the financial transaction itself, and which are offered by all EU Member States.[60] By emphasizing the lack of requirement to be involved in the daily operations of a business, RBI programmes are delineated from entrepreneurial visa programmes by the fact that the required investment is of a passive nature.[61] However, the exact distinction

[56] For an overview, see K Surak, 'Who Wants to Buy a Visa?'.
[57] This is for instance the case for the RBI programmes in Portugal and Spain.
[58] European Commission, 'Commission Staff Working Document accompanying the Commission Report on Investor Citizenship and Residence Schemes in the European Union', SWD (2019) 5 final, 17. This categorization excludes the transfer of funds to a bank account (ibid).
[59] Sumption, in this volume.
[60] European Parliament Report, p. 13; Sumption, in this volume.
[61] In other words, investors need not be actively involved in their investments: in case of real estate investment, they need not physically reside in their property permanently, in case of private-sector investments, they need not be actively involved in the company/start up, etc.

between on the one hand RBI programmes and on the other hand various kinds of entrepreneurial visa programmes is difficult to draw.[62]

RBI and CBI programmes differ from traditional FDI in many regards: in the first place they apply to individuals and not companies, and their effects on economic growth and innovation can be notably different, depending on the exact criteria for investment. Programmes including, for example, cash payments to the state budget, real estate purchase, or government bond purchase, are incomparable in their economic effects to FDI, as they normally do not entail any direct positive effects on economic growth and/or innovation.

We hypothesize that several Member States conceived these programmes in the wake of the financial crisis as one additional incentive they could use to attract foreign capital into their ailing economies.[63] Crucial in this regard is that unlike traditional investment incentives aimed at companies, Member States' are not constrained by EU membership in the introduction of investment migration programmes. Firstly, investment migration programmes are not subjected to the EU's State Aid rules, which apply only to Member State measures which favour some *undertakings*[64] as to result in a distortion of competition in the internal market.[65] While investment migration programmes may work to the benefit of national companies – for instance if investors are required to invest in local companies – they only favour individuals directly (by granting them residence or citizenship rights) so that EU State Aid law is simply not applicable. Secondly, investment migration programmes do not fall under the scope of the EU's Common Commercial Policy.[66]

When it comes to EU law more generally, individual incentives of citizenship by investment are generally considered not to fall under the competence of the EU at all.[67] EU

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[62] See on this point generally, Sumption and Hooper; Surak (2020); European Commission, 'Commission Staff Working Document accompanying the Commission Report on Investor Citizenship and Residence Schemes in the European Union', SWD (2019) 5 final, 14–15.
[63] On the chronology of the introduction of RBI and CBI programmes, see Table 1 in section 4 below. See also K Surak, 'Who Wants to Buy a Visa? Comparing the Uptake of Residence by Investment Programs in the European Union' (2020) 28 *Journal of Contemporary European Studies*.
[64] The term 'undertaking' in EU competition law and state aid law refers to 'any entity engaged in an economic activity' (Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, para 21), which has been clarified as an activity consisting in offering goods or services on a given market (Case C-205/03, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities*, EU:C:2006:453, paras 25–26).
[65] Art. 107 TFEU.
[66] See Art. 207 TFEU.
[67] Sarmiento and van den Brink in this volume. See also D Kochenov and J Lindeboom, 'Pluralism Through Its Denial: The Success of EU Citizenship' in G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018). It is theoretically possible that the CJEU will infer some constraints to CBI schemes from the principle of sincere cooperation, in particular relating to due diligence. See also AMA Scherrer and E Thirion, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) Schemes in the EU' (European Parliamentary Research Service 2018), p. 28–32; European Commission, Report on Investor

harmonization regarding long-term residency for third-country nationals explicitly permits more favourable criteria for acquiring long-term residency by individual Member States.[68] The ability of the EU to regulate investment migration programmes through anti-money laundering legislation and its residual competence to take measures which are necessary for the achievement of the EU's goals appears quite limited.[69] From a legal perspective, therefore, Member States are hardly constrained by EU membership in the shaping of their investment migration programmes.[70]

This makes investment migration programmes an attractive policy option for Member States to incentivize foreign capital inflow. Setting aside the question of whether they are effective,[71] investment migration programmes are in any case a relatively simple tool in the national toolkit to attract foreign capital either to compensate for dwindling FDI inflow directly, or to boost GDP growth and/or reinvigorate particular economic sectors such as the housing market.

