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"Civis europeus, civis solidaris sum"
The ECJ "Golden Passport" Judgment of 29 April 2025

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Abstract
The ECJ judgment in European Commission v. Malta of 29 April 2025, which declared the Maltese Citizenship by Investment (CBI) program as unlaw, was much anticipated and it has not deceived the expectations as to its groundbreaking nature. Several commentators criticized this judgment as a ruling on a subject not falling into the competence of the ECJ. In reality, however, Member States, when granting national citizenship (and thereby Union citizenship) are subject to restrictions. In this judgment, the ECJ specified some important elements of these restrictions, thereby not relying, as proposed by the European Commission, on the genuine link concept (tainted by a problematic reasoning of the ICJ in the *Nottebohm* case of 1955) but on an expansive interpretation of the solidarity principle and of the obligation of sincere cooperation according to Art. 4(3) TEU. In prohibiting commodification of European citizenship, the ECJ underscores the ever-growing importance of EU values as enshrined in Art. 2 TEU and thereby of a non-economic core of European integration which has to be upheld to guarantee the further success of this integration process.

A. Introduction

It is rare that judgments by the European Court of Justice (ECJ) receive such widespread attention as the ruling of 29 April 2025 in Case C-181/23 Commis-

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sion v. Malta.[1] Modern academic publishing channels[2], may have amplified the sound of the criticism and the applause, causing awareness far beyond the scholarly community. Economic interests by some authors in the underlying issue might have added a somewhat acrimonious note to the tone of the discussion. However, these circumstances cannot detract from the fact that this judgment (and the whole proceeding including, in particular, the Opinion by AG *Anthony Michael Collins*) deserves this keen interest without reservation. It is not only the highly delicate nature of this case's object, the selling of passports and thereby of the EU citizenship, that attracts so much attention. Simultaneously, and possibly even more so, the case's intrigue stems from the dogmatic questions it raises which bring us back to the very foundations of European integration and the pivotal role played by the ECJ in this process. In this sense, the Golden Passports judgment is also a groundbreaking ruling for the restatement of standards which since long have been part of the acquis communautaire and which are central for the further development of the EU legal order as a value-based legal framework.

In this article, after a brief description of the facts of the case, a broader analysis of the genuine link concept developed by the International Court of Justice (ICJ) in the *Nottebohm* judgment of 1955 shall be undertaken. This article posits that the 1955 ICJ provoked many misunderstandings as to the freedom states enjoy and the limits they have to respect in the naturalization of foreigners. At the same time, this judgment, if properly read, offers highly interesting insights for a proper understanding of the ECJ judgment in European Commission v. Malta. Subsequently, the Opinion by AG *Collins* of 4 October 2024 will be analyzed. It will be shown that the genuine link concept therein developed was based on a limited reading of the *Nottebohm* judgment and resulted in a genuine link notion that would have made this concept inapplicable for a satisfactory solution of the controversy in the case C-181/23. Subsequently,

1 ECJ Judgment of 29 April 2025, Case C-181/23, Commission v. Malta, ECLI:EU:C:2025:283. As *Merijn Chamon* wrote recently: "No single recent judgment of the Court of Justice has been commented so quickly, so extensively and so critically as Commission v. Malta". See *Merijn Chamon*, Commission v. Malta (C-181/23) and the Trilemma of EU Citizenship, in: 50 European Law Review 2025, p. 475.

2 See in this regard, the posts on Verfassungsblog.de, published in the immediate aftermath of the publication of the judgment of 29 April 2025, in particular *Martin van den Brink*, Why bother with legal reasoning?: The CJEU Judgment in Commission v. Malta (Citizenship by Investment), in: VerfBlog, 5 May 2025, https://verfassungsblog.de/why-bother-with-legal-reasoning/, DOI: 10.59704/7facd9bb1128174c; *Dimitry Vladimirovich Kochenov*: EU Citizenship's New Essentialism: The Solidification of the Illiberal Union, in: VerfBlog, 5 May 2025, https://verfassungsblog.de/eu-citizenships-new-essentialism/, DOI: 10.59704/452e3eca733-be6a5; *Simon Cox*, The EU Free Market Does Not Extend to Citizenship, in: VerfBlog, 30 April 2025, https://verfassungsblog.de/the-eu-free-market-does-not-extend-to-citizenship/, DOI: 10.59704/e5a2cf23f56712bd; *Ruairi O'Neill*, The Silent Engine of European Citizenship, in: VerfBlog, 7 May 2025, https://verfassungsblog.de/the-silent-engine-of-european-citizenship/; *Luke Dimitros Spieker*, It's solidarity stupid – In defence of Commission v. Malta, in: VerfBlog, 7 May 2025, https://verfassungsblog.de/its-solidarity-stupid/.

it will be evidenced that the ECJ avoided any mention of the genuine link concept to develop a truly autonomous argumentation, based on EU law, as to the requisites the naturalization of a foreigner, intended to become a citizen of a MS and thereby a Union citizen, should respect. In this context, the ECJ gave pivotal importance to solidarity, mutual trust and sincere cooperation, developing thereby a further meaning of these concepts already hinted at in its earlier jurisprudence but so far not pronounced in this strength and not analyzed as to their reciprocal interaction.

B. The facts of the case

At the heart of this controversy lies a Citizenship by Investment (CBI) program run by Malta in its most accentuated and contested form since 2014. CBI programs, according to which citizenship of a foreign state can be acquired mainly or exclusively by donations or investment into the economies of that state have become widespread on a worldwide scale. Residence by Investment (RBI) programs (golden visa programs) complement these schemes by offering somewhat lesser rights, and in any case without the (immediate) attribution of citizenship.[3] At least in Europe, the CBI program developed by Malta stood out as to the extent it commercialized national citizenship and concomitantly Union citizenship.

As Union citizenship, associated with a series of rights set out in the Articles 20 – 25 TFEU, is a natural and automatic consequence of the citizenship of an EU Member State (MS), the European Union and their MS have gained considerable interest in the way the citizenship of a MS is attributed or removed. As will be shown below, the latter event has already been the object of a broader ECJ jurisprudence, while the question up to which extent MS are free to attribute Union citizenship via their national citizenship has received by the judgment here under review its most important clarification so far.

In 2014, Malta adopted an investor citizenship scheme according to which foreign nationals could obtain Maltese nationality in exchange for predetermined payments and investments.[4] Already in the immediate aftermath of the adoption of the 2014 investor citizenship scheme, the European Commission entered into dialogue with Malta and presented its concerns about this legislation as to its compatibility with EU law, in particular as to Art. 20 TFEU and Art. 4 (3) TEU.

As Malta was not the only EU MS with a CBI program in place, the European Commission had to take a broader purview in its fight against these instruments

3 See for a recent comprehensive analysis of these programs *Dimitry V. Kochenov*/*Kristin Surak* (eds.), Citizenship and Residence Sales, 2023.

4 See the Individual Investor Program of the Republic of Malta Regulations, 2014, Subsidiary Legislation 188.03 of the Law of Malta. For a detailed presentation of this legislation see the ECJ, Judgment of 29 April 2025, para. 16ss.

and to augment pressure on the respective MS gradually. As a consequence, Cyprus terminated its CBI scheme at the end of 2020, Bulgaria by the adoption of amendments to the Bulgarian Citizenship Act on 24 March 2022.[5]

In contrast, Malta was willing to adopt only minor revisions of its CBI scheme. In 2020 it amended its citizenship law, however without overcoming the criticism raised by the European Commission in substance. According to the Maltese Citizenship Act of 2020 and the Granting of citizenship for Exceptional Services Regulations 2020, the citizenship of Malta could be awarded also for exceptional services by direct investment. While the 2020 investor citizenship scheme required legal residence for obtaining citizenship (three years as a general rule, reduced to one year in case the applicant contributed € 750.000 instead of the ordinary amount of € 650.000), this requirement was a mere formal one. The Republic of Malta did not even dispute the fact that no relevant physical presence of the applicant was required in this context.[6] The European Commission presented this censure in the terminology of a lack of a genuine link. As will be shown below, the reliance by the Commission on this ambiguous term caused much confusion, both in the proceeding before the ECJ as in academic discussion (where it continues to do so). Eventually, however, these misunderstandings could not stand in the way of a convincing clarification of the underlying, complex issues.

