The Silent Engine of European Citizenship

Ruairi O'Neill

07.05.2025 doi: 10.59704/baab1d27969e0426

In its ruling on 29 April 2025 in Case C-181/23 *Commission v Malta*, the Grand Chamber held that Malta's investor citizenship scheme, which grants Maltese nationality in exchange for predetermined payments or investments, was contrary to EU law. Although the judgment has been criticised (perhaps not without reason) for its lack of doctrinal foundation (e.g. see van den Brink's analysis, here, and Peers, here), it does demonstrate that the EU principle of mutual trust has constitutional character and is normatively capable of challenging national administrative mechanisms, such as the Maltese naturalisation scheme, that are incompatible with the values in Art. 2 TEU.

EU citizenship is based on mutual trust

Following what an esteemed former Advocate General has described as "the usual verbal sludge", paragraphs 93 to 101 of the judgment tackle the relationship between the Maltese scheme and the requirements of EU law. The key reasoning of the Court can be found in paragraph 99 of the judgment, which should be repeated here in full, given the extraordinary nature of what the Court is saying:

> *'However, a Member State manifestly disregards the requirement for such 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, when it establishes and implements a naturalisation scheme based on a transactional procedure between that Member State and persons submitting an application under that programme, at the end of which the nationality of that Member State and, therefore, the status of Union citizen, is essentially granted in exchange for predetermined payments or investments.'*

With this paragraph, the Court has taken its own understanding of the bond between a country and its citizens as being a special relationship of solidarity and good faith (para. 96) and infused it into Art. 20(1) TFEU to form the "basis of the rights and obligations reserved to Union citizens by the Treaties" (para. 97). It then proceeded to refer to transactional naturalisation within the EU as manifestly disregarding this relationship.

Even more fundamentally, however, it held that Union citizenship is based on mutual trust, which is "called into question" when a Member State is required to recognise the rights of a Union citizen who acquired their EU citizenship under the scheme (para. 101).

This judgment, somewhat unusually, expressly deviates from the Opinion of Advocate General Collins on the point about the requirement of a genuine link in Art. 20 TFEU before granting national citizenship. It also goes further than the Advocate General's Opinion with regards to the relationship between EU citizenship and mutual trust. According to the Advocate General, the agreement of the Member States to abide by decisions of other Member States as to whether an individual has lawfully acquired national citizenship is taken in the "spirit of mutual trust and respect" (para. 47).

The Court instead boldly confirmed that Union citizenship is fully based on mutual trust (para. 99), which permitted the conclusion that Malta's investment citizenship scheme breached the duty of sincere cooperation in Art. 4(3) TEU.

This judgment will fuel extensive debate, given what has now been added to our understanding of the nature and inclusiveness (or otherwise) of EU citizenship, as well as the rights and duties attached to this

status, not to mention the legal response from both the Maltese authorities to the ruling and the reactions of the investment migration industry. The remainder of this post will focus on two elements: implications of the judgment for Union citizenship and how it informs our understanding of mutual trust.

The conditions for recognising the citizenship status of EU migrants

In his Opinion, Advocate General Collins relied on existing case law, specifically *Micheletti* and *Zhu and Chen* to make the point that EU law does not allow Member States to impose additional conditions in their national law on an individual as a prerequisite for recognising their nationality of another Member State (para. 48). Thus, while a Member State may require a genuine link before granting its own citizenship to an individual, no such requirement exists generally in EU law.

Furthermore, in other decisions, the Court has held that the automatic loss of nationality of a Member State would be in breach of the principle of proportionality if the relevant national rules did not allow for an individual assessment of the consequences of that loss for the individuals concerned in light of EU law (e.g. C-212/17 *Tjebbes*, para. 41; C-689/21 *X*, para. 39).

Combining these two points, a legitimate argument can be made that the Court has impliedly changed the conditions for recognising an EU migrant's citizenship in the host Member State – and, by extension, the rights deriving from such recognition. However, this argument is unconvincing for two key reasons.

What mutual trust requires

Firstly, while *Commission v Malta* underscores the centrality of mutual trust and EU values in the Court's reasoning, the judgment's primary focus is systemic and constitutional in nature. At its core, mutual trust requires national authorities – whether administrative or judicial – to accept that their counterparts in other Member States are complying with EU law when they make decisions that have extraterritorial, horizontal effects within the EU.

Now that EU citizenship is confirmed to be based on mutual trust, a national administrative authority or judicial body that refuses to recognise a migrant's citizenship of a Member State on grounds not already provided for in EU law would not only be in breach of the EU right being exercised but potentially also Art. 4(3) TEU (as the enforcement arm of the principle of mutual trust: see C-158/21 *Puig Gordi*, para. 134), or its *lex specialis* where relevant. Furthermore, by adopting a naturalisation scheme that goes against the fundamental nature of EU citizenship, Malta has undermined that mutual trust which Member States have in its naturalisation process.

Semantics may play a role in what may happen next. The Court stated that transactional naturalisation is both contrary to sincere cooperation but also is 'liable, by its nature, to call into question the mutual trust which underlies that requirement of recognition' (para. 101). The last time the Court of Justice determined that Member State authorities may refuse to give effect to an EU law measure based on mutual trust (and its precursor, mutual confidence) as it applied to an individual Member State, on the grounds of systemic deficiencies in an entire administrative scheme of a Member State, was in Case C-411/10 *N.S.* (concerning asylum procedures and reception conditions in Greece). This theoretically opens the door for national authorities and courts to refuse to recognise the rights of certain Maltese citizens. This is a real, albeit unlikely, possibility, given that the judgment does not explicitly provide for temporal limitations.

