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Twice a missed chance: On citizenship, agency and movement in *Commission v. Malta* (citizenship for sale)

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Abstract

Both awaited and criticized, the Court of Justice's judgment in *Commission v. Malta* reflects a broader disquiet surrounding citizenship and its delicate task of sorting the 'us' and 'them'. Amid this disquiet, the judgment delivers a seemingly straightforward message: money cannot ground the bonds of citizenship. The message however rests on shaky foundations. The Court deploys a vast array of concepts but leaves many underused or overstretched. In the haste to conclude that the Maltese investor citizenship scheme is in breach of the Treaties, the judgment ultimately misses two opportunities: first, to engage with the value of agency in the construction of citizenship; and second, to clarify how the relationship between citizenship and mobility has evolved in the penumbra of European citizenship.

Keywords

Union citizenship, citizenship for sale, investment migration, free movement, golden passports

1. Introduction

2025 has been a year of disquiet for citizenship. In January, a presidential executive order came to challenge the long-standing *ius soli* rule of the 14th amendment to the US Constitution according to which anyone born in the territory of the US is a US citizen at birth.¹ In April the Italian Parliament passed an amendment to the Italian Citizenship Act restricting the traditional *ius sanguinis* rule

1. 'Protecting the Meaning and Value of American Citizenship', 20 January 2025, The White House, www.whitehouse.gov/presidential-actions/2025/01/protecting-the-meaning-and-value-of-american-citizenship/

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whereby descendants of Italians born abroad automatically acquired Italian citizenship without generational limits.² In May, the UK government announced plans to extend the ‘settlement’ period in the UK, which is a prerequisite for naturalization as British citizens, from five to ten years, as well as the introduction of requirements to ensure that settlement is ‘earned’.³ All these interventions send an akin message: existing rules do not effectively sort the ‘us’ of citizenship from the ‘them’ of others. Neither soil, nor blood, do the work correctly when it comes to citizenship acquisition.

‘Nor money’ has added the European Court of Justice in one of its more momentous judgments on European citizenship, *Commission v. Malta* rendered on 29 April 2025.⁴ In outlawing Malta’s citizenship by investment scheme as an infringement of both Article 20 TFEU on citizenship of the Union,⁵ and Article 4(3) of the TEU on sincere cooperation,⁶ the Court has weighed in on the disquiet surrounding citizenship in two important respects. First, it has concluded that a transactional approach to the grant of national citizenship, ‘in exchange for predetermined payments’ is in contrast with the nature of Union citizenship as a fundamental status.⁷ Second, and relatedly, it has for the first time suggested that Union citizenship, albeit a mere addition to national citizenship, presupposes a certain type of attachment between a Member State and its nationals, whose quality and quantity is subject to scrutiny under EU law.⁸ In particular – the judgment hints – where citizenship of a Member State is tendered and sought because of the rights of movement and residence that it entails throughout the European Union, rather than because of the links it expresses within the relevant Member State, this requirement of attachment is not met.⁹

Many comments have already pointed to the minimalism of the legal reasoning supporting the judgment, as well as to the overreach of its conclusions.¹⁰ This note rather focuses on missed chances. There are two such missed chances in *Commission v. Malta*. First, a missed chance to point out that beyond commodification, the real problem with citizenship acquisition is arbitrariness. Second, a missed chance to concede that the genuine substance of Union citizenship lies precisely in undoing and redoing the tie between national citizenship and mobility. Had those chances been taken, the judgment could have offered valuable guidance as to the meaning and scope of citizenship, national and European, in a turbulent 21st century.

2. Law 74 of 23 May 2025 ‘Conversione in legge, con modificazioni, del decreto-legge 28 marzo 2025, n. 36, recante disposizioni urgenti in materia di cittadinanza’ (Conversion into law with amendments of law decree 36, of 28 March 2025, introducing urgent provisions in respect to citizenship).

3. UK Home Office, Restoring Control over the Immigration System (Policy Paper, 12 May 2025).

4. Case C-181/23 *Commission v. Malta*, EU:C:2025:283.

5. Treaty on the Functioning of the European Union, 13 Dec. 2007, OJ C 326/47, art. 20.

6. Treaty on European Union, 13 Dec. 2007, OJ C 326/13, art. 4(3).

7. Case C-181/23 *Commission v. Malta*, para. 100.

8. *Ibid.*, para. 97.

9. *Ibid.*, para. 119–120.

10. See e.g. M. Van den Brink, ‘Why Bother with Legal Reasoning? The CJEU Judgment in *Commission v. Malta* (citizenship by investment)’, *Verfassungsblog*, 5th May 2025 <https://verfassungsblog.de/why-bother-with-legal-reasoning/>; S. Peers, ‘Pirates of the Mediterranean Meet Judges of the Kirchberg: the CJEU Rules on Malta’s Investor Citizenship Law’, *EU Law Analysis*, 30 April 2025, <https://eulawanalysis.blogspot.com/2025/04/pirates-of-mediterranean-meet-judges-of.html>; L.D. Spieker and F. Weber, ‘*Commission v Malta* (C-181/23): A Miracle of Union Citizenship’ 50(4) *E.L. Rev.* (2025); J. Weiler, ‘Postscriptum-*Commission v Malta* (Citizenship for Sale) Who of the Two is Selling European Values?’, in D. Kochenov and M. Sumption (eds), *Investment Migration in Europe and the World* (Bloomsbury, 2025), p. 395; D. Kochenov and G. Íñiguez, ‘EU Citizenship’s New Essentialism’, 50(4) *European Law Review* (2025).

