# Concise, Clear, and Convincing

## The Opinion of Advocate General Collins in Commission v Malta (Citizenship for Sale)

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The rhetorical battle over citizenship by investment has been won by the EU institutions. By selling EU citizenship, Malta would be 'selling EU values', damaging 'the very concept of European citizenship', and undermining 'the mutual trust upon which the Union is built'. This rhetoric is emotionally powerful, but emotions and rhetoric alone should not decide legal battles. It has long been obvious to most legal experts that the case launched by the Commission against Malta for offering its citizenship in exchange for an investment stood on shaky grounds. A questionable interpretation of a dubious judgment by the International Court of Justice. An unsubstantiated allusion to the principle of sincere cooperation. No doubt an appeal to the emotionally powerful but legally questionable mantra that 'EU citizenship is destined to be the fundamental status of Member State nationals'. Add some of the above rhetorical flourishes and we have the key ingredients of the Commission's case against Malta. Would this be enough to win the case and ban citizenship by investment (CBI)?

The answer to this question has to await the verdict of the EU Court of Justice. Last week, however, Advocate General Collins delivered his much-anticipated Opinion in the case, which will not offer the Commission much hope. The Advocate General proposes that the Court dismisses the Commission's challenge in a concise, clear, and, as I will explain, convincing legal opinion.

### Clarifying the Commission's Arguments

One merit of the Opinion is that we finally get clarity about the exact arguments the Commission relied upon to object to CBI practices. The various documents and press releases published since the Commission launched its infringement procedure against Malta always left its precise argumentation in the dark. It was clear from the beginning that the principle of genuine link, established in the 1954 *Nottebohm* judgment of the International Court of Justice, was at the heart of the case. It was less clear whether the Commission considered the absence of a genuine link in the award of nationality as problematic or whether it objected to offering EU citizenship for sale to those without a genuine link to the state in question. It was also unclear whether the Commission invoked the principle of sincere cooperation in Article 4(3) as a self-standing argument or as an argument that was subsidiary to the other arguments and therefore not very relevant (explained here).

This is not just legal nitpicking. It matters how the argument is constructed. If the objection is that national citizenship should not be awarded to those with no genuine link to the state awarding nationality, there would potentially be many unintended victims of the challenge against Malta. After all, Malta is far from unique in allowing individuals without a genuine link to obtain its nationality. In fact, not all Member State naturalisation schemes require legal residence and many of these schemes do not require (extensive) physical presence (discussed here). It would be constitutionally questionable to challenge all these practices, for the Treaties leave no doubt that EU citizenship 'shall be additional to and not replace national citizenship'. However, if the objection was that selling EU citizenship is unlawful if the practice allows persons without a genuine link to the awarding state to purchase its nationality, then the Commission's argument quickly falls apart. It simply is unconvincing that the principle would apply only to CBI practices and not to national citizenship policies in general.

Nonetheless, the Commission clarified during the proceedings that it 'does not purport to prescribe how Member States are to determine "who are their nationals" [and that] the present action is limited to a specific investor citizenship scheme' (para 20). So the Commission never intended to prescribe the principle of genuine link as a principle generally applicable to EU citizenship law, but it unfortunately also never clarified on what ground the principle could be limited to the specific context of CBI. As for sincere cooperation, the Commission admitted during hearings that the argument that Malta breaches the principle of sincere cooperation follows from the Commission's 'allegation that … Malta is in breach of Article 20 TFEU' (para 40). In other words, the Commission invoked sincere cooperation to beef up its argument that Article 20 TFEU was violated.

Indeed, what emerges from the Opinion is the impression of a poorly constructed and ultimately thin legal case against Malta. The principle of sincere cooperation added nothing to the overall argument and the Commission tried – unconvincingly – to limit the scope of the genuine link principle to CBI practices. Yet this unconvincing argument was all it had left. Pressed by the Advocate General, the Commission was forced to admit at the hearing that its entire complaint was 'based upon the existence of a requirement under EU law – and, to a lesser extent, under international law – that, in order to preserve the integrity of EU citizenship, there must be a 'genuine link' between a Member State and its nationals' (para 41).

