EU Citizenship Should Not Be Sold

…Even if National Citizenship Can Be

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In his Opinion of 4 October 2024, Advocate-General Collins urged rejection of the European Commission's challenge to Malta's 2020 Naturalisation for Investment Scheme. He framed the Commission's case as resting on a single premise, that there is "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" (point 41). He rejected that idea in very strong terms, considering it "would upset the carefully crafted balance between national and EU citizenship in the Treaties and constitute a wholly unlawful erosion of Member States' competence in a highly sensitive field which they have clearly decided to retain under their exclusive control" (point 57).

I argue that the AG's Opinion fails to recognise that the true threat to institutional balance under the Treaties is the sale of EU citizenship. Upholding the Commission's challenge would not deprive Malta of power to confer Maltese citizenship. Instead, it would build on settled jurisprudence that EU law constrains national rules conferring EU citizenship and follow the longstanding direction of travel of the Court's jurisprudence, which has already overcome objections that it is too radical.

Malta would not lose power to confer Maltese citizenship

The AG's lopsided analysis fails to recognise that it is, in fact, the sale of EU citizenship to third-country nationals who lack any genuine link to that State which would upset the Treaties' "carefully crafted balance between national and EU citizenship". Those newly-minted EU citizens would hold rights which – by virtue of EU law – override the sovereignty that Member States are otherwise free to exercise over them. It is the consequences of selling EU citizenship, rather than Maltese citizenship, which have raised serious concern in civil society.

A key feature of EU law is that Article 20 TFEU does not preclude a Member State from retaining – or adopting – a nationality scheme under which some of its nationals do not have EU citizenship. The Declaration on nationality of a Member State annexed to the Final Act of the TEU provides that the state may "*declare, for information, who are to be considered their nationals for Community purposes.*" In *Kaur*, the Court upheld the UK's declaration that British Overseas Citizens are not British nationals for the purposes of EU law.

This option for Member States, which the AG did not address, means that Malta can choose to declare that citizens under its 2022 scheme are not its nationals for Union purposes. It may thus exercise its sovereign power to operate an investor citizenship scheme under which persons with no genuine link to Malta become *Maltese* citizens, but without thereby acquiring EU citizenship.

The existence of this "two-tier" nationality option weakens Malta's sovereignty concerns. Indeed, it underlines what Malta is really selling here – not Maltese citizenship, but EU citizenship and its rights.

EU law can constrain national rules for citizenship

In the 1992 foundational case of *Micheletti*, AG Tesauro relied on the Declaration on nationality of a Member State, to opine that "acquisition and loss of nationality is – and that is not contested here – exclusively a matter for each State" (point 3). But the Court took a fundamentally different approach, adopting the formula it has repeatedly affirmed since: "Under inter-

national law, it is for each Member State, *having due regard to Community law,* to lay down the conditions for the acquisition and loss of nationality" (para. 10).

This radical holding of the Court, developed in subsequent case-law, means, as Merijn Chamon has pointed out, that EU law constrains the exercise by individual Member States of their powers to lay down the conditions for the acquisition and loss of that State's nationality.

The rationale for the *Micheletti* holding is clear. The brand-new Maastricht Treaty meant that acquisition and loss of a Member State's nationality would automatically lead to acquisition or loss of the new EU citizenship. Under what would become Article 20 TFEU, EU law could not come between national citizenship and EU citizenship. The Court therefore had a choice. Either EU law must surrender to the absolute control of Member States in this field, or EU law could constrain rules on national citizenship automatically conferring EU citizenship.

The Court chose the second path, developing the jurisprudence in *Rottmann* and since, consistently with its holding that Union citizenship is "*intended to be the fundamental status of nationals of the Member States*": *Grzelczyk* (para. 31); *Baumbast* (para. 82).

The radical character of that jurisprudence is demonstrated by the 2015 *Pham* judgment of the UK Supreme Court. In language strikingly similar to AG Collins' characterisation of the Commission's case against Malta, the Supreme Court spoke of the *Rottmann* judgment as one reached "in the face of the clear language of a Treaty and of associated declarations and decisions . . . a decision which oversteps jurisdictional limits which Member States have clearly set at the European Treaty level" (paras. 85, 90).