2. Legal and factual background

The Republic of Malta first adopted an Individual Investor Programme in 2014, having amended the Maltese Citizenship Act in 2013 to allow for acquisition of Maltese citizenship through fulfilment of the requirements for the programme.¹¹ The 2014 Individual Investor Programme enabled the grant of Maltese citizenship in exchange for a qualifying investment and a short period of residence in Malta. The European Commission first raised concerns about the investor citizenship programme and its compatibility with EU law in April 2020. A few months later the government of Malta adopted a new iteration of the programme. In its response to the Commission in December 2020 the government of Malta indicated that the new programme addressed the concerns that had been raised. Unpersuaded, the Commission issued a further letter of formal notice in July 2021. The government of Malta disagreed with the findings of the Commission, which issued a reasoned opinion in April 2022, and subsequently brought the infringement proceedings that are the subject matter of the judgment under discussion.¹²

While the 2020 scheme had a similar structure to the 2014 one, additional requirements had been specified in part to address the Commission concerns. Under the new version of the scheme, in order to qualify for a passport an applicant had to commit €600,000 to an investment, acquire a residential property or lease residential property, commit another €10,000 to a philanthropic cause and provide proof of residence in Malta for a minimum period of three years, which could be reduced to one year if the initial investment was raised to €750,000.¹³ A 2020 amendment to the Maltese Citizenship Act also gave a new legal basis to the programme, now grounded in a provision allowing the grant of Maltese citizenship to persons having rendered ‘exceptional services’ to the Republic of Malta, or to humanity.¹⁴ ‘Exceptional’ – the new provision clarified – meant ‘manifestly superior’ and referred to contributions by ‘scientists, researchers, athletes, sports people, artists, cultural performers, investors and entrepreneurs’.¹⁵

These amendments arguably aligned the Maltese investor citizenship scheme more closely with a range of other programmes adopted in European countries and beyond to recruit individuals of ‘super-talent’, or super wealth, through the lure of passports and residence permits. Relevant programmes introduce fast-tracks to residence or to citizenship for applicants bringing a defined ‘input’ to the host country and its economy, whether sport promise or achievement of Olympic level, a credible business plan for the establishment of an innovative business, or a sizable investment.¹⁶ Residence-by-investment programmes, whereby a residence permit is offered in exchange for an investment, have been in place in a number of countries including, among others, Ireland, the United Kingdom, the United States, South Korea, Australia, the Netherlands and Portugal.¹⁷

11. Maltese Citizenship Act, ACT XXX of 1965, as amended by Acts: II of 1970, XXXI of 1972, LVIII of 1974, XXXI of 1975, IX of 1977, XIII of 1983, XXIV of 1989, IV of 2000 and X of 2007; Legal Notice 410 of 2007; Act XV of 2013, XXIV of 2017, XXVI of 2017, XV and XXXVIII of 2020; The Malta Individual Investor Programme (MIIP) Regulations, Legal Notice 47 of 2014.

12. Case C-181/23 Commission v. Malta, para. 28–40.

13. Ibid., para. 24.

14. Maltese Citizenship Act, s. 10(9).

15. Ibid. Also see Case C-181/23 Commission v. Malta, para. 21.

16. F. Strumia, ‘New Generation Skilled Migration Policies. Talent as Output, High Regard Guests and Citizens in Absentia’, in D. Kochenov and J. Sumption, *Investment Migration in Europe and the World* (Bloomsbury, 2025), pp. 52–53.

17. J. Džankić, *The Global Market for Investor Citizenship* (Palgrave Macmillan, 2018). Also see Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

Citizenship by investment programmes, such as the Maltese one, are less common, but nonetheless well-represented around the world. St Kitts and Nevis has been one of the pioneers in adopting a programme of this type already in the 1980s.¹⁸ In Europe, Cyprus, Malta and Bulgaria have resorted to specific citizenship by investment programmes, while several other countries allow the preferential naturalization of investors in the context of broader discretionary naturalization provisions.¹⁹ A dedicated industry has proliferated in the penumbra of these programmes, whose implementation and administration governments often outsource to private advisors. Relevant programmes have attracted accusations of commodifying citizenship,²⁰ and have raised security, corruption and money laundering concerns.²¹ The Maltese investor citizenship scheme is thus arguably part of a trend rather than one of a kind. It belongs to a set of policies on the grant of residence and citizenship in exchange for money that have become the target of widespread criticism over the last few years.²²

From a further perspective it also represents an instance of a broader use of citizenship, particularly second citizenships, in an instrumental manner. Empirical research suggests that the possibility to acquire citizenship of a Western country, whether by means of ancestry, through *ius soli* or as a result of residence- and citizenship-by-investment schemes, appeals to large audiences, particularly in middle-income countries, as a form of insurance.²³ Acquisition of a second citizenship, in other words, is not necessarily the coronation of a concrete life project, but is rather a strategy to secure an exit option from the country of belonging, if and when needed.²⁴

In times of sovereigntism and nationalist revivals, this strategic use of citizenship is bound to cause resistance. President Trump's executive order reversing a century of doctrine and practice under the US Constitution's 14th amendment can be seen as an expression of such resistance. Its underlying purpose is excluding from US citizenship children born to visitors and irregular migrants. Italian reforms restricting rules on the attribution of citizenship *iure sanguinis* suggest similar concerns, albeit also responding to the concrete factual problem of having millions of descendants of Italians around the globe potentially claiming Italian citizenship.²⁵

The European Commission taking issue at Malta's citizenship by investment programme follows, to an extent, a similar script. There is however an important difference. The infringement proceeding is not a response to the use of the Maltese scheme on the part of applicant citizens. It is a response to the design, on the part of the government of an EU Member State, of a scheme whereby national and European citizenship can be sold to individual applicants in exchange for an

Committee of the Regions, 'Investor Citizenship and Residence Schemes in the European Union', 23 January 2019, COM(2019) 12 final.