### 3.2. The demand side: the new investors

Conceiving of investment migration programmes as a means to partially compensate for losses in foreign capital aligns with concurrent trends on the demand side of the market for residency and citizenship. Thanks to the combination of globalization and capitalism, growth has picked

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Citizenship and Residence Schemes in the European Union', COM (2019) 12 final, p. 5 and 9ff; European Commission, 'Commission Staff Working Document accompanying the Commission Report on Investor Citizenship and Residence Schemes in the European Union', SWD (2019) 5 final.

[68] Art 13 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44. For a detailed analysis, see Martijn van den Brink, 'Investment Residence and the Concept of Residence in EU Law: Interactions, Tensions, and Opportunities' (2017) *IMC Research Paper* 2017/1.

[69] Art 352 TFEU. For a detailed analysis, see Sarmiento and van den Brink in this volume.

[70] On 20 October 2020, the European Commission nevertheless started infringement proceedings against Cyprus and Malta because their citizenship-by-investment schemes allegedly violate the principle of sincere cooperation in Art 4(3) TEU and 'the integrity of the status of EU citizenship' . See European Commission, *Investor citizenship schemes: European Commission opens infringements against Cyprus and Malta for "selling" EU citizenship* (20 October 2020). The Commission's action is premised on the ICJ's controversial 'genuine links' theory (*Liechtenstein v Guatemala* (Nottebohm) [1955] ICJ 1). For a highly critical first reaction, see 'Kochenov: Commission Would Likely Be "Humiliated" If CIP-Matter Goes to Court Over "Genuine Links"', *Investment Migration Insider Daily* (23 October 2020), https://www.imidaily.com/editors-picks/kochenov-commission-would-likely-be-humiliated-if-cip-matter-goes-to-court-over-genuine-links/. For critical analyses of the *Nottebohm* judgment from an international law viewpoint, see eg RD Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 *Harvard International Law Journal* 1; A Sironi, 'Nationality of Individuals in International Law: A Functional Approach' in S Forlati and A Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge 2013); PJ Spiro, Nottebohm and 'Genuine Link': Anatomy of a Jurisprudential Illusion (2019) Investment Migration Working Papers No 2019/1. For an analysis of *Nottebohm* from an EU law perspective, see Kochenov and Lindeboom, 'Pluralism Through Its Denial: The Success of EU Citizenship'.

[71] See Sumption in this volume.

up spectacularly over the past two decades in countries that used to have less advanced economies. For instance, Russia is the country with the fastest growing number of millionaires worldwide.[72] According to the Global Wealth report, there were 97,100 Russian millionaires in 2008, a number which has more than doubled to 200,300 millionaires in 2018.[73] In China, GDP per capita has dramatically increased.[74] As in Russia, this new prosperity has been accompanied by growing and glaring inequalities, especially since the number of millionaires in China has been rising fast: 805,000 millionaires in 2010, corresponding to 3% of the world's millionaires; 3,480,000 and 8% in 2018.[75] Overall, there are now over 42 million of millionaires worldwide.[76] According to the Global Wealth report, at the beginning of the 21st century, "the 13.8 million millionaires in the world were heavily concentrated (97%) in high-income countries. Since then, 28.3 million 'new millionaires' have appeared, of whom 4.3 million – 15% of the total additions – originated from emerging economies."[77]

Serving as a paradigmatic case of the new investors' entrance in the international investment arena, China offers a particularly interesting study illuminating the magnitude of changes in international capital flows. China's investments in sovereign debt, portfolio investments and foreign direct investments (FDI) have grown across the globe, from massive positions in US treasuries to ubiquitous ownership and exploitation of African and Australian mines. When it comes specifically to FDI, the numbers are staggering: the stock of outbound FDI held by China doubled between 2008 and 2011 to reach $364 billion in 2011. The growth continued in 2012, with an additional $62 billion invested abroad by Chinese companies in an international context where global FDI flows declined.[78] In 2012, China became the third largest direct investor in the world in flows, after the US and Japan (excluding tax heavens). Chinese FDI is now flowing to Europe as well. Virtually non-existent five years ago, Chinese investment into Europe has surged spectacularly throughout the 2010 decade, with a peak in 2017.[79] From Sweden to Germany, from Greece to Hungary, private and public Chinese

[72] https://www.themoscowtimes.com/2017/09/29/russia-has-the-fastest-growing-number-of-millionaires-in-the-world-a59113.

[73] https://worldwealthreport.com/reports/population/europe/russia/.

[74] S Babones, 'China's Middle Class Is Pulling Up the Ladder Behind Itself', *Foreign Policy* (blog) (1 February 2018), https://foreignpolicy.com/2018/02/01/chinas-middle-class-is-pulling-up-the-ladder-behind-itself/.