The normalisation of the Rottmann approach

In the ten years since that trenchant criticism was issued, the Court of Justice has completely normalised the *Rottmann* approach in its jurisprudence. When considering whether national law had had due regard to Article 20 TFEU, the Court has repeatedly reviewed the "legitimacy" of the State's conditions for the acquisition and loss of nationality. In *Rottmann*, the Court held that "it is *legitimate* for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality" (para. 51); a holding repeated in Tjebbes (para. 35). In Wiener Landesregierung it held that "in the exercise of its powers to lay down the conditions for the acquisition and loss of its nationality, it is *legitimate* for a Member State . . .to take the view that the undesirable consequences of one person having multiple nationalities should be avoided. The *legitimacy*, in principle, of that objective is borne out by Article 15(b) of the European Convention on Nationality . . . that *legitimacy* is further supported by Article 7(2) of the Convention on the Reduction of Statelessness" (paras. 55-56). The Court effectively required Austria to grant citizenship, despite national law allowing it to be denied because of road traffic offences (paras 73-74). In Udlændinge- og Integrationsministeriet the Court held: "When exercising its competence to lay down the conditions for acquisition and loss of nationality it is also *legitimate* for a Member State to take the view that nationality is the expression of a genuine link with that Member State, and therefore to prescribe that the absence, or the loss, of any such genuine link entails the loss of nationality . . . There is no need, for the purposes of the present case, to examine the legitimacy of such criteria in so far as. . . they do not draw a distinction between the birth and residence or stay of the person concerned in a Member State and the birth and residence or stay of that person in a third country." (paras. 32 & 36).

As the passages cited show, the Court's development of EU law constraints on Member States' nationality rules has been informed by international agreements, without the Court holding that international law is an essential basis for EU law to impose such limits. The Court thus remains free to develop the limits of EU citizenship as an autonomous concept.

Most recently, in *Wiener Landesregierung*, the Court expressly recognised the trans-national character of EU citizenship as precluding a Member State from effecting even a temporary loss of its own nationality before the citizen had succeeded in an application

for citizenship of a second Member State (paras. 47-50). Even where national citizenship has been (wrongly) taken away, EU citizenship continues to have legal force where the "*purpose [is] to continue to enjoy the status of citizen of the Union and the rights attaching thereto.*" (para. 26).

Requiring a "genuine link" builds on the established jurisprudence

The Commission's case calls on the Court to develop the concept of Union citizenship in a manner which balances the sovereignty of each Member State in determining its own nationality law against the collective interest of all Member States as to who may have the extensive rights of EU citizenship which encroach on their sovereignty.

To strike that balance, Article 20 TFEU should be interpreted as precluding Member States from adopting laws which permit the granting of national citizenship – in circumstances where doing so confers Union citizenship – to third country nationals who have no genuine link with the Member State.

The jurisprudence above lays the ground for the Court to determine the parameters of citizenship, and there is nothing to contradict a "genuine link" requirement in the – admittedly sparse – case-law on the substance of citizenship. While the Court did not repeat AG Poares Maduro's Rottmann endorsement of *Nottebohm* (point 17), the idea of EU citizenship being granted to those with no such link to a Member State seems in tension with the Court's holding in *Commission v Belgium* that it is "the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality" (para. 10)). It also seems at odds with its recognition of the British nationals excluded from EU citizenship in *Kaur* as "people [who] had *some form of link* with the United Kingdom, even though they had never lived there or visited it and had no close connection with that State" (para. 18).

Consequences of accepting the requirement of a genuine link

The concept of a "genuine link" is not defined in EU law or international conventions, as observed by AG Collins (point 55) and Joseph Weiler. However, according to the AG, Malta does not contend that the 2020 citizenship scheme requires, as a rule, that the applicant has a genuine link to Malta (point 29). It follows that Malta's scheme would be precluded by an interpretation of Article 20 TFEU that acquisition rules must require such a link, without the need for the CJEU to develop, in this case, a comprehensive definition of "genuine link".

If the Court is nevertheless called upon to indicate the contents of the 'genuine link' required by Article 20 TFEU, it is not limited to settled international law concepts. Instead, it may do so as an autonomous concept of EU law, by reference to the existing nationality laws of the Member States, as well as international law.

One key concern with accepting the Commission's case is that it might allow a Member State to rely on the lack of a genuine link in order to refuse to recognise a citizen of another Member State as an EU citizen (point 57). The Court could address this concern by limiting the temporal effect of its interpretation of Article 20 TFEU so as not to affect existing or past national citizenship laws other than Malta's 2020 scheme, on the basis of "the general principle of legal certainty inherent in the EU legal order." That is an established option in the case of references under Art 267 TFEU, and a possibility the Court has left open for judgments under Art 258 TFEU, see C-288/12 *Commission v Hungary*, para. 64.

An important choice

The Court is ultimately faced with an important choice. If it rejects the Commission's case, it will allow EU citizenship to be sold to people with no link to a Member State. By contrast, choosing to recognise a genuine link requirement is a legitimate development of the protean Article 20 TFEU concept of EU citizenship, entrusted to the Court for definition. It would set

a crucial boundary, protecting EU citizenship from complete dilution as a monetised advantage in the hands of a few Member States and helping to secure it as a cornerstone of a durable, cohesive Union.

The author is engaged by Transparency International to advise them on EU law, and is grateful for the ideas contributed to this blog by Eka Rostomashvili and Adam Foldes of Transparency International.

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