On 2 March 2022 Malta suspended the CBI scheme for nationals of a few states (first of all Russia and Belorussia)[7] but left it in force for nationals of all other states and reiterated its standpoint towards the European Commission that it retained this scheme to be in conformity with EU law. On 21 March 2023, the European Commission took up the challenge and initiated a proceeding before the ECJ. As Malta had been, at that time, the only EU MS having still a CBI scheme in place, the opportunity seemed to be ideal for the European Commission to seek definite clarification whether such schemes would be compatible with EU law, also in view of continuing pressure to grant more openness in this respect.[8]

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5 See *David de Groot*, European Parliamentary Research Service, Aspects of golden passport and visa schemes in the EU, September 2024, p. 2s.

6 As the Commission pleaded before the Court, the physical presence of the applicant in Malta was necessary only on two occasions, namely to provide biometric data for the purposes of obtaining a residence permit and for the swearing of an oath of allegiance. See ECJ, Judgment of 29 April 2025, para. 62.

7 Furthermore, also nationals of Afghanistan, the Democratic Republic of Congo, Iran, North Korea, Somalia, South Sudan, Sudan, Syria, Venezuela and Yemen were exempted from application. See ECJ Judgment of 29 April 2025, para. 36.

8 As Dimitry V. *Kochenov*/Kristin *Surak* (n. 3) remark in the introduction of their 2022 collective writing: "Citizenship and residence by investment is a fast-growing global phenomenon. As of 2022 more than a third of all countries in the world offered paths to membership in exchange for a donation or investment into their economies."

C. The genuine link – a Babylonian language confusion since the ICJ *Nottebohm* judgment of 1955

In the Commission's action of 21 March 2023, reference to the (missing) genuine link requirement in Malta's CBI scheme assumes pivotal importance. It constitutes the backbone of the Commission's argumentative line, seemingly this action's main justification.

In the section of the ECJ judgment of 29 April summarizing the Commission's claim (para. 42–62) eleven references to the genuine link can be found, while in the following paragraphs, summarizing Malta's defense (para. 63–78), four such references appear. In contrast, the Court, in its findings (para. 79–122) mentions this term not even once. This might be all the more puzzling as for the Commission, the acceptance of the genuine link argument by the Court seemed to be essential for its action to be crowned with success.[9]

The explanation for this apparent contradiction can be found in the fact that the concept of the genuine link is nowhere defined, not in international law nor in EU law and widely diverging meanings have been attributed to it. This Babylonian language confusion starts with the renowned ICJ judgment of 1955 in the *Nottebohm* case.[10]

This is a leading ICJ case: no respectable international laws textbook can omit reference to it; its details are retained to be known to each international law students. In contrast to this, it is surprising to see, how little the inherent contradictions of the respective judgment seem to be known, contradictions evidenced already in the dissenting opinions in this proceeding and in the first commentaries to this judgment by prominent authors published in the aftermath of the judgment's release.[11]

Already as to the facts of the case, misperceptions seemed to obfuscate the sight and the ensuing legal assessment in the ICJ judgment.

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9 See ECJ, C-181/23, EC v. Malta, Opinion of AG *Collins*, 4 October 2024, para. 41: "The Commission confirmed in its oral submissions that its single complaint is 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. In the course of those submissions, the Commission also affirmed that the success of its action turns on the validity of that premiss".

10 ICJ, *Nottebohm* Case (Liechtenstein v. Guatemala) (Second Phase), ICJ Rep 1955.

11 See, i.a., *Erwin Loewenfeld*, Der Fall Nottebohm, in: AVR 5/1955/56, pp. 387–410, and *Alexander N. Makarov*, Das Urteil des Internationalen Gerichtshofs im Fall Nottebohm, in: 16 ZaöRV 1955/56, pp. 407–426. In his subsequent entry in the encyclopedia *Karl Strupp/Hans-Jürgen Schlochauer*, Nottebohm-Fall, Wörterbuch des internationalen Rechts, vol. II, 1961, pp. 635–638, *Makarov* writes that the majority of writers had taken a dismissive attitude towards this judgment (p. 636). One of the most detailed analysis of this judgment is still the one by *Josef L. Kunz*, The Nottebohm Judgment, in: 54 AJIL 1960, pp. 238–266. For a more recent critical stance towards this judgment see *Audrey Macklin*, Is it Time to Retire Nottebohm?, in: AJIL Unbound 2018, pp. 492–497.

Some factual elements are uncontested: *Friedrich Nottebohm*, a German national born in 1881 in Hamburg, in 1905 transferred his residence to Guatemala where he became an increasingly prosperous businessman, together with two brothers, *Juan* and *Arturo*. He continued to have business and personal connections in Germany, but his fixed abode was in Guatemala. In 1939 he several times visited another brother in Vaduz, Liechtenstein, who had been living there since 1931. On 9 October 1939, soon after WWII had broken out, he was again in Liechtenstein and applied for this country's citizenship. He obtained this citizenship on 15 October 1939. He had been dispensed of a three-years-residence requirement by the Liechtenstein Law on naturalization of 4 January 1934, on the basis of an exception, also foreseen by this law, for "circumstances deserving special consideration", consisting in this case in the payment of a sizeable sum to the commune of residence (Mauren) as well as to the principality. According to both Liechtenstein and German law, he lost German citizenship simultaneously. *Nottebohm* returned to Guatemala in 1940 and took up again his business activities there. In 1941, Guatemala entered into war against Germany. Notwithstanding having a Liechtenstein passport *Nottebohm* was arrested in 1943 and deported to the United States and interned there under the U.S. Latin American Detention Program as an alien enemy. After the war, he was released but no longer admitted by Guatemala and therefore he took permanent residence in Liechtenstein. On 25 May 1949, Guatemala released a Legislative Decree by which the property of all "private persons or corporations holding the nationality of any of the countries with which the Republic was at war, or who held such nationality on the 7th of October 1938, even though they claimed to have acquired another nationality subsequently", was expropriated.[12]

Nottebohm managed to convince the principality of Liechtenstein to take up his cause via the exercise of diplomatic protection and to institute, in 1951, a proceeding before the International Court of Justice (ICJ) against Guatemala. In its judgment of 6 April 1955 the ICJ, however, declared Liechtenstein's claim as inadmissible as this country, according to the ICJ, was not entitled to exercise its diplomatic protection for *Nottebohm*.

While much of the Court's reasoning was contestable and was, in fact, strongly criticized in literature, as will be exposed below, there appeared one consensus among the parties: should *Nottebohm*'s Liechtenstein citizenship had been acquired fraudulently, Liechtenstein would not have any right to diplomatic protection. A similar consideration was generally accepted also in the infringement procedure against Malta, providing thereby a connection to the *Nottebohm* case that is widely ignored.

However, there was no proof for a fraudulent behavior by *Nottebohm* in order to obtain the Liechtenstein citizenship. Paradoxically, Liechtenstein was not

12 See *Hans von Mangoldt*, Nottebohm Case, in: EPIL, vol. III, 1997, pp. 698–700 (698).

permitted to prove the contrary; at least it should have been possible to address this issue in the merits of the case, but this was declined by the Court.

The Court rather preferred to identify a series of, mostly subjective, elements an applicant for a citizenship should evidence in order to make him or her eligible for diplomatic protection by the country granting this citizenship.