18. See St Kitts and Nevis Citizenship by Investment – The First. The Finest, <https://ciu.gov.kn/>.

19. J. Džankić, *The Global Market for Investor Citizenship*, p. 181–199.

20. E.g. A. Shachar, 'Picking Winners: Olympic Citizenship and the Global Race for Talent', 120 *Yale Law Journal* (2011), p. 2107–8.

21. See J. Džankić, *The Global Market for Investor Citizenship*, p. 1–4; M. Sumption, 'Can Investor Residence and Citizenship Programmes be a Policy Success?', in D. Kochenov and S. Surak (eds), *Citizenship and Residence Sales – Rethinking the Boundaries of Belonging* (Cambridge University Press, 2023), p. 21–22; also see Commission Report, 'Investor Citizenship and Residence Schemes in the European Union', COM(2019) 12 final, p. 10–21.

22. D. Kochenov and S. Surak (eds), *Citizenship and Residence Sales*; T. Ammann, 'Passports for Sale: How Unmeritocratic are Citizenship by Investment Programmes?', 22 *European Journal of Migration and Law* (2020), p. 309; A. Tanasoca, *The Ethics of Multiple Citizenship* (Cambridge University Press, 2018).

23. J. Harpaz, *Citizenship 2.0: Nationality as a Global Asset* (Princeton University Press, 2019).

24. *Ibid.*

25. See Dossier accompanying Law Decree 36/2025 A.S. n.1432, Disposizioni Urgenti in Materia di Cittadinanza (Urgent Provisions with respect to Citizenship), 2 April 2025. <https://documenti.camera.it/leg19/dossier/pdf/D25036.pdf>

investment. The involvement of European citizenship elevates the political question – is it desirable that individuals are able to purchase citizenship in exchange for money, a question in whose respect international or domestic law would have little to say²⁶ – to a legal question of EU law – is it lawful under EU law for a Member State to sell its national citizenship, and with it European citizenship? The Maltese case in other words represented the golden test for investment citizenship programmes because of the involvement of European citizenship.

Framing the question as a legal question, and as a question of EU law, raised, however, a question of competence, that entailed unpacking the relation between national and Union citizenship.²⁷ This relation is clear in the words of the EU Treaties: every national of a Member State is a citizen of the Union, and Union citizenship is an addition to nationality.²⁸ Per a declaration annexed to the Maastricht Treaty at the time of the introduction of Union citizenship, it was clarified that ‘the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned’.²⁹

However, the case law of the Court of Justice has, over the years, complexified the relation. Member State powers in respect to the grant and loss of nationality must be exercised having due regard to EU law. The latter warning predates, truth to be said, the appearance of Union citizenship in the Treaties.³⁰ The trend, to simplify a rather complex area of the case law, has initially been one of deference to the Member States for decisions pertaining to access to national citizenship and the ensuing rights;³¹ and of more intense scrutiny for decisions pertaining to the loss or deprivation of nationality, resulting in the loss of Union citizenship.³² The latter type decisions engage, as Advocate General Collins reminds in his opinion, the relation between a Member State and its nationals who are also EU citizens, rather than that between a Member State and a non-national.³³ They require an assessment of proportionality of the consequences of loss of Union citizenship for the affected individual and their family members.³⁴ If the consequences in terms of Union citizenship are disproportionate, then deprivation of national citizenship is a breach of EU law. Nonetheless, in recent case law, the Court has applied this assessment of proportionality in a rather permissive manner. It has repeatedly nodded in acceptance to Member States’ legislation that prescribed the loss of nationality where prolonged absence from the territory of the state justified questioning the permanence of a genuine bond between national and state of nationality.³⁵ In sum, on the eve of *Commission v. Malta*, the jurisprudential situation was one in which the

26. The Court of Justice, as AG Collins highlights, had already considered the allegation of instrumental use of the nationality law of a Member State in order to acquire the benefits of EU citizenship in *Zhu and Chen*, and found no illegality there. See Opinion of Advocate General Collins in Case C-181/23 *Commission v. Malta*, EU:C:2024:849, para. 50.

27. Although of course with the legal question, also comes a question of competence. See on this J. Weiler, in D. Kochenov and M. Sumpson (eds), *Investment Migration in Europe and the World*, p. 395.

28. Treaty on the Functioning of the European Union, art. 20.

29. Treaty on European Union, Declaration on Nationality of a Member State, OJ C 191, 29 July 1992, p.98.

30. Case C-369/90 *Micheletti and Others v. Delegación del Gobierno en Cantabria*, EU:C:1992:295.

31. Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag*, EU:C:2006:545; Case C-192/99 *The Queen v. Secretary of State for the Home Department, ex parte Manjit Kaur*, EU:C:2001:106.

32. See Case C-135/08 *Rottmann v. Freistaat Bayern* EU:C:2010:104; Case C-689/21 *Udlændinge- og Integrationsministeriet (Perte de la nationalité danoise)*, EU:C:2023:626; Case C-221/17 *Tjebbes and Others v. Minister van Buitenlandse Zaken* EU:C:2019:189.

