The EU Free Market Does Not Extend to Citizenship

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In the landmark Commission v Malta judgment of 29 April 2025, the European Union Court of Justice outlawed the "commercialisation" of EU citizenship, closing a door for corrupt actors. The Grand Chamber judgment not only bars the Maltese practice at issue, but also casts doubt on the legality of citizenship grants under that and similar schemes, while raising legal arguments for would-be citizens to challenge discriminatory laws.

A landmark judgment on the nature of EU citizenship and mutual trust

The carefully-reasoned judgment concerned Malta's 2020 Naturalisation for Investment Scheme. Advocate-General Collins' Opinion of 4 October 2024 had framed the Commission's case as depending on the proposition that EU law requires a "genuine link" between a Member State and its nationals (point 41). But the Court sidesteps whether EU law requires such a positive link and instead outlaws the class of citizenship schemes which commercialise EU citizenship, of which one is "transactional naturalisation . . . in exchange for predetermined payments or investments" (paras. 99-100 and operative paragraph).

The Court's reasoning begins by recalling the proposition, first expressed more than 32 years ago in *Micheletti*, and now settled law, that when Member States "lay down the conditions for the grant and loss of their nationality", they must have "due regard to EU law" (para. 81). The Court rejects Malta's argument that breach of this rule requires a general and systematic breach of EU values or objectives (paras. 82-83).

The Court then explains that the rights and freedoms derived from EU citizenship – to enjoy an area of freedom, security and justice without internal frontiers; to move, reside and work within that area; to vote and stand as candidates in EU and municipal elections and within national political parties, and to have consular protection of each Member State (paras. 84-91) – mean national citizenship laws have "consequences for the function of the EU as a common legal order" (para. 89). The Court recalls the holdings of its 2014 judgment blocking EU accession to the European Convention on Human Rights, that EU citizens' rights are part of a "specific system" including "the process of integration that is the raison d'être of the European Union itself" (para. 91).

From this settled basis, the Court derives the new (but unsurprising) proposition that "Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States as regards the fact that none of them is to exercise [the power to grant national citizenship] in a way that is manifestly incompatible with the very nature of Union citizenship." (para 95).

On transactional naturalisation procedures

The Court then turns to the novel issue of "a naturalisation scheme based on a transactional procedure [under] which the nationality of that Member State and, therefore, the status of Union citizen, is essentially granted in exchange for predetermined payments or investments." The Court holds that such a scheme "manifestly disregards the [EU law] requirement for . . . a special relationship of solidarity and good faith, characterised by the reciprocity of rights and duties between the Member State and its nationals, and thus breaks the mutual trust on which Union citizenship is based, in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU." (para. 99).

Malta's 2020 investor citizenship scheme is found by the Court to be, prima facie, a transactional procedure because the conditions for payments or investments of predetermined minimum amounts "occupy a key position in the scheme" (para 103).

The Court considered if the scheme had other conditions which would deprive it of an essentially transactional or commercial character and concluded it did not.

First: actual residence in Malta was not an essential criterion for citizenship, whether legally or in practice (paras. 105-114). The scheme allowed applicants to buy their way out of longer residence requirements (paras. 110-111) and the checks Malta made were to protect the state from the risks of the transaction, not to consider if citizenship was justified including by ties to Malta (paras. 112-114).

Second, connecting factors to Malta other than residence were not a condition for citizenship (paras. 115-120). The law required no "specific and concrete examination" of investments "to establish the existence and extent" of ties to Malta, as distinct from checking the investments were in fact made (para. 116). Establishing links to Malta after citizenship was granted was also not a requirement allowing for revocation (paras. 117-118). Malta – by it's authorised agents – promoted the scheme as a chance to buy citizenship of the EU and live in countries other than Malta (paras. 119-120).

In light of its factual findings, the Court did not need to – and did not – reach conclusions as to the hypothetical conditions of actual residence or other ties which would neutralise the transactional requirements of the scheme.

A serious blow to the golden passport industry

The judgment seems a serious blow to the Maltese Government. Their golden passport scheme have been opposed by other Maltese political parties and anti-corruption campaigners as a back-door into the EU for foreign corrupt actors, in particular Russian citizens. The scheme was adopted against a background of corruption, including Government-acknowledged high-level state culpability for the killing of Daphne Caruana Galizia, a Maltese journalist in 2017, while she investigated Malta's 2014 golden passport scheme.

The Government presents the golden passports scheme as very important to Malta. It claims the 2014 and 2020 schemes "directly generated over €1.4 billion in revenue for Malta", though it only identifies some €110,000 of expenditure. In panicky language, the Government calls for "national unity" and to "rise above partisanship" before accusing the opposition party of doing "its utmost to cause maximum damage, particularly at the European level".