[75] Credit Suisse, "Global Wealth Report 2018," Credit Suisse, October 18, 2018, https://www.credit-suisse.com/corporate/en/articles/news-and-expertise/global-wealth-report-2018-us-and-china-in-the-lead-201810.html.

[76] Ibid.

[77] Ibid. See further K Surak 'What Money Can Buy: Citizenship by Investment on a Global Scale' in D Fassin (ed), *Deepening Divides, How Physical Borders and Social Boundaries Delineate our World* (Pluto Press 2019).

[78] OECD, *FDI in Figures* (April 2013), http://www.oecd.org/daf/inv/FDI%20in%20figures.pdf.

[79] S Meunier, B Burgoon and W Jacoby, 'The Politics of Hosting Chinese Investment in Europe' (2014) 12 *Asia Europe Journal* 109; A Kratz, M Huotari, T Hanemann and R Arcesati, 'Chinese FDI in Europe: 2019 Update',

investors have built factories, participated in infrastructure projects, and purchased iconic European companies.

In absolute numbers, China is still a minor investor in Europe in terms of stocks of investment, and the size of Chinese investment is very modest compared to the size of Chinese trade with Europe: over the last decade, EU imports from China have been exceeding Chinese FDI inflow least one order of magnitude.[80] But the flows tell a different story, with investments that tripled from 2006 to 2009, tripled again by 2011 to $10 billion and reached $12 billion in 2012.[81] According to official EU figures, Chinese investment flows into Europe grew by 155 per cent between 2009 and 2011.[82] Chinese FDI inflow in the EU grew to EUR 35.9 billion in 2016.[83] Although investments decreased to EUR 29.7 billion in 2017, this value was still almost fifteen times higher than FDI inflow in 2010.[84]

The accumulation of Chinese direct investments in European companies can be explained by the combination of lower prices for many European assets as a result of the economic downturn, as well as a greater number of assets for sale in general, and a more favourable political climate consisting of lessened political resistance in Europe to deals that may have been objectionable in flusher times.[85]

The key difference between ordinary FDI and portfolio investments on the one hand, and investment migration programmes on the other hand, is that in the latter case countries have significantly more to offer than returns on investments only. The right to reside in any of the EU Member States, as secured by the CBI programmes, is of considerable intrinsic value to foreign individual investors. This flips the market on its head, to the extent that investment

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MERICS Mercator Institute for China Studies (8 April 2020), https://www.merics.org/en/papers-on-china/chinese-fdi-in-europe-2019.

[80] For statistics, see European Commission, 'European Union, Trade in goods with China' (8 May2020), at https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_china_en.pdf.

[81] T Hanemann, *Chinese Investment: Europe vs. the United States* (25 February 2013), http://rhg.com/notes/chinese-investment-europe-vs-the-united-states; T Hanemann and D Rosen, *China Invests in Europe: Patterns, Impacts and Policy Implications* (Rhodium Group 2012).

[82] Eurostat, 'Top ten countries as extra EU-27 partners for FDI positions', http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Top_ten_countries_as_extra_EU-27_partners_for_FDI_positions,_EU-27,_end_2009-2011_(EUR_1_000_million).png&filetimestamp=20130722084750

[83] F Bickenbach and W-H Liu, 'Chinese Direct Investment in Europe – Challenges for EU FDI Policy' (2018) 19 *ESifo Forum* 15.

[84] Ibid.

[85] See to this end Meunier, '"Beggars Can't Be Choosers"'.

not only, or not even primarily, serves to generate a Return on Investment (ROI), but is the price for a favoured product.

From the perspective of residence and citizenship, participants in the programmes are willing to pay for this ‘product’. Individuals who have an interest in investment migration programmes include in particular Russian and Chinese investors.[86] In the period between October 2012 and May 2018, 60% of investment residence permits in Portugal were granted to Chinese persons.[87] In Greece, for example, 47% of all investment residence permits since the creation of the programme in 2014 went to Chinese investors; the other large groups were Russian (14.5%) and Turkish (10.4%) nationals.[88] Former Soviet Union nationals received 95% of all Latvian immigrant investor permits between 2010 and 2013.[89] The number of Russian investors accounts for approximately 60% of Cyprus’ CBI programme, and for about half of the one of Malta.[90]

In terms of the specific advantages of residence and citizenship, both may provide additional economic benefits, such as easier asset diversification, fiscal benefits, and facilitation of the administrative and regulatory burdens associated with these objectives. Additionally, residence and citizenship offer several non-economic benefits, including:

(1) *Political freedom and individual rights*. Individual investors may seek to reside in a democratic country, or at least have the option to move to a democratic country at a moment’s notice. Most recent economic growth in the world has taken place in countries with political regimes that restrict democratic rights. However, this benefit would only apply to investors who are seeking to move to the country of their investment migration programme (the majority of RBI and CBI consumers do not actually move).