33. Opinion of Advocate General Poiares Maduro in Case C-135/08 *Rottmann*, EU:C:2009:588, para. 52.

34. Case C-135/08 *Rottmann v. Freistaat Bayern*.

35. Case C-689/21 *Udlændinge- og Integrationsministeriet (Perte de la nationalité danoise)*; Case C-221/17 *Tjebbes and Others v. Minister van Buitenlandse Zaken*.

Court closed one eye when it came to Member States depriving their nationals of national and Union citizenship; and it closed two eyes when it came to Member States deciding on who their nationals were.

But the situation in *Commission v. Malta* was necessarily an eye opener for the Court. It required taking stance on two novel citizenship questions: the legality of (national) citizenship by investment schemes; and the legality of lending Union citizenship to instrumental use. To justify its very jurisdiction to weigh on the relevant questions, the situation required in turn a reckoning into the Court's own stance on Union citizenship, its essence and its relation to national citizenship. The ingredients for a landmark case were all there. And with these came the risk of misusing its powers;³⁶ as well as the risk of missing a chance, or more.

3. The proceedings and judgment

The arguments of the parties in the case, respectively the Commission and the Maltese government, revolve around the above points. Both the opinion of Advocate General Collins and the judgment of the Court begin by taking stock of the terms in which the Commission and the respondent Republic of Malta articulate their position around these points.

The Commission's argument is that the 2020 investor citizenship scheme is an infringement of the principle of sincere cooperation of Article 4(3) TEU as well as of the integrity of the status of EU citizenship created by Article 20 TFEU. The Commission reiterates that while powers in matters of nationality belong to the Member States, these powers must be exercised having due regard to EU law. The grant of nationality automatically entails the grant of Union citizenship and of the rights that come with it. As Union citizenship entails the right to move and reside in any Member State, this has an impact on all other Member States. The relevant power is thus no longer the exclusive concern of each Member State. It must be exercised in a way that upholds the mutual trust that underpins the edifice of Union citizenship. Moreover, Union citizenship and its rights require a measure of solidarity and trust among the peoples of Europe. In order to ground and maintain this solidarity and trust, it follows that national citizenship can only be granted where nationality is the expression of a genuine link between a state and its nationals.³⁷

The Republic of Malta argues in response that the power to grant nationality lies at the very core of national sovereignty and is an element of the Member States' national identity that Article 4(2) of the TEU requires the European Union to protect. While acknowledging that the existence of a genuine link between a person and a state may be a legitimate basis for the grant of nationality through naturalization, it highlights that neither the EU Treaties nor international law make the finding of a genuine link a pre-requirement for the grant of nationality. The Republic of Malta also argues that only where a national policy systematically breaches objectives and values that are defined in the Treaties it can be held a breach of those values and objectives. This is not the case of the investor citizenship programme. The Commission's action amounts, in the view of the respondent, to an attempt to prevent a Member State from implementing policies that have been legitimately adopted in a field of national competence, while forcing the relevant Member State to rewrite not a single provision, but an entire national legislative framework.³⁸

36. In this sense, J. Weiler, in D. Kochenov and M. Sumption (eds), *Investment Migration in Europe and the World*, p. 395.

37. Opinion of AG Szpunar in Case C-689/21 *Udlændinge- og Integrationsministeriet*, EU:C:2023:53, para. 16–25. For a critique of this part of the argument see D. Kochenov and G. Íñiguez, 50(4) *European Law Review* (2025).

38. Opinion of Advocate General Collins in Case C-181/23 *Commission v. Malta*, EU:C:2025:283, para. 26–30.

Advocate General Collins, while not subscribing to this last point, essentially endorses the position of the Republic of Malta. His opinion reviews the case law on nationality and Union citizenship. This review leads him to conclude that EU law imposes no duties in terms of the grant of nationality, and in this respect it does not differ from international law.³⁹ The Advocate General holds that the Commission has failed to prove that Article 20 TFEU requires the existence of a genuine link in order to lawfully grant nationality. ‘To find otherwise’ – here the opinion of the Advocate General has the solemnity of a warning – ‘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’.⁴⁰ He thus advises the Court to dismiss the action.⁴¹

The Court is, however, unpersuaded. It starts off by rejecting the government of Malta’s argument that a Member State’s exercise of the power to grant nationality is only an infringement of EU law if it amounts to a significant breach of the values and objectives of the EU. Nothing in the Treaties supports the application of this more lenient level of scrutiny to the power to grant as opposed to the power to withdraw nationality.⁴²

Having cleared this preliminary point, the Court then articulates a three-step reasoning that will lead it to eventually find in favour of the Commission: a threshold argument that the power to grant nationality is subject to review under EU law; a test for the exercise of the relevant review; and the application of the relevant test to Malta’s 2020 Investor citizenship scheme.

The articulation of this reasoning, to be sure, is not neat. The judgment summons a vast arsenal of concepts, rules and slogans in support of the effort. Beyond an exhaustive restatement of the rights attaching to Union citizenship and of the rules governing its operation under the Treaties,⁴³ the Court calls on mutual trust and mutual recognition,⁴⁴ the area without internal frontiers,⁴⁵ the nature of Union citizenship as fundamental status,⁴⁶ the role of the provisions on citizenship in the context of the process of integration that is the *raison d’être* of the EU⁴⁷ and the democratic life of the European Union.⁴⁸ Some of these notions remain unused or not clearly linked to the main findings of the Court, such as for instance the reference to the area without internal frontiers which the EU comprises. Others are interspersed in the line of argument so as to support, or attempt to support, an interim conclusion. For instance the brief excursus on democratic life in the European Union and the role of citizenship in that respect leads to the conclusion that ‘the exercise by the Member States of their power to lay down the conditions for granting their nationality has consequences for the functioning of the European Union as a common legal order’.⁴⁹ And the excursus into the rights attaching to Union citizenship and its nature as a fundamental

39. *Ibid.*, para. 44–57.