While immediately promising to bring Malta's laws "in line with the principles outlined in the judgment", the Government refused to suspend the scheme. The Government also seeks to head off arguments that the judgment has retroactive effect by asserting – without explaining – that "decisions taken under both the current and the previous legislative framework remain valid".

While Malta's Government criticised the Court for "ignoring" the AG's Opinion to "delve into other aspects", its commercial agents are much angrier with the Court. Henley & Partners – who claim to have "designed and set up" many national residence and citizenship schemes – protest that "the Court has now reversed course by a staggering 180 degrees". This seems based on their belief that Advocate-General Collins is "the ECJ's lead judge", which would surprise Koen Lenaerts, the Court's long-standing President and chair of the 13-judge Grand Chamber. As strikingly, Henley contends that the Court's decision "appears politically motivated" since "the reasoning provided by the Court is tenuous at best".

Some may lose their golden passports

While the judgment certainly ends Malta's 2020 scheme, the more difficult issues are its effect on EU citizenship already granted, whether under that scheme, Malta's previous 2014 scheme or former citizenship-investment schemes in other EU states, such as Austria, Bulgaria and Cyprus.

Malta did not ask the Court to limit the temporal effect of its interpretation of EU law so as not to affect citizenship already granted by Malta, though it could have done so: C-288/12 *Commission v Hungary*, para. 64. It seems too late now for Malta – or anyone else – to limit its effect, since such a restriction "may be permitted only in the actual judgment which gives the

ruling" (C-432/17 O'Brien, para. 34), albeit that concerned a reference, not a Commission action.

The judgment therefore has effect *ex tunc*, that is, it authoritatively determines the meaning of EU law since it was adopted in its present form, and not just from the judgment. The judgment is founded on Article 20 TFEU, which came into force on 1 December 2009, before any of the golden passport schemes.

Member states which granted citizenship under these schemes will not want, generally, to take it back. Decisions to do so would face legal challenges, reputational harm and demands for restitution of the money spent. But states may nevertheless face demands to withdraw citizenship from particular individuals. Dozens have lost citizenship in Cyprus after a judicial investigation found widespread corruption. States which sold passports may be pressed by governments of other EU states to revoke citizenship of problematic individuals, to allow for them to be expelled. Indeed, those other EU states could well argue that they are entitled to refuse to recognise golden passports, on the basis that such recognition goes beyond the requirements of mutual respect.

Individuals who are faced with losing their investor citizenship because of the judgment may advance arguments based on general principles of EU Law, such as legal certainty and legitimate expectation. The prospects of such arguments may depend on what they knew, or ought to have known, as to whether the citizenship schemes were contrary to EU law. For example, even before Malta's current scheme had begun operating in November 2020 (para. 23), the Commission had already issued a letter of formal notice contending that Malta's 2014 investor citizenship scheme breached EU law.

The judgment thus raises the possibility of litigation, not only between golden passport holders and EU states trying to withdraw their citizenship before their national courts, but involving the EU states where the passport-holder lives or visits, before those other national courts. Such cases would seem likely to end up back before the CJEU.

The future of investor citizenship schemes in the EU

The CJEU's ruling does not require states to impose a genuine link requirement, nor does it hold that a condition of actual residence is essential for a lawful citizenship scheme. The transactional nature of Malta's scheme and absence of requirements other than wealth – which made it so attractive to those with wealth – also made it so blatant that the Court did not rule on when "transactional" conditions may be included in a naturalization scheme. The judgement thus leaves unclear what naturalization conditions are required by the "special relationship of solidarity and good faith, characterised by the reciprocity of rights and duties between the Member State and its nationals" (para. 99). But the Court's treatment of Malta's defence suggests that a citizenship scheme imposing conditions of investment or payment may be permitted under EU law if it also includes sufficiently demanding conditions of actual residence or other concrete ties to the EU state concerned. Consideration of this will depend on how states respond, with the Maltese Government's initial reaction suggesting a modified scheme may be adopted.

A silver lining?

While the judgment is a bitter pill for states and businesses that sell citizenship, the clear ruling that laws on *granting* citizenship must comply with EU law and values might set limits on national law obstacles to obtaining citizenship. National policies such as citizenship fees set at far more than the cost to the state of administering the application might be characterised as transactional; though the highest charges presently imposed are around €1000, by Ireland and Netherlands. EU law principles might also call into question rules or practices which make acquiring citizenship unreasonably slow or difficult, such as Greece's exclusion of people born in Greece who have not completed sufficient years of schooling.

While the Trump administration trashes the ethical norms of public service, the Court's judgment has an intensely moral character, or – as Henley & Partners see it – "a broad and abstract perspective . . .

ruling essentially on a (current) political dislike . . . for the transactional nature of citizenship by investment". The Court's judgment affirms that the European Union's free market does not apply to citizenship.

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