For the ICJ "[n]aturalization is not a matter to be taken lightly".[13] "[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population with that of any other States". The ICJ does not give any evidence as to general limits in international law for naturalization and rather refers generally to "the practice of States, to arbitral and judicial decisions and to the opinions of writers" which, if at all, relates to issues concerning double citizenship.[14] Towards the end of the judgment the ICJ comes to develop extremely demanding criteria for a naturalization process that would enable the naturalizing country to exercise diplomatic protection: The respective person should become "wedded to is traditions, its interests, its way of life and assume the obligations – other than fiscal obligations – and exercise the rights pertaining to the status thus acquired".[15]

Somewhat hidden in other parts of the judgment, further, highly exacting requisites for the exercise of diplomatic protection in favor of *Nottebohm*, which are at least indirectly connected with those mentioned above, can be found. Thus, on p. 25 of the judgment, the ICJ states that there was nothing to indicate that the application for naturalization made by *Nottebohm* in October 1939 was motivated by any desire to dissociate himself from the Government of his country. This censure is buzzling. Assuming that the ICJ wanted to attribute concrete legal relevance to this statement and not only to cast moral blame on *Nottebohm*, one has to wonder what legal norm would have required the latter to act in such a sense.[16] Even though in 1955 the memory of the WWII and the crimes committed by the Nazi regime was very much alive and present, to require from (former) German citizen to dissociate themselves not only from this country but also from this country's government (and politics) for naturalization by another country to become effective for diplomatic protection is a requirement without any basis in international law.

As has been shown already at the date of the release of the *Nottebohm* judgment there are many other shortcomings to the findings by the majority of the

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13 ICJ, *Nottebohm* Case (Liechtenstein v. Guatemala) (Second Phase), ICJ Rep 1955, p. 24.
14 ICJ n. 13, p. 23.
15 ICJ n. 13, p. 26.
16 See *Josef L. Kunz*, The Nottebohm Judgment (Second Phase), in: 54 AJIL 1960, pp. 536–571 with further references.

Court.[17] Here, only the issues of immediate relevance for the case European Commission v. Malta can be treated. Among them, of pivotal importance is the approach taken by the ICJ when distinguishing between national sovereignty in the naturalization process and (asserted) limitations as to the effects of this process in international law, in particular with regard to the exercise of the right to diplomatic protection. For the ICJ, the sovereign rights of states in the naturalization process are practically unfettered while this Court identified, at the same time, a plethora of constraints, unheard of before, as to the effects of such a naturalization on the international law level. This apparent contradiction finds its roots on the one hand in a definition of citizenship (or nationality)[18] which is hardly tenable and on the other hand in a strictly dualistic vision of the relationship between international law and national law, also impeding the identification of an effective problem solution.[19] For the Court "[n]ationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it".[20] In reality, however, beyond its constitutive effect (i.e. conferring rights and duties to the citizen), it has also – and has always had – a discriminatory effect, i.e. it is distinguishing between citizens and non-citizens, a fact which necessarily comes to bear (also and perhaps foremost) on the international level. The conferral of citizenship is therefore a two-sided event: While it is, in principle, for the state to determine who are its nationals, this decision affects also, directly or indirectly, immediately or potentially, the legal sphere of other states, which are compelled to accept the effects of this status conferral, except specific international law provisions provide otherwise.[21] The whole dispute here at issue (and, as will be seen below, in essence also the conflict at the center of European Commission v. Malta) revolves around these elements: By conferring citizenship states can oblige other states (and, in the EU context, also the European Union) but this unilateral, authoritative exercise of a right conferral[22] is not without limits. Exactly the nature and the extent of these limits stand at the center of the disputes here at issue. In the *Nottebohm* case the ICJ devised, as explained above, a far-reaching genuine link theory, according to which naturalization, qualifying for the exercise of diplomatic protection by the naturalizing state, would presup-

17 See the dissenting opinions by the Judges *John E. Read*, *Helge Klaestad* and *Paul Guggenheim* (Judge ad hoc). For example, it is difficult to understand why *Nottebohm*'s undisputed permanent residence in Liechtenstein starting from the year 1946 could not heal any purported shortcoming in the original naturalization process of 1939, especially given the fact that expropriation of *Nottebohm*'s assets in Guatemala had taken place in 1949 and Liechtenstein had attempted to exercise diplomatic protection in 1951.

18 The expressions citizenship and nationality while being attributed, in some contexts, different meanings, shall be used here, in conformity with the prevailing practice, interchangeably.

19 See *Josef L. Kunz* (n. 16), p. 550s.

20 ICJ, *Nottebohm* Case (Liechtenstein v. Guatemala) (Second Phase), ICJ Rep 1955, p. 20.

21 In substance, this has already been stated in the Hague Convention on the Conflict of Nationality Laws of April 12, 1930.

22 In Italian law doctrine, a specific term for such a legal situation exists, the diritto potestativo.

pose a series of objective and subjective elements demonstrating in an uncontestable manner the allegiance of the naturalization-seeking person with the naturalizing state. As evidenced by *Josef L. Kunz*, for naturalization to be valid for international purposes there must be "some connection"[23], while the genuine link required by the ICJ was of a new totally new nature[24] and in any case without foundation in international law.

As mentioned above, the impression arises that these criteria were created specifically for Mr. *Nottebohm*, perhaps also under the impression of the evil done by *Nottebohm*'s (former) home country only a few years before, as to which the ICJ demanded a particularly qualified dissociation, unheard of before in international law. By declaring Liechtenstein's claim inadmissible, the road was barred for examining another highly problematic practice, pursued in Anglo-American countries: the confiscation of enemy property.[25] More recent research has put the *Nottebohm* case in a politically even more delicate context: *Nottebohm* was arrested in 1943 at a US American request based on the Latin American Detention Program directed against persons of German ancestry or nationality residing in other American countries on the assumption that they were Nazi sympathizers. Over time, however, the original security objectives of this program were overshadowed by the intent by the United States and Latin American governments to achieve economic benefits.[26]

There can be no doubt that the confiscation of enemy property is clearly contrary to international law now.[27] In the period immediately after WWII uncertainties in this regard persisted, but nonetheless the ICJ judgment of 1955 in the *Nottebohm* case can be understood, with all its particularities and shortcomings, mainly if examined in a perspective taking into account the overall post-

23 See *Josef L. Kunz* (n. 16), p. 546 and p. 538 referring to *Angelo P. Sereni*, Diritto internazionale, 1958, p. 691, according to whom "even the most tenuous links are sufficient to justify the grant of nationality to one who voluntarily applies for it" (cited according to *Kunz* (n. 16), p. 553). Shortly before the ICJ handed down the judgment in the *Nottebohm* case, *Philipp C. Jessup* had voiced the hope that this proceeding would bring clarity into the question of confiscation of enemy property towards which he took a very critical stance, notwithstanding that at that time (in 1955) practice was incoherent: "It is the writer's view that those who maintain that such confiscation is unlawful have the better of the argument […]". See *Philipp C. Jessup*, Enemy Property, in: AJIL 1955, pp. 57–62 (57, reference to the *Nottebohm* case in n. 25).

24 See *Josef L. Kunz* (n. 16), p. 551.

25 See *Josef L. Kunz* (n. 16), p. 566.

26 See *Cindy G. Buys*, Nottebohm's Nightmare: Have We Exorcised the Ghosts of WWI Detention Programs or Do They Still Haunt Guantanamo?, in: Chicago Kent Journal of International and Comparative Law 2011. After the ICJ had handed down the judgment in the *Nottebohm* case, Guatemala expropriated all German property without compensation. See *Cindy G. Buys* (n. 26), p. 14.

27 See, i.a., Articles 33, 35, 38 and 46 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. According to the Eritrea-Ethiopia Claims Commission partial Award, Loss of Property in Ethiopia owned by Non-Residents – Eritrea's Claim 24, 441, after a war, private property has to be returned to the owner, otherwise the belligerent party has to pay full compensation. See *Hans-Georg Dederer*, Enemy Property, MPEPIL online ed., 2015, para. 47.

war political climate.[28] As has been said more recently, "*Nottebohm* was wrong then, and may be even more wrong now."[29] This judgment can be considered as one of those ICJ pronunciations where the dissenting opinions have gained more traction than the judgment itself. Nonetheless, this judgment stands out for the uncertainties it has created[30] and which have consequences up to these days, as the ECJ proceeding in the Golden Passports case seems to evidence.