The legal certainty aspect

The second point derives from the legal certainty problem with this judgment. Until a week ago, Malta's investor citizenship scheme was, at the very least, not unlawful under EU law, since the presumption was that Member States had exclusive competence to decide how a person becomes a citizen of that country. As articulated by Advocate General Collins in both *Préfet du Gers* (para. 22) and *Commission v Malta* (para. 44), the Member States could have pooled competences

and conferred on the Union the power to decide who may become an EU citizen, but they chose not to do so. Given the force of the constitutional language employed by the Court in the current judgment, it would be unthinkable for Malta to continue to operate its investor citizenship scheme.

At the same time though, should the authorities of a host Member State determine that an existing beneficiary of the Maltese investment citizenship scheme does not have the right to exercise the rights and benefits that come with the status of EU citizenship, it would not necessarily follow that to do so goes against the *Micheletti* doctrine, assuming it still applies. EU law requires a proportionality assessment of the affected individual's circumstances. At risk of sound overly blunt, the financial situation of a person who qualified for the Maltese investment scheme hardly makes them too vulnerable to engage in other forms of lawful migration, albeit with additional bureaucratic hoops to jump through.

A surprise only for some

This judgment may come as a surprise for some, not least because the Advocate General advised the Court that the Maltese investment scheme did not breach any existing EU law. Followers of the development of the principle of mutual trust are instead likely to find the judgment, and the reasoning behind it, perhaps obvious!

The intrinsic limitation that mutual trust applies through other, normative provisions of EU law belies its significance as a structural constitutional principle which governs horizontal relations between national administrative and judicial authorities in the EU, and which is the manifestation of the 'ever closer union' in Art. 1 TEU. In contrast to van den Brink's worry that judgments such as the current one risk bending the EU's constitutional framework, *Commission v Malta* demonstrates that mutual trust resides at the centre of that framework, holding together the variety of constitutional identities – national, EU, shared – and constitutional actors – national and Union institutions as well as the citizen.

The continuation of an emerging pattern

Basing EU citizenship on mutual trust is highly significant for two reasons. Firstly, it means that the exercise of free movement does more at the atomic level than permit individuals to move to, reside and participate in the social, economic and politic life of the host Member State. What travels within the area of freedom, security and justice without internal frontiers is not just people, but the administrative decisions that made free movement possible, including their manifestation in an individual's passport or ID, even naturalisation certificate.

Mutual trust is most often associated with mutual recognition measures, particularly in criminal cooperation such as the European Arrest Warrant, and in recent years with rule of law backsliding. This judgment adds to the understanding that mutual trust infuses the entire relationship between Member States that is facilitated by EU law, whether in the internal market or the AFSJ, EU citizenship or the European Competition Network, mutual recognition and information exchanges, and composite administrative procedures generally.

A pattern is nonetheless emerging: where EU law does not fully harmonise an administrative or judicial procedure which has cross-border effects, mutual trust is the adhesive substance, the glue that holds the inherent legal-systemic diversity together: constitutional Polyfilla.

Future implications

Secondly, a maximalist approach to interpreting this judgment, such as the one presented here, has other potential implications. Mutual trust requires Member States to presume that all the other Member States comply with EU law and fundamental rights. It is one thing for the Court of Justice to say that mutual trust is absent from a particular national scheme creating cross-border effects, giving limited license to other Member States to refuse to recognise the measures produced by that scheme. It is quite another thing should the day arrive that a Member State is found to be in breach of the values contained in Art. 2 TEU.

For example, during the rule of law crisis in Poland, a large number of academics argued that specific judicial cooperation measures based on mutual trust (such as the EAW) be suspended as they relate to Poland, on the grounds that the national judiciary lacked independence and therefore did not satisfy the requirements inherent in the value of the rule of law in Art. 2 TEU and given concrete expression in Art. 19 TEU. Beyond individual cases, Art. 7 TEU remains the only currently known mechanism, albeit a political one, for finding that a Member State has seriously and persistently breached the values in Art. 2 TEU. The proposition being made here is that, since mutual trust presumes respect for Art. 2 TEU values, a confirmed breach of those values should automatically lead to the general suspension of mutual trust regarding that Member State.

And given that mutual trust is the basis for so much more than the instruments adopted within the AFSJ, and now also includes EU citizenship, any suspension applies not only to specific instruments but to the entirety of the free movement of people from that Member State. This has not hitherto been considered as an obvious consequence of a breach of Art. 2 TEU, and will inform future research into how that measure applies in relation to national legal systems. This decision is potentially monumental.

ABOUT THE AUTHOR

Ruairi O'Neill
Ruairi O'Neill is a doctoral candidate at the Institute of Law Studies of the Polish Academy of Sciences and a lecturer at the University of Warsaw Faculty of Law and Administration.

SUGGESTED CITATION
O'Neill, Ruairi: The Silent Engine of European Citizenship, Verfassungsblog, 07.05.2025, doi: 10.59704/baab1d27969e0426.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250508-005221-0.