## Putting CJEU Case Law on Nationality in its Place

The Advocate General wasted no words in rejecting the argument that there must be a 'genuine link' between a Member State and its nationals. His analysis is concise, clear, and convincing. The Advocate General firmly asserts that it is for the Member States 'alone to determine who is entitled to be one of their nationals and, as a consequence, who is an EU citizen' (para 46), and he gives good reasons to justify his view. The most interesting reason concerns the *Micheletti* judgment, which established that Member States may not 'restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality'. Others have argued that the *Michelletti* ruling supports the case against Malta. Advocate General Collins shows why the opposite is true. He rightly observes that 'the system of mandatory mutual recognition that this case-law contemplates has the corollary that Member States are not required to have a shared conception of what constitutes nationality and that their rules for its grant can diverge' (para 48).

Of course, some CJEU rulings impose (minimal) restrictions on member states' right to determine who their nationals are, but these rulings are concerned with the loss of nationality. The Commission might have invoked the case law to support its allegations against Malta. In response, the Advocate General not only explains why there is more abundant case law on the withdrawal than the award of nationality, but also, more specifically, why 'EU law makes different demands of the Member States under both headings'. Loss of nationality may not only have the effect of individuals losing their EU citizenship; it may also render them stateless. Because the acquisition of nationality does not deprive individuals of their rights, the case law on the withdrawal of nationality cannot be extended without more to its acquisition (para 52).

This also concerns the principle of genuine link. In *Tjebbes*, the Court ruled 'that it is legitimate for a Member State to take the view that nationality is the expression of a genuine link between it and its nationals, and therefore to prescribe that the absence, or the loss, of any such genuine link entails the loss of nationality' (para 35). It obviously does not follow that EU law requires Member States to take this view and provide that the absence of a genuine link entails the loss of – or the impossibility of acquiring – nationality. The Advocate General expressed this view: 'EU law does not define, much less require, the existence of such a link in order to acquire or to retain that nationality' (para 55).

## Nottebohm as a Non-Starter

Nor does such a requirement derive from international law. Much ink has already been spilled over the

Commission's assertion that the requirement that nationality cannot be awarded to persons who have no genuine link with the state awarding nationality stems from the *Nottebohm* judgment (see, for example, several of the contributions to this forthcoming book). The best and most straightforward response has always been that this judgment has no bearing on the case against Malta (explained here and here). Fortunately, the Advocate General made sure there can be no misunderstanding about this. He explicitly quotes the statement in *Nottebohm* that the judgment does not change that 'it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality …'. That's all he had to point out. *Nottebohm* always was a non-starter in the case against Malta.

The Opinion is a powerful reminder that incursions into the domain of nationality are difficult to justify as the Treaties stand. The most far-reaching and uncontroversial limitation on the national competence to lay down the rules on nationality remains the requirement for Member States to recognise the nationality awarded by other Member States. Yet this limitation simultaneously protects the national competence in the domain of nationality. The Advocate General put it well when he remarked that 'a duty under EU law to recognise nationality granted by other Member States is a mutual recognition of, and respect for, the sovereignty of each Member State – not a means to undermine the exclusive competences that the Member States enjoy in this domain' (para 57). Neither this limitation nor any other principle of EU or international law can justify the kind of encroachments on the domain of nationality that the Commission envisages.

## Conclusion

It is hard to disagree with the Advocate General. This is not to say that citizenship by investment is morally justified or politically prudent, but it is worth reminding critics that the Court is not asked to decide on the political merits of the practice. The only question before it concerns the merits of CBI under EU law. If the answer to that question was not clear before, it is clear now after the Opinion. We must expect the Court to follow the Opinion; anything else would be a constitutional outrage.

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