Even if it should be contended that this judgment's real aim had been to limit the purview of diplomatic protection, the *Nottebohm* judgment is prevailingly known for its findings about the nature and the limits of the naturalization of foreigners. The subsequent approach in academic writings and by international law practice was at least partly a different one, although the ICJ judgment of 1955 continued to evoke misunderstandings up to these days.

By the Draft Articles on Diplomatic Protection[31] the ILC had the opportunity to restate the law of diplomatic protection and to repolish it from the many uncertainties it had accumulated over time, not least because of the *Nottebohm* judgment. In a refreshing manner, the ILC distanced itself from the genuine link doctrine as developed by the ICJ in 1955. It did so by limiting the relevance of the Court's statement strictly to the specific circumstances of the case, impeding thereby any deduction of a general principle or next to any possibility of a generalization of the basic findings. At the same time, the ILC added also a warning: Attributing general validity to the genuine link principle as stated in *Nottebohm* "would exclude millions of persons from the benefit of diplomatic protection".[32] Not even for cases of dual citizenship, for which, if at all, the *Nottebohm* principles could have made sense[33] the ILC considered it advisable to rely on these principles.[34]

On a whole, by this approach the ILC strengthens the instrument of diplomatic protection relying on a presumption of genuineness of the individual's

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28 See *Helmut Rittstieg*, Doppelte Staatsangehörigkeit im Völkerrecht, in: NJW 1990, p. 1402.

29 See *Audrey Mackling* (n. 11), p. 492.

30 See *Audrey Mackling* (n. 11), p. 495ss.

31 YbILC 2006, vol. II, Part Two.

32 See n. 31, Art. 4, Commentary, para. 5. There, the ILC further states: "Indeed, in today's world of economic globalization and migration, there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire, or have acquired nationality by birth or descent from States with which they have a tenuous connection".

33 This was at least the prevailing view among contemporary writers when commenting the *Nottebohm* judgment. Many of them saw the genuine link criterion as a reasonable tie breaker when it would come to decide who should exercise diplomatic protection as to persons with dual citizenship. See, for example, *Ignaz Seidl-Hohenveldern*, Der Fall Nottebohm, in: RIW 1955, pp. 147–149.

34 See Articles 6 and 7 of the Draft Articles on Diplomatic Protection. Even in the case, regulated in Art. 7 of the Draft Articles, that a State should seek to exercise diplomatic protection against a State of which the respective person is also a national, the ILC preferred to rely on the criterion of "predominance": The state with the stronger ties with the individual should exercise diplomatic protection.

link to a state, of which the individual is a national and for whom that state seeks to exercise diplomatic protection. It should not be ignored that diplomatic protection, notwithstanding its limited purview, is an important predecessor of modern human rights protection and it is still of considerable importance.[35]

While traditional international law theory was always keen to emphasize that by recurring to diplomatic protection states exercise their own right and not those of the individual,[36] it cannot be denied that the position of the individual always played an important role in this context.[37] With the advent of human rights law, this role became even more pronounced.[38] In many cases, diplomatic protection is placed more or less directly at the service of human rights protection. In fact, notwithstanding the circumstance that human rights protection is becoming ever more sophisticated it still often lacks effective instruments of implementation and in such situations, diplomatic protection can play an important instrumental role.[39] If in 1955, diplomatic protection could not convincingly be dealt with in a dualistic perspective, separated from the issue of the conferral of citizenship, this is even less the case today, in an international legal system strongly (even though not perfectly) dominated by human rights norms which bring the international and the national level still closer together.[40] As will be shown below, fundamental rights and, more in general, a value-oriented perspective is now governing both the withdrawal and the conferral of citizenship, especially within the European Union as an essentially value-based legal system. At the same time, this new orientation towards principles themselves in continuous fluctuation provides enormous dynamic to any assessment of the applicable standards in this field, thereby also accentuating controversies about the correctness of judicial interpretations in this area.

D. The Opinion by AG *Collins* of 4 October 2024

In hindsight, the commentary to the Draft Articles on Diplomatic Protection could be read as a warning as to any attempt to transform the genuine link

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35 See *Malcolm N. Shaw*, International Law, 2021, pp. 715ss.

36 See the PCIJ judgment of 1924 Mavrommatis Concessions Case stating at p. 12 that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law".

37 See *Vasileios Pergantis*, Towards a "Humanization" of Diplomatic Protection?, in: 66 ZaörV 2006, pp. 351–397.

38 This applies even though still only few countries grant to their national a right to diplomatic protection.

39 See *John Dugard*, Diplomatic Protection, in: MPEPIL online ed. 2021, para. 10.

40 A restrictive interpretation of the right to diplomatic protection following a limitation of naturalization rights would also limit effective human rights protection as diplomatic protection has become an instrument to this end.

criterion in a workable instrument, when it referred to "divergent views [within the ILC] as to the interpretation of the [*Nottebohm*] case".[41]

AG *Collins* fully adopts the dualistic perspective of the ICJ *Nottebohm* judgment of 1955 and applies it not only to the relationship between international law and national law but also to that between EU law and national law.

First of all, AG *Collins* gives an overview of the ECJ jurisprudence on the withdrawal and the loss of EU citizenship as well as on the duty of MS to reciprocally recognize national membership and the related obligation to recognize EU citizenship. The AG sees in this jurisprudence the confirmation of far-reaching sovereign powers of MS conferring citizenship.[42] The limitations added to this power are mentioned (for example the need to respect the proportionality principle when the withdrawal of citizenship leads to statelessness, as in *Tjebbes*[43]) but portrayed as secondary.

Afterwards he turns to the specific issue of the right by MS to confer national citizenship and thereby to the core question at issue in the Golden Passport case. Here, he distinguishes neatly between the international level and the national one. As to the first perspective, he sees the *Nottebohm* ruling "limited to allowing States to withhold recognition of nationality granted in the absence of a genuine link between a person and the State of which she or he claims to be a national. It does not oblige States to require that such a link exists either between them and their own nations or between other States and their nationals".[44] As to the "internal side", the conferral of citizenship by a state, for AG *Collins* the *Nottebohm* judgment gives expression to the principle that "the rules for the grant of nationality are a matter for individual States".[45]

The problems that arise with this finding are twofold: First of all, it is dubious whether the internal and the external side of the conferral of citizenship can be severed, i.e. whether a dualistic perspective makes sense at all in this context. As seen, the conferral of citizenship was thought from its very origins in an international context, i.e. as creating a bond towards states, which stand in international relations. Secondly, such a portrayal of the *Nottebohm* judgment neglects the far-reaching limitations added to the sovereign power of states when conferring citizenship. Although formally these limitations might have said to come to bear only as soon as the international level is touched, the restrictions introduced for naturalization by the ICJ are so pervasive that it is hard to see them not touching the very essence of this concept ("[n]aturalization is not a matter

41 See ILC, Draft Articles on Diplomatic Protection with commentaries, 2006, Art. 4, para. 5.

42 In this context, AG *Collins* also referred to Declaration No. 2 on nationality of a Member State, annexed to the final act of the Treaty on European Union, as reflecting the extent of MS prerogatives in this domain, characterized, according to AG by the intention of MS not to pool their respective conceptions of nationality. ECJ, C-181/23, EC v. Malta, Opinion of AG *Collins*, 4 October 2024, para. 45.

43 See ECJ, C-221/17, *Tjebbes*, judgment of 12 March 2019.

44 ECJ, C-181/23, EC v. Malta, Opinion of AG *Collins*, 4 October 2024, para. 56.

45 See n. 44.

to be taken lightly")[46], even though the ICJ was keen in 1955 to separate these levels.

As a next step, AG *Collins* examines what this (purported) attribution of an exclusive competence in this field means in the relationship between EU MS. For him, "[t]here is no significant divergence between EU law and international law on the question as to whether a genuine link must exist between an individual and the State of which he or she is a national, since neither imposes such a requirement".[47] From this, for AG *Collins* the following results: "A duty under EU law to recognize nationality granted by other Member States is a mutual recognition of, and respect for, the sovereignty of each Member States – not a means to undermine the exclusive competences that the Member States enjoy in this domain."