40. *Ibid.*, para. 57.

41. *Ibid.*, para. 58.

42. Case C-181/23 *Commission v. Malta*, para. 82–83.

43. *Ibid.*, para. 86–90.

44. *Ibid.*, para. 85.

45. *Ibid.*, para. 84.

46. *Ibid.* para. 92.

47. *Ibid.*, para. 91.

48. *Ibid.*, para. 89.

49. *Ibid.*, para. 89.

status is deployed to support the point that ‘European citizenship is thus one of the principal expressions of the solidarity that forms the basis of the process of integration’.⁵⁰

The interpreter must treasure-hunt in this multitude of sometimes just sketched arguments to identify the real milestones in the Court’s reasoning. The first one is the threshold argument: the power to grant nationality is not less constrained than the power to withdraw nationality, and it cannot be exercised in a way that threatens the nature of Union citizenship.⁵¹ This impliedly confirms that the relevant power must be subject to judicial review. The second step in the reasoning is the test for the review of the relevant power. This comes a few paragraphs further down, where the Court affirms that the bedrock of the bond of nationality is a ‘relationship of solidarity and good faith between the state and its nationals’.⁵² A Member State manifestly disregards the requirement of this relationship of solidarity and good faith and thus breaks the mutual trust on which Union citizenship is based in breach of Article 20 TFEU and Article 4(3) TEU when it implements a naturalization scheme based on a transactional procedure.⁵³

After a few more distractions, the judgment gets to deploy the just announced test to assess Malta’s 2020 Investor citizenship scheme. The question is, in other words, whether the scheme amounts to a naturalization scheme based on a transactional procedure. In this respect, the Court relies on five considerations. First, it finds that the nature of the first three conditions for the grant of Maltese citizenship under the scheme – the payment of a contribution of either €600,000 or €750,000 to the Maltese government, the purchase or lease of immovable real estate, in each case for a set minimum value, and the philanthropic or other contribution of €10,000 – confirms that the payment of predetermined amounts represents an essential condition for the grant of citizenship under the scheme.⁵⁴ Second, it observes that the residence requirement for applicants under the scheme points to legal rather than actual residence, so that physical presence in Malta is not a real requirement for citizenship.⁵⁵ Third the checks that are performed on applicants in respect, among others, of the source of their wealth, their political affiliations and their reputation are meant to protect national security and not to assess the nature of the ties between the applicant and Malta.⁵⁶ Fourth, while it appears that Malta continues to review compliance with the requirements of the scheme for a period of five years after the initial grant of citizenship, and can revoke naturalization upon a number of set occurrences, there is no ex post scrutiny of the types of links that an investor develops with the country.⁵⁷ Fifth, Malta openly presented the investor citizenship programme as a naturalization scheme offering primarily the benefits descending from Union citizenship, thereby confirming the transactional nature of the programme.⁵⁸

Combined, these considerations confirm that the investor citizenship programme amounts to a transactional naturalization procedure, whereby the grant of citizenship, both national and by extension European, is commercialized. Through designing and running the programme – the Court

50. *Ibid.*, para. 93.

51. *Ibid.*, para. 95.

52. *Ibid.*, para. 96.

53. *Ibid.*, para. 97 and 99.

54. *Ibid.*, para. 102–103.

55. *Ibid.*, para. 105–108.

56. *Ibid.*, para. 112–114.

57. *Ibid.*, para. 116–118.

58. *Ibid.*, para. 119–120.

concludes – the Republic of Malta has thus failed to fulfil its obligations under Article 20 TFEU and Article 4(3) TEU.

4. Comment – some unfinished good ideas and two missed chances

A. Overview

The infringement proceeding brought by the European Commission against Malta was a tall order for the Court of Justice. It offered the opportunity to clarify and make order in a rich but rather disorderly jurisprudence that had, after 30 years, produced some ambiguous slogans and several unsolved problems: the destiny of Union citizenship as fundamental status of nationals of the Member States; the not otherwise defined genuine substance of Union citizenship; the extent to which powers in the area of nationality need to have regard to EU law. The opportunity came through an unusual procedural path. Most twists and turns in the jurisprudence of Union citizenship came in the context of disputes started by citizens endeavouring to make use of Union citizenship and its ensuing rights.⁵⁹ The citizenship question, in all those cases, came to the Court through a preliminary reference. Here, by contrast, the dispute was an infringement proceeding started by the European Commission. In all those previous cases the spark of litigation had been the attempt to get more out of citizenship. Here the spark was rather the attempt to put a brake to citizenship's dubious deployment on the part of a Member State. The case was, by its timing, substance and procedural path, a frontier one.

One would have expected the judgment to address the situation with gravity and lucidity. But the judgment that the Court rendered rather sounds like a compilation of unfinished attempts, mixing aborted arguments and overstretched ones. It reads somewhat like a first draft, rich of unfinished good ideas, that would have needed mulling over, redrafting and finessing.