(2) *Political and economic stability*. Most of the wealthy individuals participating in investment migration programmes come from countries with potential political and

[86] See for a broader overview of the share of Russian and Chinese investors in European investment migration programmes, Transparency International and Global Witness, *European Getaway: Inside the Murky World of Golden Visas* (2018), at https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/european-getaway/.

[87] L van der Baaren and H Li, ‘Wealth Influx, Wealth Exodus: Investment Migration from China to Portugal’ (2018) IMC-RP 2018/1, p. 9.

[88] Investment Migration Insider, “Portugal, Spain, Greece: A Statistical Comparison of Golden Visa Rivals,” *Investment Migration Insider* (blog), September 11, 2018, https://www.imidaily.com/editors-picks/portugal-spain-greece-a-statistical-comparison-of-golden-visa-rivals/.

[89] Sumption and Hooper, “Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration.”

[90] K Surak, ‘Millionaire Mobility and the Sale of Citizenship’ (2020) 46 *Journal of Ethnic and Migration Studies*.

individual instability. European residency permits or citizenship is an insurance policy in case something happens in their home country[91]. They may need an easy escape from political unrest, autocratic crackdown, or personal targeting and persecution by the regime for economic or political reasons, such as a corruption campaign targeting the source of their wealth.

(3) *General living conditions including environmental health and better education*. Residency or citizenship in Europe may also serve as an option to avoid poor and deteriorating environmental conditions, and improve overall living conditions including a better education system for their children.[92] According to the environmental performance index, 10 out of 10 countries ranked the highest in the world are in Europe and 9 out of 10 are EU member states (Switzerland is the world's number one ranked country).[93] By contrast, China is ranked at the 120th place in this ranking.

(4) *Worldwide travel freedom, in the case of citizenship acquisition*. These new investors most likely come from a country that restricts their international mobility and that does not allow visa-free travel to the rest of the world. For instance, Chinese citizens can travel without a visa to only 66 countries, and do need a visa to enter some of the world's most desirable destinations, such as EU countries and the United States.[94] By contrast, citizens with a passport from Malta or Portugal, for instance, can travel visa-free to 171 and 175 countries respectively. Being a national of Malta or Cyprus allows one to live and work 41 other countries freely without any substantive requirements, while being a national of China does not allow one to settle in *any* other country. Hence, in terms of international freedom of movement, nationalities of 'new

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[91] Ibid 12-13.

[92] Ibid 5–7, 16.

[93] EPI, "2018 EPI Results | Environmental Performance Index," 2019, https://epi.envirocenter.yale.edu/epi-topline?country=&order=field_epi_rank_new&sort=asc.

[94] D Kochenov and J Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing 2020). For the data of the Quality of Nationality Index, see D Kochenov and J Lindeboom, *Quality of Nationality Index Dataset*, Mendeley Data, v3 (20 July 2020), http://dx.doi.org/10.17632/53zr7cfyrs.3. On the quantitative approach to citizenship value, see D Kochenov and J Lindeboom, 'Empirical Assessment of the Quality of Nationalities: The Quality of Nationality Index (QNI)' (2017) 4 *European Journal of Comparative Law and Governance* 314.

investors' are not primarily sources of rights, but are rather liabilities for those who hold them.[95]

(5) *Prestige of nationality or residence*. In some situations, the perceived value of having a particular nationality or residence right is not directly linked to objective opportunities and constraints, but rather references the degree of prestige associated with the respective country of nationality.[96] Having the nationality of one of the EU Member States may entail increased social standing. The same might apply to residence rights, especially of countries such as the United Kingdom or, outside the EU context, the United States.

Indeed, according to a 2018 report, about a third of all Chinese millionaires are currently considering emigrating to a different country – the US, the UK, Ireland and Canada topping the list of chosen destinations – in order to live in a place with a better education system, cleaner air, more political freedom, and better protection for their wealth.[97]

In summary, RBI and CBI programmes may seem like particularly attractive policy options for EU Member States to generate more capital inflow. First, these investment migration programmes are beyond the scope of EU law, unlike traditional means to incentivize FDI. Second, investment migration programmes offer long-term residency or citizenship, a good which is particularly valuable for individual investors from China, Russia and other countries.