Even if one should espouse the dualistic perspective in considering the effects of naturalization also in the EU context (a perspective, as seen, hardly tenable neither outside nor inside the EU area), this conclusion is problematic as it is based on a wrong comparison. In fact, such an approach would be justifiable (if at all), if Union citizenship had no autonomous substantive meaning or if the effects of the acquisition of this (additional) citizenship would be purely technical and deeply ingrained with the national citizenship of MS. In the latter case, Union citizenship would have to be understood as nothing more than a quality which unleashes a potential in national citizenship implanted in this status with the accession of a state to the EU. Not least, such a perspective would also greatly diminish the status of the European Union as an autonomous value order, especially if these values are to be attached to Union citizenship.

As will be explained below, according to the vision of this author, a different stance must be taken, according to which Union citizenship, notwithstanding being intimately associated with citizenship of a MS, is part of a separate value order, related but at the same time autonomous with regard to that constituted by national citizenship. Without doubt, the citizen of a MS is ipso facto part and addressee of a value order which finds its source in national constitutions as well as in the EU legal order endowed with direct effect. At the same time, however, the judgment in European Commission v. Malta gives confirmation to the fact that Union citizenship is not only declaratory and confirmatory of the status as described before but creates autonomous added value. If the history of the concept of Union citizenship has been characterized since its introduction by the treaty of Maastricht by an ongoing quest for the identification of an autonomous meaning of this concept[48], by the judgment in European Commission v. Malta an important step forward in this process has been made.

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46 ICJ, *Nottebohm* Case (Liechtenstein v. Guatemala) (Second Phase), ICJ Rep 1955, p. 24.

47 ECJ, C-181/23, EC v. Malta, Opinion of AG *Collins*, 4 October 2024, para. 57.

48 See, for an expansive view of the rights flowing from Union citizenship already in 2008, *Eleanor Spaventa*, Seeing the Wood Despite the Trees? – On the Scope of Union Citizenship and its Constitutional Effects, in: 45 CMRL 2008, pp. 13–45.

No similar views have been shared by AG *Collins*. In this, he has been coherent with his earlier stance taken in Préfet du Gers[49] where he proposed to the Court to find that British citizens residing in France at the time of Brexit should lose their Union citizenship and their right to vote in municipal elections in the municipalities where they resided. The ECJ decided in this sense,[50] in a judgment that can be appreciated as logically coherent and formally correct. The findings could have been, however, also different ones, would the Court have been prepared to attribute more normative autonomy to Union citizenship, especially in consideration of the principle of good faith, of proportionality and of mutual trust, principles which were attributed decisive relevance in the later Golden Passports case.[51]

E. The ECJ judgment of 29 April 2025

I. Why the genuine link criterion had to be abandoned

In its judgment of 29 April 2025, the ECJ speaks clearly out against the commercialization of Union citizenship as being incompatible with the fundamental status of national of EU MS[52], thereby echoing again the famous statement in *Grzelczyk*, according to which Union citizenship constitutes the fundamental status of nationals of the MS.[53]

Following the requests by the European Commission in its application of 22 March 2023 the Court declared therefore the Maltese CBI scheme as contrary to EU law, and in particular to Art. 20 TFEU and Art. 4(3) TEU. Interestingly, as mentioned in the introductory part of this article, the Court managed to achieve this result without taking avail of the central argument by the European Commission for its complaint, the genuine link criterion.

The Court has acted wisely in this regard. As shown, the genuine link argument, borrowed from the ICJ judgment of 1955, is inherently deficient, incoherent and contradictory. It stands in contrast to purported far-reaching powers of states as to the naturalization of foreigners, chiefly limited only in cases of abuse. The dualistic perspective adopted by the ICJ in 1955 when this Court distinguished between effects of nationalization on the national level (which could not be second-guessed by the ICJ) and those explaining their effects on the international level was not sustainably for the international law reality of

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49 ECJ, C-673/20, Préfet du Gers, Opinion of GA *Collins* of 24 February 2022.

50 ECJ, C-673/20, Judgment of 9 June 2022.

51 See P. 1, Brexit: Kein Kommunalwahlrecht der Briten in der EU nach Brexit – Urteilsbesprechung zu: EuGH, Urteil v. 9.6.2022, C-673/20, EP/Préfet du Gers u. a., in: 33 EuZW/18 2022, pp. 858–859.

52 Para. 100 of the judgment in C-181/23.

53 See Judgment of 20 September 2001, *Grzelczyk*, C-184/99, para. 31.

1955 and it is even less so to describe the relationship between EU citizenship and citizenship of a MS.

In a certain sense, the dualistic approach adopted by AG *Collins* was even more pronounced than that of the ICJ in 1955 in the *Nottebohm* case. In fact, AG *Collins* fully concentrated on the sovereign powers of MS to grant citizenship, widely ignoring the limits set in this regard by the communities, in the broader and narrower sense, the respective state pertains. Only by ignoring these aspects, AG *Collins* in his Opinion could come to the conclusion that EU law had nothing to say about the naturalization of foreigners in Malta by CBI schemes. The ICJ, instead, followed a different vision of dualism: it left naturalization to the states, as long as it had no repercussions at all at the international level. Whether naturalization with such limited effects does exist at all did not bother this Court. As soon, however, as the granting of citizenship had effects on the international level, very demanding criteria would apply, whose presence should have constitutive effect as to the international side of citizenship. As shown, the values and the ideology at the basis of such an approach could be understood only if looked at from the overall political perspective of the post-war period, which was still very suspicious if not hostile against anything that could be interpreted as a ruse of persons related to the axis power or in the largest sense a stratagem in their favor. If any principle, suitable for generalization in the abstract, could be deduced from this genuine link approach of the 1950s, it can be found in the following: Granting citizenship is never an event totally unrelated to other states, as long as states form a state community. Other states may have a say in the naturalization process if this process takes place abusively, damaging their interest. The growing cohesiveness of the state community (or of sub-parts of this) intensifies their common interests and consequently, the likelihood that naturalization of foreigners may touch upon interests of other states of this community will also grow. As a result, they should have a say in such processes. Exactly such a situation has materialized with regard to Malta with naturalization based on a CFI scheme, conferring also the citizenship of a highly integrated Union taking pride of qualifying itself as a legal system based on the rule of law.[54]

It follows that the European Union could not tolerate such a naturalization process based on the unilateral commodification of one of its most outstanding immaterial assets. The way the ECJ came to legally disqualify the Malta CBI scheme, has led to considerable criticism in literature. It will be shown that the respective reasoning is coherent and gives expression of the Union self-perception as value-based community, reflected also in a broader, recent jurisprudence.

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54 See i.a. *Koen Lenaerts*, The Rule of Law and the Coherence of the Judicial System of the European Union, in: 44 CMRL 2007, pp. 1625–1659, emphasizing that the European Union is founded on the rule of law (at p. 1625).

The genuine link criterion, already contradictory in its interpretation by the ICJ in 1955, has become definitely unfit for the function originally attributed to it by the Commission, following the interpretation of this concept by the Advocate General. As a consequence, a new argumentative strategy had to be devised by the Court to defend the fundamental values here at issue.

II. Re-stating the Court's jurisdiction in citizenship cases as to its reach

There is not much jurisprudence in EU law about national citizenship issues and as to its focus it seems imbalanced, nurturing inferences as to a possible need to qualify the conditions for naturalization differently from those for the loss of citizenship. This case offered the Court the opportunity of a brief stocktaking of its previous jurisprudence on Union citizenship as well as the chance for an important clarification that showed also the way for the ensuing ruling.

The findings of the Court start in para. 79 of the judgment with two very short paragraphs on the additional character of Union citizenship, depending as it is from the national citizenship of MS which have exclusive competence in this field.