B. The unfinished good ideas

A first unfinished good idea comes at para. 84 of the judgment, where the Court recalls that the Union is to offer an area of freedom, security and justice without internal frontiers.⁶⁰ The Court continues to consider the corollary measures that an area without internal frontiers demands, such as common controls at external borders, as well as the centrality of principles of mutual trust and mutual recognition in such a legal space. The argument seems to go in the direction of saying that the handling of citizenship in a similar area without internal frontiers requires cooperation on the part of participating Member States as well as some peculiar duties on their part when it comes to the handling of their nationalities. This would have been a good hook to start reflecting on the extent to which national citizenship is no longer an entirely autonomous concept when, as in the EU, it is linked to a status of supranational citizenship. But the judgment abandons the argument en route to rather engage in listing the well-known rights attaching to Union citizenship. It will return to mutual trust only some 15 paragraphs later, at para. 101, when already in the thick of assessing the commercial nature of the investor citizenship scheme.⁶¹

59. Case C-456/02 *Trojani*, EU:C:2004:488; Case C-34/09 *Zambrano*, EU:C:2011:124; Case C-200/02 *Zhu and Chen*, EU:C:2004:639; Case C-184/99 *Grzelczyk*, EU:C:2001:458.

60. Case C-181/23 *Commission v. Malta*, para. 84.

61. *Ibid.*, para. 101.

A further unfinished good idea comes at para. 88 and 89, where the judgment introduces the concept of the ‘democratic life of the European Union’.⁶² This is in the context of listing the political rights that Union citizenship entails. This appeared as the start of an argument about the political as well as the legal dimension of citizenship, and the possible foundation for an argument about the minimum link to a national body politic that this political dimension of citizenship requires.⁶³ But once again the judgment stops short of full elaboration. It just remarks that through exercising the political rights that Union citizenship confers, citizens ‘participate directly in the democratic life of the European Union’. This statement rather than introducing a line of reasoning to be further articulated is immediately linked to an inconclusive conclusion: ‘It follows that the exercise by the Member States of their power to lay down the conditions for granting their nationality has consequences for the functioning of the European Union as a common legal order’.⁶⁴ After which, without further ado, the judgment veers towards reviewing the rights of Union citizens to obtain diplomatic protection in third countries.⁶⁵ Repeated reliance on these false starts and sudden changes of direction in the line of argument make for a judgment that reads as tentative and unconvincing. And that misses at least two chances along the way. The first is a chance to truly engage with what is wrong, if anything, with the commercialization of citizenship. The second is a chance to clarify the relationship between national citizenship and mobility in light of Union citizenship.

C. The first missed chance: The problem with citizenship is arbitrariness not commercialization

While the question of whether the investor citizenship scheme amounts to a transactional procedure is central to the judgment, the Court’s reasoning eschews a further, no less important question: why is a transactional procedure for the grant of citizenship a problem, and a legal one? Had it dealt head-on with this question, the judgment would have shed light on the 21st-century meaning and value of citizenship. The opportunity could have validly been caught after considering the question of competence more convincingly. This could have been in the form of bringing the argument initiated at para. 84 to fruition: the power to lay the conditions for the grant of nationality belongs to the Member States; it must be exercised with due regard to EU law. And in the context of an area of freedom, security and justice without internal frontiers, whose functioning is premised on a notion of mutual trust, some common minimum standards must apply to the exercise of that power. If the relevant power is exercised in a manner that strains mutual trust among the Member States, then it attracts scrutiny under EU law.

Having thus engaged with the question of competence, the judgment could then have turned to the substance of the scrutiny. The judgment takes it for granted that commercialization of citizenship is wrong,⁶⁶ as it takes it for granted that the ‘bedrock of the bond of nationality must be a relation of good faith and solidarity’ between a state and its citizens.⁶⁷ But each of these affirmations requires some critical engagement.

62. *Ibid.*, para. 88–89.

63. For a more optimistic take on the Court’s identification of a civic ethos of EU citizenship see M. Chamon, ‘Commission v Malta (C-181/23) and the Trilemma of EU Citizenship’, 50(4) *European Law Review* 2025, p. 484.

64. Case C-181/23 *Commission v. Malta*, para. 89.

65. *Ibid.*, para. 90.

66. Case C-181/23 *Commission v. Malta*, para. 99–100.

67. *Ibid.*, para. 96.

There is something intuitively unappealing about the idea that the bond of citizenship be sold in exchange for money. The narrative of citizenship is one dotted with words – allegiance, loyalty, protection – and metaphors – marriage, parenthood – that are hardly squared with the logics of commerce. Yet the sale of citizenship has been common practice for a good part of history.⁶⁸ Also, there is something intuitive about the idea that citizenship ought to express a bond of some sort between a state community and its members. Yet that bond has never been defined in law.

So the best a judgment can do is unpacking each of those aspects in the context of the system of legal provisions on Union citizenship, and in the context of the practice of citizenship, national and supranational, more broadly. In the context of this unpacking, two questions arise that the judgment in *Commission v. Malta* could have validly engaged with: should citizenship be based on expressions of commitment, rather than on evidence of links? And relatedly, what types of eligibility requirements would enhance individual agency and reduce arbitrariness when it comes to the grant of citizenship?

Rules on citizenship acquisition in most contemporary states rely on proxies for the existence of a link between the state and the citizen. Blood and territory are the most commonly used proxies. If you are in the territory of the state, or were born there, you must have a link to it. If you descend from persons who are or were citizens, you must have a link to it. These are, in simple terms, the rules of *ius soli* and *ius sanguinis*. They largely work an approximation. They do point to an arguable link between an individual and the national community of a state of birth, descent or residence. However, that link does not necessarily express any commitment to the relevant community. Many descendants of citizens, like those that prior to recent reforms automatically got Italian citizenship at birth in Brazil or Argentina, may never set foot in the country of their inherited citizenship. Equally, some people who were born in a country, maybe because their parents were there for a limited period for professional reasons, may not develop or maintain a link to the relevant country later on in their life.