### 3.3. Regulatory competition: A race to the bottom?

The proliferation of European investment migration programmes, especially if conceived as a market in which different suppliers of citizenship and residence 'compete' for demand, raises the question to what extent a 'race to the bottom' is happening. Investment migration programme markets can in this regard be compared loosely to regulatory competition in which

[95] See generally D Kochenov, *Citizenship* (MIT Press 2019); D Kochenov and J Lindeboom, 'Part I: Laying Down the Base' in Kochenov and Lindeboom (eds), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing 2020).
[96] See generally Y Harpaz, *Citizenship 2.0: Dual Nationality as a Global Asset* (Princeton University Press 2019); and J Džankić, *The Global Market for Investor Citizenship* (Palgrave 2019).
[97] R Frank, 'More than a Third of Chinese Millionaires Want to Leave China' (5 July 2018), https://www.cnbc.com/2018/07/05/more-than-a-third-of-chinese-millionaires-want-to-leave-china.html, referring to a report by Hurun Research Institute and Visas Consulting Group: *Immigration and the Chinese HNWIs 2018* (30 June 2018), www.hurun.net/EN/Article/Details?num=670D27DA6723.

states compete for regulatees.[98] Regulatory competition may lead to forum shopping and lower regulatory standards.[99] In terms of substance, it is usually thought that regulatory competition leads to policy convergence, although this is not necessarily the case: states may disagree on the right policy mix and specific objectives.[100] Looking at investment migration programmes, regulatory competition could have three types of regulatory effects: (1) downward pricing pressure on the required investment amounts for residence and/or citizenship; (2) lowering of procedural standards, including due diligence; and (3) substantive policy convergence, for instance relating to the types of investments required for similar 'goods' (long-term residence, citizenship).

Downward pricing pressure is a reality for Caribbean CBI programmes, such as the ones offered by St Kitts and Nevis and Antigua and Barbuda, which saw a series of substantial price cuts in past years.[101] Downward pricing pressure would also be expected in the context of EU investment migration programmes, mainly CBI, to the extent that at least some investors are primarily interested in acquiring EU citizenship rather than the nationality of any particular Member State.[102] If the primary good for which there is demand is homogenous among suppliers, one would expect a competitive equilibrium under normal market conditions.

Nonetheless, Cyprus provides the only example of price cuts for an existing CBI programme in the EU. In 2013, Cyprus lowered the required investment from at least EUR 10 million to EUR 3 million. In 2016, it was again lowered to EUR 2 million. In terms of comparing investment migration programmes among countries, downward pricing pressure is difficult to ascertain because EU Member States are using a wide variety of different investment options which are not always comparable.[103] At this moment, however, there is no evidence that the required investment amounts are lowering. This applies both to CBI and RBI programmes offered by EU Member States. In 2020, moreover, the Maltese government announced that its current CBI programme would be replaced with a new investment migration

[98] See generally e.g. CM Tiebout, 'A Pure Theory of Local Expenditure' (1956) 64 *Journal of Political Economy* 416; C Barnard and S Deakin, 'Market Access and Regulatory Competition' in C Barnard and J Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart 2002).
[99] See e.g. WL Cary, 'Federalism and Corporate Law: Reflections Upon Delaware' (1974) 83 *Yale Law Journal* 663.
[100] C Townley, *A Framework for European Competition Law* (Hart 2018) 194–197; A Phillips and JC Sharman, *International Order in Diversity: War, Trade and Rule in the Indian Ocean* (Cambridge University Press 2015) 41, 46.
[101] https://www.imidaily.com/caribbean/caribbean-cip-race-bottom-time-form-cartel/.
[102] See also Kochenov and Lindeboom, 'Pluralism Through its Denial'; W Maas, 'European Governance of Citizenship and Nationality' (2016) 12 *Journal of Contemporary European Research* 533
[103] See further Sumption in this volume.

programme which will include higher required investments.[104] As such, there seems to be little risk of a race to the bottom in price.

As to procedural standards, Transparency International and Global Witness warn about a 'race to the bottom' in terms of standards of due diligence and transparency in their report on the investment migration programmes industry.[105] Due diligence standards have also been a concern for the European Parliament and the European Commission in their respective reports.[106] The precise extent of these risks remains, however, unclear.

In terms of policy convergence, there does not appear to be a visible trend among European investment migration programmes in terms of the required investments. This may precisely pertain to the specific economic challenges posed to the respective countries during the Euro crisis (for instance, countries experiencing a housing prices crash introducing an investment migration programme centred on real estate investment). As countries compete for FDI through a variety of investment incentives, based on their specific economic needs, one would expect countries making use of investment migration programmes also to tie their programmes to meet their specific policy preferences.[107]

## 4. Investment migration programmes against the background of FDI and the Euro crisis

If investment migration programmes are perceived as a policy tool to attract foreign capital, whether this tool is utilized depends on a matrix of various policy considerations. Notably, popularization of investment migration programmes may have benefitted from the contextual factors mentioned in the previous sections: the inclusion of FDI in the exclusive competences of the EU, the deteriorating levels of FDI across Europe and State Aid constraints on FDI incentivization, and the overall economic, budgetary and fiscal challenges posed to a large number of EU Member States. In this section, we will have a closer look at the possible

104 https://www.maltatoday.com.mt/news/national/103354/passportforcash_programme_will_be_shut_down_replaced_by_new_residency_programme_#.XwEdzpMzau4.