The innovative findings come afterwards, appropriately introduced by the words "that said" which give to the previous statements a touch of tedious, albeit necessary rehearsal in the need of further specification and development.

In para. 82 the Court emphasizes, first, that MS when exercising their powers in granting or withdrawing citizenship are subject to twofold restrictions, namely both by international law as by EU law. As it is obvious, the Court afterwards concentrates on the latter ones.

AG *Collins* has rightly stated in his Opinion, that the ECJ jurisprudence is richer on the issue of the withdrawal or the loss of EU citizenship than on questions relating to the conferral and/or to the subsequent recognition of this citizenship.[55] For the Republic of Malta, the ECJ's jurisdiction as to questions of granting citizenship should be limited to a finding of significant breaches of the values or objectives of the European Union, which are general and systematic in nature.[56]

Perhaps somewhat overshooting the Court rejected this asymmetric approach and reclaimed full jurisdiction in this whole field with reference to the need to defend the primacy of EU law comprehensively.[57] In view of the circumstance that on the one hand, the powers by the MS as to the granting of citizenship are in fact far-reaching, and on the other, the breaches contested to Malta could easily be qualified as significant as well as general and systematic in nature a more restrictive approach by the Court as to its jurisdiction could have ended up in the same result, while formally remaining more deferential to MS sovereignty.

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55 ECJ, C-181/23, EC v. Malta, Opinion of AG *Collins*, 4 October 2024, para. 52.
56 ECJ, C-181/23, EC v. Malta, Judgment of 29 April 2025, para. 82.
57 See n. 56., para. 83.

III. A value-based ECJ jurisprudence on Union citizenship issues

The Court achieved a fully-fledged affirmation of its jurisdiction in citizenship issues by taking recourse to a value-based argumentation, thereby giving also a decisive further boost to the value discussion, presently very much en vogue in particular with regard to the rule of law topic.[58] While some commentators sharply criticized the whole proceeding as they sensed the threat of a "jurisdictional or competence creep"[59], a closer examination of the underlying questions must come to a different result which is in line with the ECJ judgment of 29 April 2025. As a matter of principle, MS, when exercising their exclusive competences are not as free as the term might suggest at first sight.[60] As the Court is adamant in emphasizing also in respect to national (exclusive) MS competences in the field of citizenship, "those powers must be exercised having due regard to EU law".[61] As will be shown below, the EU law here to be taken into regard, is epitomized by the principle of solidarity which assumes an overarching role in this context, providing guidance for the interpretation of a series of further norms and principles that come here into play. Eventually, the Court's arguing

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58 See most recently, *Marc Blanquet* (ed.), Valeurs Fondatrices de l`Union Européenne – Valeurs Communes aux États Membres, Collection Plumes d'Europe 2025 as well as ECJ, Advisory Opinion by Advocate General Capeta, C-769/22, EC v. Hungary, 5 June 2025.

59 See, one year before the judgment in C-181/23 was handed down, *Joseph H. H. Weiler*, Citizenship for Sale (Commission v Malta), in: Verfblog, 14 April 2024, https://verfassungsblog.de/citizenship-for-sale/, DOI: 10.59704/f3c2e8cfd7fcbbe7, in relation to the European Commission's action against Malta ("an egregious exercise of jurisdictional creep"). See, as a response to this commentary, *Merijn Chamon*, A Rejoinder to Citizenship for Sale (Commission v. Malta): Some Remarks and Counterarguments, in: VerfBlog, 15 April 2024, https://verfassungsblog.de/a-rejoinder-to-citizenship-for-sale/, DOI: 10.59704/6316e22d0f570c6d, largely anticipating the argumentation of the Court in its judgments of 29 April 2025 (renouncing, however, the genuine link terminology).
In the immediate aftermath of the publication of the judgment one commentator qualified the Court's argumentation as to the competence question as "profoundly maddening and mind-bending, offering us legal reasoning of a kind and quality that is unacceptable of the EU's highest court". See *Martjin van den Brink* (n. 2).

60 As *Bruno de Witte* has well explained, even if there is not explicit competence for the EU to act in a given field, this "does not imply a green light for the Member States". He qualifies this situation by referring to a no, but argument: "no, the European Union has no competence to deal with subject X [here: national citizenship], but this does not mean that the member States can do whatever they want on that subject; their competence is, rather, constrained by the need to respect certain legal obligation stemming from EU law". See *Bruno de Witte*, Exclusive Member State Competences – Is There Such a Thing?, in: *Sacha Garben*/*Inge Govaere* (eds.), The division of competences between the EU and its Member States, 2017, pp. 59–73 (60). The solidarity obligation as well as the obligation so sincere cooperation according to Art. 4(3) TEU constitute – in the context of a value-oriented integration process – a strong constraint for the exercise of the MS competences in the field of citizenship.

61 ECJ, C-181/23, EC v. Malta, Judgment of 29 April 2025, para. 81, with further references to preceding cases concerning Union citizenship. Although solidarity, mentioned in the second sentence of Art. 2 TEU, is not characterized explicitly in Art. TEU as a value, it is necessary for the achievement of the values expressed in the first sentence. See ECJ, Advisory Opinion by Advocate General *Capeta*, C-769/22, EC v. Hungary, 5 June 2025 note 74.

became essentially value-guided, another circumstance which may have caused dissent by lawyers used to a more technical and formal approach to EU law.

As a sort of a prologue to the value discussion, the Court provides an overview of the rights Union citizenship entails or is associated with.[62] Already at this stage, the Court does not limit itself to enlist a series of technical sub-rights usually presented when Union citizenship is explained, but these specifications are rather systematically related to the EU value order, and in particular to the principle of mutual trust and mutual recognition, which are portrayed as essential for the creation and the maintaining of an internal order without borders.[63] In particular, the political rights flowing from Union citizenship are related to democracy as a value, which is under Article 2 TEU one of the foundational values of the European Union. The syllogism is "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]

Following from these considerations, the Court moves Union citizenship into a constitutional context,[65] where the values enshrined in Art. 2 TEU are the basic legitimizing source of European integration. The emphatic formula for the definition of European citizenship, coined by the ECJ in *Grzelczyk*,[66] is thereby filled with new substantive content: The fundamental status of nationals of the Member States is built on fundamental values of the European Union.

In this regard, a particular role is attributed to the principle of solidarity. As is well-known, this principle is permeating the whole system of EU law and it is designed to characterize the overall structure and the finality of the EU treaties in a systematic perspective.[67] Already in 2021 the ECJ declared the principle of solidarity as "one of the fundamental principles of EU law".[68] The judgment in C-181/23 has offered the opportunity to add further flesh to this principle.

As mentioned, in the past, much of the controversy associated with the discussion about solidarity has been related to the fact that this principle has regularly been invoked in the context of an affirmation of rights and pretensions. Solidarity is the well-sounding formula, if in a relationship, might it be narrower or looser, requests for aid, support, assistance and burden sharing are presented. In a closer community, even the redistribution of wealth may be justified by the recourse to the concept of solidarity. It stands to reason that such an under-

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62 ECJ, C-181/23, EC v. Malta, Judgment of 29 April 2025, para. 84–90.

63 See n. 62, para. 85.

64 See n. 62, para. 89.

65 See n. 62, para. 91. See also *Peter Hilpold*, Die verkaufte Unionsbürgerschaft, in: NJW 2014, pp. 1071–1074.

66 ECJ, C-184/99, *Grzelczyk*, Judgment of 20 September 2001, para. 31.

67 See *Peter Hilpold*, Solidarity and Next Generation EU: Rebalancing National and Common Interests, in: *Anuscheh Farahat*/*Marius Hildebrand*/*Teresa Violante* (eds.), Transnational Solidarity in Crisis, Baden-Baden 2024, pp. 65–87 (65).