At this point, there is something to be said about looking for commitment to a community, rather than for links. Commitments can be more easily tied to actions, rather than just to position in life. On actions a person has more control than on status or position. Investor citizenship potentially fares better than existing rules on *ius sanguinis* and *ius soli* from this perspective. Per se the fact of investing money in a country does not warrant a link. However, if the investment is material, and the investor may expect a return, it may warrant a commitment of some sort.

Rewarding commitment in turn is a way to reward a measure of individual agency and self-determination when it comes to citizenship. Arbitrariness is a fundamental feature of contemporary citizenship. The vast majority of the world population gets citizenship at birth on the basis of factors completely outside their control: where they are born, or worse, where their parents or grandparents were born, or who they were. In the same family you can easily have a citizen sibling and a non-citizen one depending on how long after their parents moved to their country of birth they were born. Citizenship that is thus bestowed on a person without any agency on their part, files them to a country, in most cases for good. Changing citizenship, or adding a different citizenship to one's legal status, is an ordeal that, through residence and naturalization requirements, can take the best part of a human life.

68. P. Riesenbergh, *Citizenship in the Western Political Tradition: Plato to Rousseau* (University of North Carolina Press, 1992), p. 152–153. Also see D. Kochenov and G. Íñiguez, 50(4) *European Law Review* (2025), p. 458–459.

Arbitrariness can be mitigated through injecting into citizenship values of agency and volition, through enabling in other words an individual to exercise a measure of choice and control on their own status of citizenship. Bar exceptional circumstances, this is hardly ever the case when it comes to conferral of citizenship. An example of such exceptional circumstances is the case of early American citizenship in the aftermath of the American revolution, and in the context of establishing a new republican compact among the colonies that had seceded from Britain. Here, as James Kettner reconstructs in his fascinating work, a consensus had formed that allegiance to the new post-revolutionary polities required an act of individual volition, whether expressed or implied.⁶⁹

A further case in which an individual is given a measure of choice and control as to their own citizenship status is precisely the case of investor citizenship. A transactional programme such as the Maltese one rewards with citizenship – to an extent, an act of volition. One could counterargue that every process of naturalization is characterized by volition as one must willingly apply. However, with most naturalization regimes meeting the bar of eligibility is still within the domain of arbitrariness: no one exercises volition in respect of who their grandparents are or where they are born. Collecting €600,000 to contribute to a foreign country does entail some agency, and under the right conditions it can also qualify as an act of commitment. In the case of Malta, the use of the investor citizenship scheme by Russian oligarchs, as well as the alleged proliferation of nominal residence schemes to satisfy the minimum residence requirement under the programme, makes no good testimonial.⁷⁰ These are, however, problems that one can fix with rigorous diligence and implementation. Imagine another scenario: Bill Gates retires to Europe and contributes some brain power and money to fixing the continent's problems. Or a promising young swimmer who comes from Brazil, or from Kenya, buys a house in Malta to train in its beautiful waters every so often. On the side, with the strength of a Maltese 'golden' passport, our athlete also wins a few medals in Malta's name. Cast under this light, an investor citizenship scheme becomes less unappealing.

Of course, then, an argument of inequality opens up. Not everyone can afford this agency. And, indeed, the Maltese programme was never meant as a mass doorway to European citizenship. It was always capped at a few hundred issuances (1500 in the last iteration). But citizenship has always been unequal. Even the republican citizenship that some commentators have seen defended in the Court of Justice's judgment was, in the Roman times when it originated, profoundly unequal.⁷¹ Only for males and for wealthy ones. This inequality was not fixed by removing participation from the citizenship equation. It was fixed by gradually extending participation as history evolved. Similarly here, eliminating the transactional element will not fix the equality or the arbitrariness problem. Commercialization is, to some extent, the wrong element to fix.

This is also because the problem with the Maltese scheme was not just commercialization per se but rather what was being commercialized. As the Court emphasizes towards the end of the judgment, Malta was selling an asset that was not entirely theirs to sell. It is in raising this further point that the judgment misses its second chance.

69. J. Kettner, *The Development of American Citizenship 1608–1870* (University of North Carolina Press, 1978), p. 208–09.

70. See A. Moores, 'Reporting from the Passport Paper Collaboration', 27 April 2021, www.daphne.foundation/passport-papers/2021/04/round-up

71. L.D. Spieker, 'It's Solidarity, Stupid! In Defence of Commission v Malta', *Verfassungsblog*, 7 May 2025.

D. The second missed chance: Citizenship and mobility can go together

'The 2020 investor scheme was publicly presented by the Republic of Malta as a naturalisation scheme offering primarily the benefits arising from Union citizenship, in particular the right to move and reside freely in the other Member States.'⁷² The judgment here relies on the fact that Malta is selling not just national, but also Union citizenship and the attached right to free movement, to corroborate the conclusion that the Maltese scheme infringes both Article 4(3) TEU and Article 20 TFEU.⁷³

On the one hand, this particular problem could have found a political solution. For instance, the Commission could have negotiated to get a share of the cake. It could have proposed that if citizenship is sold, a share of the profits be committed to a common fund to offset the costs of healthcare, social assistance or other benefits claimed by migrant citizens in host Member States; or to help support third-country nationals who are forced movers to the EU. A similar solution, rather than pursuing the outright outlawing of citizenship by investment, could have added an implied requirement of 'commitment to the EU' among the eligibility criteria for the scheme. This would have provided a more solid justification for the grant of national-cum-European citizenship. It would also have limited the incentives for Member States to free ride on the value of Union citizenship in administering their own nationality.