105 Transparency International and Global Witness, *European Getaway: Inside the Murky World of Golden Visas* (2018), at https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/european-getaway/.

106 European Parliament report, European Commission, Report on Investor Citizenship and Residence Schemes in the European Union', COM (2019) 12 final.

107 Cf. the general discussion on the relationship between regulatory competition and national policy preferences, Townley, *A Framework for European Competition Law*, 197; Phillips and Sharman, *International Order in Diversity*, 41, 46.

relationships between the financial and economic crises in the EU Member States and the proliferation of investment migration programmes.

Common features of all the countries that have created or amended[108] investment migration programmes since 2008 include a financial/economic crisis, either in the form of debt or real estate crisis, and the lack of many desirable economic, productive assets. In some cases, the specific criteria for investment appear to align with the specific economic challenges of the respective country.

However, while the majority of EU Member States (21 out of 28, including at the time the United Kingdom) has introduced an RBI and/or CBI programme, and most of them were introduced at the start of or after the financial crisis of 2008, we cannot establish any robust causation between financial and/or economic crisis and the emergence of an investment migration programme. The seven Member States which have not introduced any investment migration programme are Germany, Finland, Denmark, Sweden, Slovenia, Austria[109] and Belgium. As mentioned above, this may relate to the fact that in countries such as Germany and Finland, the Euro crisis had less dramatic effects on the overall economy. Furthermore, they did not experience sector-specific crises comparable to the real estate crises in Ireland and the Baltic states. More importantly, attempts to attract foreign capital by other means than FDI is a policy question that may be influenced by political culture and sentiments. The option to 'sell' citizenship can generally be regarded as more politically sensitive than other means to attract foreign capital.

Table 1: Comparison of economic crisis and investment migration programmes[110]

| IP introduction | Member State | IP type | Investment options | Nature of economic crisis |
|---|---|---|---|---|
| 1994 | United Kingdom | RBI | Government bonds; private- | Financial crisis (2007 – 2008); |

[108] The UK's tier-1 visa programme was already introduced in 1994. In 2008 the programme was substantially revised. See generally A Tryfonidou, 'Investment Residence in the UK: Past and Future', *Investment Migration Policy Briefs* 2017/1.

[109] Austria informally appears to offer CBI under Art 10 of its Citizenship Act, which allows for naturalization on the basis of 'extraordinary merit'. However, the required investment appears to be variable and it is unknown to what extent there is a consistent and reliable policy programme. It is not considered to have a CBI programme by the European Commission.

[110] FDI net inflow numbers are in current US dollars. Data is collected from the World Bank, which refers to the BoP database from the International Monetary Fund, supplemented by data from the United Nations Conference on Trade and Development and official national sources. The country list is taken from Scherrer and Therion (2018).

| | | | | |
|---|---|---|---|---|
| | | | sector investment | Economic recession (2008 – 2009) |
| 2003 | Romania | RBI | Private-sector investment | Starts in 2008/2009 Economic recession |
| 2004 | Lithuania | RBI | Private-sector investment | Starts in 2008/2009 Economic recession, real estate crash |
| 2005 | Bulgaria | CBI RBI | Private-sector investment or government bonds | Starts in 2008/2009 Economic recession |
| 2007 | Cyprus | CBI | Donation to public fund + private-sector investment and/or real estate investment (combination possible) | Economic recession (2009); Financial and banking crisis (2012 – 2014) |
| 2009 | France | RBI | Private-sector investment | Economic recession (2008 – 2009 and 2012 – 2013) |
| 2009 | Estonia | RBI | Private-sector investment | Economic recession (2008 – 2009); real estate crash (2008) |
| 2010 | Latvia | RBI | Private-sector investment + government donation; or real estate + government donation; or zero-interest | Economic recession; credit crash (2008 – 2009) |