68 ECJ, C-848/19 P, Germany v. Poland, Judgment of 15 July 2021, para. 38.

standing of solidarity is met with suspicion by those states which feel burdened by such request, especially if this happens in a systematic way. Therefore, it is maintained that a relationship based on the principle of solidarity will be a stable one only if it is governed by the concept of reciprocity, i.e. if the exchanges are commutative, balanced, at least in the longer run.[69]

The present judgment sheds a new light on the principle of solidarity, approaching it from different angles of view.[70] It is addressed, on the one hand, from a comprehensive, overarching perspective, when it is portrayed as being "an integral part of the identity of the European Union as a specific legal system, accepted by the Member States on a basis of reciprocity".[71] On the other hand, the principle of solidarity qualifies also the special relationship between single nationals of a MS and their home country and the reciprocity of rights and duties,[72] particularly in the field of Union citizenship.

For the Court, Union citizenship is devaluated if it is granted on the basis of a transactional procedure,[73] if this process is "commercialized"[74] and Union citizenship is thereby, according to the word of the European Commission, "commoditized".[75]

In the past, the solidarity discussion in EU law regarded primarily the extent of rights and duties within the EU in a process of resource claim and resource redistribution. This is true for financial solidarity (especially with regard to the so-called bailout-discussion during the financial crisis hitting Europe from 2009 to 2018), and the Next Generation EU-Program as a reaction to the COVID-crisis,[76] but in particular also with regard to Union citizenship.[77]

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69 See *Peter Hilpold*, Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union, in: 34 Yearbook of European Law 2015, pp. 257–285.

70 Preliminary thoughts going in this direction, have, however, been expressed by AG *Cruz Villalón*, in 2010, when he stated that Union citizenship is "founded on the existence of a community of states and individuals who share a […] commitment to solidarity". See ECJ, C-47/08, EC v. Belgium, Opinion by AG *Cruz Villalón* of 14 September 2010, ECLI:EU:C:2010:513, para. 138. See also *Hélène Gaudin*, Et si l'on parlait de l'abus de droit d'un État member en matière de citoyenneté de l'Union?, in: 139 L'Observateur de Bruxelles 2025, pp. 36–41.

71 ECJ, C-181/23, EC v. Malta, Judgment of 29 April 2025, para. 93.

72 See n. 71, para. 96.

73 See n. 71, para. 99.

74 See n. 71., para. 100.

75 See n. 71, para. 44.

76 See *Peter Hilpold* (n. 69), pp. 257–285; see also *Peter Hilpold*, Die Europäische Wirtschafts- und Währungsunion, 2021; *Francesco Martucci*, The Solidarity Framework – Towards a new Pillar of the EMU?, in: *Ruth Weber* (ed.), The Financial Constitution of European Integration, 2023, pp. 145–160; *Armin Steinbach*/*Sebastian Grund*, Der EU-Corona-Aufbaufonds – nächste Etappe in die Fiskal- und Transferunion?, in: NJW 2023, pp. 405–410 and *Farahat*/*Hildebrand*/*Violante* (eds.), Transnational Solidarity in Crisis – How Law Shapes Critical Transformations of Our Time, 2024, pp. 65–87.

77 See *Peter Hilpold*, Unionsbürgerschaft – Entwicklung und Probleme, EuR 2015, pp. 133–147 and *Koenraad Lenaerts*/*Stanislas Adam*, La Solidarité, Valeur Commune aux États Membres et Principe Fédératif de l'Union Europeéenne, in: 57 CDE 2021, pp. 307–417. As to social rights,

Also the *Grzelczyk* formula of the fundamental status was, at least initially, closely related to the prohibition of discrimination as to claims of social and educational rights of citizens exercising their right to free movement.[78]

In European Commission v. Malta the *Grzelczyk* formula is again used to address a status issue in the narrower sense, in combination with a de-economized solidarity principle where a material foundation of the acquisition of citizenship, i.e. a purchase of citizenship, even renders this act illegitimate. Decisive importance is attributed to the (immaterial) value aspect; absent this, no trust, no good faith can exist between the MS in the European Union.

Union citizenship, especially in combination with the four freedoms and interpreted as a value-based concept on the basis of Art. 2 TEU, has enormously enriched the MS and their nationals. They should therefore take care, in their own interest, not to imperil these achievements, not to demean the legal concept converting these rights to a mere commodity.

In a more cynical perspective, one might ask why purchasing citizenship should not also constitute an act of solidarity and good faith guaranteeing the reciprocity of rights and duties. This question has to be answered in the negative, as the Court has in mind a more complex concept of solidarity which is based on a broad array of values and which does not exhaust its effects in a single transaction, may it also consist in an investment program lasting several years. At the background stands a conception of nationality which translates into a concept of nation so famously defined by *Ernest Renan* as a "plébiscite de tous les jours".[79] The proposition is, that buying a citizenship will less likely end up in an everyday plebiscite in favor of the respective state than a value-based acquisition of this citizenship.

While continuing to have primary competence in citizenship matters, MS bear the responsibility that naturalization is value based or at least not contrary to the values set out in Art. 2 TEU. MS bear this responsibility vertically towards the EU, but also horizontally, to each other. Here, the obligation of sincere cooperation comes into play which itself is to be seen as a specification of the principle of solidarity.[80] Referring to its earlier jurisprudence in "Meta Plat-

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it was fittingly said that Union citizenship had become the "door opener to the social security systems of the MS. See *Florian Sander*, Die Unionsbürgerschaft als Türöffner zu mitgliedsstaatlichen Sozialversicherungssystemen?, in: 120 DVBl 2005, pp. 1014–1022. As is well-known, the ECJ judgment in *Dano* marked an end of expansive jurisprudence on social rights flowing from Union citizenship. See ECJ, C-140/12, *Dano*, Judgement of 11 November 2014.

78 See *Peter Hilpold*, Nichtdiskriminierung und Unionsbürgerschaft, in: *Matthias Niedobitek* (ed.), Europarecht, 2020, pp. 805–886 and *Niam Nic Shuibhne*, EU Citizenship Law, 2024, pp. 48ss. and 66ss. The status element in a narrower sense became later on centerstage in *Rottmann* (C-135/08) and *Tjebbes* (C-221/17), regarding the competence of the MS in the field of the loss of nationality of their citizens.

79 *Ernest Renan*, Qu'est-ce qu'une Nation?, 1882.

80 See *Claudio Franzius*, Art. 4 EUV, in: *Matthias Pechstein*/*Carsten Nowak*/*Ulrich Häde* (eds.), Frankfurter Kommentar EUV – GRC AEUV, 2023, p. 172, para. 102.

forms"[81] the Court calls into mind that "it is for each Member State, inter alia to refrain from any measure which could jeopardize the attainment of the European Union's objectives".

The present judgment reveals the enormous potential lying in this concept enshrined in Art. 4(3) TEU. Generally, it is said that this principle has a stabilizing function for the Union as a whole, but it is also interpreted in a dynamic-evolutive way,[82] so that the remaining autonomous powers of the MS have to be continuously re-assessed.[83] As a minimum, this obligation prohibits measures by MS which are to be qualified as abusive or by which EU obligations are circumvented,[84] but this obligation comprehends also lower-level obligations of restraint as well as active duties over all state powers to attribute effectivity to EU law within MS and in the EU comprehensively.

Sincere cooperation is an instrument fostering integration, but at the same time its content and meaning depends also upon the level of integration achieved. The more benefits and advantages European integration provides, the more the integration process is a value-driven one, the more this pre-requisite becomes demanding as it is designed to preserve mutual trust: MS must be enabled to confide that their peers do not exercise their powers in granting citizenship in a way that is manifestly incompatible with the very nature of Union citizenship.[85]

The interaction of the principle of solidarity and that of sincere cooperation becomes here again transparent: Union citizenship premised on a high level of solidarity will require sincere cooperation on a demanding level and will not be limited to an obligation to exclude manifest violations of EU law.