On the other hand, in pointing the finger to Malta's marketing of its scheme through reliance on Union citizenship and its attached right to free movement, the judgment reconfirms the idea that a relation of good faith and solidarity between a state and its nationals requires absence of movement.

However Union citizenship challenges precisely that idea. The second chance that the judgment in *Commission v. Malta* misses is thus the chance to clarify that if there is something fundamental about Union citizenship, this is the way it has reshuffled the relation between the sovereign state, its citizens and mobility rights. Union citizenship alters the terms of an implied pact between sovereign and subject, and then state and citizen. This pact revolves around a promise of protection in exchange for a promise of allegiance.⁷⁴ Ever since at least the times of the Italian medieval cities, where the good citizen was the one who took care of the walls, a citizen's presence and settlement have been the first and foremost proxies for this allegiance.⁷⁵ Absence, instead, weakens citizenship. In modern times, while international law recognizes for everyone a right to leave,⁷⁶ the concrete exercise of that right is not devoid of consequences in terms of citizenship. Witness all the recent cases in which the same Court of Justice has recognized precisely the right of the Member States to deprive of citizenship persons whose prolonged absence has put up for question the link of solidarity and good faith to the state.⁷⁷

With the addition of European to national citizenship the pact is altered: 'I owe you protection, even if you choose to leave' – the implied promise of the state to the citizen becomes. A rich line of case law of the Court of Justice on prohibited restrictions to free movement on the part of home

72. Case C-181/23 *Commission v. Malta*, para. 120.

73. *Ibid.*, para. 120.

74. For a restatement of this pact, see the decision of the US Supreme Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), 680.

75. M. Weber, *The City* (ed. and trans. Don Martindale and Gertrud Neuwirth) (The Free Press, 1958), p. 77–78.

76. *International Covenant on Civil and Political Rights*, (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171, art. 12(4).

77. E.g. Case C-221/17 *Tjebbes and Others v. Minister van Buitenlandse Zaken*; Case C- 689/21 *Udlændinge- og Integrationsministeriet*.

Member States witnesses to this altered pact.⁷⁸ Under the terms of this revised pact, the citizen ought to be able to freely choose whether to live citizenship in a sedentary or in a migrant capacity.⁷⁹ Movement becomes a citizen's freedom. Citizens can choose to move, or not to move, and either way they ought not to suffer a prejudice. If this is the free choice that comes at this point with citizenship of a Member State of the European Union, there ought to be nothing inherently wrong with wanting into a Union citizenship, or in advertising it, as a gateway to free movement.

5. Conclusion

Had it caught the two chances that it misses, the judgment in *Commission v. Malta* could have gone a significant way in quelling the disquiet surrounding citizenship on the eve of this century's second quarter, disquiet of which the very dispute underlying the judgment is an offspring.

Had it focused on the importance of managing the arbitrariness of citizenship, the judgment could have contributed to shift attention away from an arguably moot debate on whether authentic bonds of citizenship ought to be grounded in soil, blood or money. It could have invited consideration of the importance of rewarding authentic commitment, in whatever form expressed, and with it the value of agency and self-determination in the context of access to citizenship. An emphasis on these parameters would have made the judgment relevant also in the context of the broader citizenship debate surrounding the re-interpretation of the US 14th amendment, the Italian reform of *ius sanguinis* and the proposed lengthening of times for settlement and naturalization in the UK. It would have helped rephrase the key questions in those debates in novel terms: under what circumstances do birth in the territory of the state, descent from citizens and residence in the territory, respectively, express or enable commitment to the community of the citizens?

Had the judgment, in addition, clarified the way in which Union citizenship alters the relation between citizenship, loyalty and mobility, it could also have offered a perspective to bridge the mounting tension between the idea of the migrant and the idea of the citizen, a tension that fuels contemporary anti-migration narratives.

Having missed both these chances, the real message that the judgment ultimately sends is in the negative only: money is not sufficient to justify citizenship.

This negative message raises more questions than it answers: Why exactly is money a problem in the context of citizenship grants? Why is it a legal problem? Why is it a EU law problem? Why is this a problem in the context of Union citizenship if it is not a problem in the context of its national counterparts?

This panoply of unanswered interrogations will leave those looking for added clarity and certainty around European citizenship in frustration. However, in the context of missed chances, lack of clarity may be a blessing. It ensures that further rounds will come in the quest for European citizenship's essence and relation to national citizenship. And each new round is

78. E.g. Case C-503/09 *Lucy Stewart v. Secretary of State for Work and Pensions*, EU:C:2011:500; Case C-192/05 *Tas-Hagen v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, EU:C:2006:676; Case C-673/16, *Coman and Others v Inspectoratul General Pentru Imigrări*, EU:C:2018:385; Case C-456/12 *O. and B.*, EU:C:2014:135. F. Strumia, 'The Social Contract between the State and the Citizen-migrant: EU Free Movement under a Cosmopolitan Statist Lens', 3(3) *European Law Open* (2024).

79. For the implications that this has for the protection of a right not to move in the EU, see Opinion of AG Sharpston in Case C-147/24 *Safi v. Landeshauptstadt Hannover*, EU:C:2025:650.

bound to bring a novel chance for pondering some of the dilemmas underpinning the bond and meaning of contemporary citizenship: not least among these, arbitrariness and agency, loyalty and movement.

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