| | | | | |
|---|---|---|---|---|
| | | | government bonds + government donation; bank account transfer + government donation | |
| 2011 (EU membership since 2013) | Croatia | RBI | Private-sector investment | Economic stagnation/recession (2008 – 2014) |
| 2012 | Ireland | RBI | Private-sector investment; or real estate (investment fund); or public interest donation | Economic recession (2007 – 2009; 2011-2013); Banking crisis and real estate crash (starting 2010) |
| 2012 | Slovakia | RBI | Private-sector investment | No economic recession |
| 2012 | Portugal | RBI | Real estate; or private-sector investment; or public interest fund; or job creation; or bank account transfer | Economic recession (2008 – 2013); sovereign debt and deficit crisis (starting 2010) |
| 2013 | Hungary (suspended in 2017) | RBI | Government bonds | Economic recession (2007 – 2009 and 2011 – 2012); Sovereign debt (starting 2008) |
| 2013 | Malta | CBI | Government donation, selected (portfolio or direct) | Economic recession (2008 – 2009) |

| | | | | |
|---|---|---|---|---|
| | | | investment; real estate | |
| 2013 | Poland | RBI | Private-sector investment | No economic recession |
| 2013 | Netherlands | RBI | Private-sector investment | Economic recession (2008 – 2009 and 2011 – 2013) |
| 2014 | Greece | RBI | Real estate; or private-sector investment; or government bonds | Economic recession (starting 2008); Sovereign debt crisis (starting 2009); Real estate crash (starting 2009) |
| 2014 | Spain | RBI | Private-sector investment; real estate; government bonds; or bank account transfer | Economic recession (2008 – 2009 and 2011 – 2013) Real estate crash and Banking crisis (starting June 2012) |
| 2015 | Malta[111] | RBI | Government bonds, government donation, and real estate | Economic recession (2008 – 2009) |
| 2016 | Cyprus | RBI | Private-sector investment; real estate; or bank account transfer | Economic recession (2009); Financial and banking crisis (2012 – 2014) |

[111] This refers to Malta's current RBI programme. From the introduction of its Permanent Residence Scheme in 1998, Malta has had several other permanent residency programmes aimed at high net worth individuals.

| | | | | |
|---|---|---|---|---|
| 2017 | Czechia | RBI | Private-sector investment and job creation | Economic recession (2008 – 2009 and 2011 – 2013) |
| 2017 | Italy | RBI | Private-sector investment; or government bonds; or public interest donation | Economic recession (2007 – 2009 and 2011 – 2014); sovereign debt crisis (starting 2011) |
| 2017 | Luxembourg | RBI | Private-sector investment, and job creation, bank account transfer | Economic recession (2008 – 2009) |

In one case, the link between the Euro crisis and the amendment of an investment migration programme was explicitly made by the government itself. The decision of the Cypriot government in 2013 to lower the investment required for citizenship from EUR 10 million to EUR 3 million was expressly aimed at recovering from the financial crisis by targeting Russian investors.[112] In March 2013, the country had received a EUR 10 billion bailout from the EU institutions and the IMF in exchange for a restructuring of the two largest banks and significant cuts on wealthy savers.[113] The latter had particular impact on Cyprus' attractiveness for foreign investment, as foreign investors – in particular from Russia – were heavily affected by the haircut on large savings.[114]

In other cases, the policy link between economic conditions and the investment migration programme is less obvious, or at least not made explicit, although the chronology suggests that the economic crisis has at least been an incentive to introduce such a programme. For instance, while Malta's economy has not suffered to the extent of  as that of Cyprus', the similarities between the Cypriot and Maltese economies around 2013 led to speculation about

[112] In April 2013, President Nicos Anastasiades announced the lowering of required investment to acquire Cypriot citizenship in a speech to Russian businesspeople. It was also announced that investors who had lost at least EUR 3 million by the bailout haircut would be eligible to apply for citizenship. See 'Cyprus to ease citizenship requirements, attacks EU "hypocrisy"' *Reuters*, 14 April 2013, at https://www.reuters.com/article/us-cyprus-president-russia/cyprus-to-ease-citizenship-requirements-attacks-eu-hypocrisy-idUSBRE93D09720130414.
[113] 'Cyprus agrees deal on €10bn bailout', *Financial Times* (25 March 2013).
[114] Ibid.

a possible bailout programme for Malta as well.[115] Moreover, analysts feared that such speculation could lead to a loss of confidence in the Maltese economy, potentially entailing a massive withdrawal of foreign investment.[116]

Did these programmes succeed in attracting foreign investment and how much did they contribute to the economy? Their true economic impact is very difficult to ascertain.[117] This is also because investment migration programmes might entail negative externalities, which include, but are not limited to upward pressure on real estate prices,[118] exacerbated macroeconomic vulnerabilities,[119] erosion of trust among the Member States as well as in national institutions,[120] and risks of corruption, money laundering and tax evasion.[121] According to Transparency International, over the past ten years, investor schemes in the EU have attracted EUR 25 billion.[122] As shown on Table 2, they are generating annually EUR 976 million in Spain, EUR 914 million in Cyprus, and EUR 670 million in Portugal.[123] The impact has been particularly important for small countries, such as Cyprus and Malta.

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[115] 'Analysis: Malta unlikely to follow Cyprus into crisis' *Reuters*, 13 May 2013, at https://www.reuters.com/article/us-eurozone-malta-analysis/analysis-malta-unlikely-to-follow-cyprus-into-crisis-idUSBRE94C04H20130513: '"The key risk ... is that its international offshore investors begin to relocate in light of the policy uncertainty created by the Cypriot bail-in," Myles Bradshaw, a portfolio manager at PIMCO, said. "This would have significant negative economic effects that could in turn create a problem with domestic banks' asset quality. Together with the deep recession, this could force Malta to seek external assistance"'.

[116] Ibid.

[117] See also Sumption in this volume.

[118] AMA Scherrer and E Thirion, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) Schemes in the EU' (European Parliamentary Research Service 2018), 42–44. See also, L Alderman, 'In Greece, an Economic Revival Fueled by "Golden Visas" and Tourism', *New York Times* (20 March 2019).

[119] AMA Scherrer and E Thirion, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) Schemes in the EU' (European Parliamentary Research Service 2018), 39–41.

[120] Ibid 45–46.

[121] Commission, 'Investor Citizenship and Residence Schemes', 10–19.

[122] Transparency International and Global Witness, 'European Getaway: Inside the Murky World of Golden Visas' Global Witness, (2018), at https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/european-getaway/.

[123] Ibid.

Table 2: Estimation of annual revenue generated by RBI/CBI Programmes in the EU (in EUR)

| | |
|---|---|
| Bulgaria | 25 million |
| Cyprus (only CBI) | 914 million |
| Greece | 250 million |
| Hungary | 434 million |
| Ireland | 43 million |
| Latvia | 180 million |
| Malta (only CBI) | 205 million |
| Portugal | 670 million |
| Spain | 976 million |
| United Kingdom | 698 million |

*Source: Transparency International*[124]

Both in absolute and relative terms these figures are not comparable to the order of magnitude of FDI inflows, which run into the billions or dozens of billions per year. Overall the contribution of investment migration programmes does not appear strikingly significant, even though some of the programmes targeting specific sectors may have been effective in attaining their objectives.[125] Under the premise that investment migration programmes are an additional tool to incentivize foreign investment inflows, either to remedy dwindling FDI or more generally generate economic benefits, the effectiveness of these programmes generally remains obscure.[126]

## 5. Conclusion

The recent proliferation of investments through CBI and RBI programmes in Europe may be understood, at least in part, as a response to the 2008 financial crisis, the subsequent global economic crisis, and the Euro crisis, which have impacted smaller economies in particular. We suggest that these programmes diffused across EU Member States hurt economically by these various crises as a way to obtain a quick infusion of foreign capital in their national economy.

[124] Ibid.

[125] One of the paradoxical problems appears to be that the type of investment migration programme which is probably most effective in directly contributing to its objective – real estate investment criteria – is also the one most likely to lead to negative effects in the medium to long term in the form of housing prices rising too quickly. On the link between rising housing prices and RBI in Greece, see for instance, J Bateman, 'Athens property boom: Greeks left out as prices rise', *BBC* (18 February 2019), at https://www.bbc.com/news/world-europe-47237923.

[126] See also Sumption in this volume.

In order to explain the proliferation of investment migration programmes in Europe since the start of the Great Recession, the alignment of demand and supply on the market for residency rights and citizenship seems essential. From the demand perspective, residence in and citizenship of EU Member States are highly valued goods, especially for new investors from Russia, China and other upcoming countries. From the supply perspective, EU membership hardly constrains Member States in their ability to introduce investment migration programmes. This lack of EU competence can be juxtaposed with several EU rules limiting Member States' abilities to attract FDI, in particular EU State Aid rules and the EU's newly acquired exclusive competence in FDI. Thus, investment migration programmes can be conceived as an additional tool in Member States' toolkit to attract foreign capital, which is largely outside the scope of EU competences.

To our knowledge, only the Cypriot RBI and CBI programmes were introduced with the explicit aim of combatting the severe economic crisis. However, all EU Member States that have introduced investment migration programmes since 2007 were to a significant extent harmed by the economic crisis, facing starkly reduced FDI inflows and overall macroeconomic malaise. Against this background, the proliferation of both CBI and RBI programmes might, at least to a certain degree, be explained as a responsive and contingent phenomenon.