F. Reactions by commentators and what this judgment will be remembered for

As soon as this proceeding had been pending, it had been clear to many commentators that a fundamental pronouncement by the Court was in the offing. The reactions to the judgment of 29 April 2025 showed a deeply divided academic community, with some authors applauding the Court and others sharply criticizing it, some in a strident tone. Even if the statements by those involved in the lucrative trading of Golden Passports are ignored, there remains a consistent group of critics who had serious issues with this judgment, some in a technical-dogmatic sense, some from the standpoint of value considerations, some as to its

81 ECJ, C-252/21, Judgment of 4 July 2023, para. 53.
82 See *Claudio Franzius* (n. 80), para. 90 and para. 98.
83 See n. 82, para. 99.
84 See n. 82, para. 109s.
85 ECJ, C-181/23, EC v. Malta, Judgment of 29 April 2025, para. 95.

potential (arguably problematic) influence on future citizenship matters. Therefore, this judgment surely deserves close attention and with all likelihood it will be considered in the future as one of the leading cases of the ECJ jurisprudence.

As to the following aspects, European Commission v. Malta will be remembered as groundbreaking:

First of all, this judgment laid bare many of the contradictions that afflict the genuine link concept, as it became notorious by the *Nottebohm* judgment of 1955. As has been shown, the judgment of 1955 can be properly understood only if the broader circumstances of this era are taken into consideration. In this sense, the *Nottebohm* judgment was also a value-based judgment, intended as it was to impede any (actual or perceived) circumvention of state authority engaged in the fight against the great evil of the first half of the 20th century. In this period, in which human rights only slowly began to affirm themselves, the rights of the individual played, if at all, only a minor role. The ICJ did not ignore the far-reaching powers of states in the field of naturalization but the adoption of an extreme dualistic perspective allowed the Court to conceive a highly demanding genuine link concept applicable only for the international level. Notwithstanding the strong criticism voiced already in 1955 against this approach, this ill-guided perspective had continued to haunt any discussion in this field for decades. The attempt to revitalize the genuine link concept in the case European Commission v. Malta laid definitely bare its deficits and contradictions, with the Court eventually espousing the substantive assessment of the case made by the European Commission but not the terminology used by this institution to present the claim. The main contestation regarded the commodification of Union citizenship by Malta, and thereby the attempt to extract profit from this concept in the unilateral favor of one MS, while the values inherent in this citizenship were those of all MS and eventually of their people. Here, an aspect of solidarity comes into play that is often neglected: it regards the special relationship between citizens and the MS of which they are nationals. This relationship has to be more than a transactional one if it shall have the strength and the stability, the lasting reciprocal solidarity between the European Unions, its MS and the Union citizens, the European integration process needs to further succeed.

Allowing a sale of citizenship would not only create irreparable immaterial harm to the European Union but also undermine the European integration project in its entirety and in particular also in an economic sense as integration moves forward on the basis of a consensual value basis. In view of the important goods that are here at stake, the obligation of sincere cooperation according to Art. 4(3) TEU had to be taken seriously in a qualified manner.[86]

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86 It is interesting to note that AG *Poiares Maduro* referred already in 2010 to the increasing worries that "mass naturalization of nationals of non-member States" would violate the principle of sincere cooperation. See ECJ, C-135/08, *Rottmann*, AO by AG *Poiares Maduro* of 30 September 2009, para. 30.

For some commentators this judgment is technically unconvincing[87] or even "hinting at the solidification of the illiberal European Union".[88] This impression might have been generated by the circumstance that the Court had to leave, in many ways, the well-trodden paths of a mere technical argumentation as now the time seemed to have come to give Union citizenship a decisive boost of autonomous life without cutting its lifeline to the national citizenship of MS. Many critics ignored in this context the very nature of Union citizenship as a concept of an incremental nature, a characteristic it shares with EU law as a whole.[89]

Some commentators argued further that in the future many existing naturalization programs of MS might come under EU scrutiny and possibly be prohibited. In this context it has been stated that also "grounds for granting (citizenship or rights) that rely solely on ethnic, religious, or other criteria, but otherwise do not suggest any such special connection to a state, are just as problematic as purely financial 'ties'."[90] However, in C-181/23 the Court did not require a comprehensive "integration and participation of the individual in the society of their (future) home country"[91] but it rather focused on guaranteeing a specific bond of solidarity which can find its roots in the most diverse causes. First of all, it should, negatively spoken, not find its basis in a mere transaction, detached from any value the European Union cherishes. A naturalization program referring to common ancestry could perfectly be presented in solidarity terms fitting to the requirements set by the Court in C-181/23. In fact, the solidarity the Court aimed at is and can only be prospective solidarity. It is surely up for each MS, if it wants so, to define what are the ultimate sources of this solidarity and not for the European Union, as any other solution would run counter the obligation to respect national identity as enshrined in Art. 4(2) TEU.[92]

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87 See *Guillermo Íñiguez*, On Genuine Links, Burdens of Proof, and Declaration No. 2: Some Musings on the Court's Reasoning in Commission v. Malta (C-181/23), in: EULawLive 5 May 2025, https://eulawlive.com/op-ed-on-genuine-links-burdens-of-proof-and-declaration-no-2-some-musings-on-the-courts-reasoning-in-commission-v-malta-c-181-23/; *Steve Peers*, Pirates of the Mediterranean meet judges of the Kirchberg: the CJEU rules on Malta's investor citizenship law, in: EU Law Analysis, 30 April 2025, https://eulawanalysis.blogspot.com/2025/04/pirates-of-mediterranean-meet-judges-of.html; *Martijn van den Brink* (n. 2).

88 *Dimitry V. Kochenov* (n. 2).

89 See *Thomas Giegerich*, Unionsbürgerschaft, in: *Reiner Schulze*/*André Janssen*/*Stefan Kadelbach* (eds.), Europarecht, 2020, p. 399, "Unionsbürgerschaft als Rechtsverhältnis 'auf Zuwachs'" (para. 9).

90 See *Lorin-Johannes Wagner*, Mit Geld lässt sich nicht alles kaufen, in: Die Presse of 12 May 2025, p. 15.

91 See n. 90 (translated by this author). Interestingly, such a requisite rather calls into mind the ICJ *Nottebohm* judgment of 1955 and the definition therein of the genuine link – an approach exactly not followed by the ECJ.

92 A commodification of citizenship by selling citizenship would, to the contrary, exclude any argumentation in solidarity terms ab initio, as the Commission argued (using the genuine link terminology). See ECJ, C-252/21, Judgment of 4 July 2023, para. 59.

The feeling of belonging to a people on the basis of ancestral ties may even generate a strong sense of attachment as the successful integration of the ethnic German resettlers in Germany demonstrates.[93]

Similar results can be obtained, in principle, with programs offering naturalization to persons having a record of outstanding achievements in academia, in arts or in sports. Individuals eligible for such a distinction might appreciate this particular gesture of welcome with a feeling of strong sympathy towards this country just for having been honored with such an offer and perhaps also for the opportunity to further develop their talent. All these situations, in their particularity and rewarding nature, are therefore suitable to establish a special relationship of strong solidarity and they have nothing to do with a commodification of citizenship, quite the opposite. In this sense, the judgment in the Golden Passport case should not, or at least not primarily be remembered for its prohibitive elements but rather for its promotional, incentivizing character.

The *Grzelczyk* formula, which for some has lost impetus in the last years,[94] has been reinvigorated forcefully and has been filled with new content.

G. Conclusions

Union citizenship is definitely no longer a mere "metaphor"[95], a "pie in the sky"[96], "little more than a cynical exercise in public relations"[97], "more appearance than reality"[98] or a "blunder"[99]. Over the years the ECJ has developed a broad jurisprudence guaranteeing the rights of Union citizens when they are at risk of losing this status as a consequence of a withdrawal of the citizenship of MS. Thereby, it had become clear that Union citizenship is more than a mere appendix to national citizenship which would be totally dependent from the latter one. It is rather the case that Union citizenship creates subjective positions, which are granted some protection. Decisions about the loss of national citizenship remain, in principle, within the competence of MS, but as thereby also Union citizenship is withdrawn, a series of cautions apply that flow from

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93 See *Nils Friedrichs*/*Johannes Graf*, Integration gelungen? Lebenswelten und gesellschaftliche Teilhabe von (Spät)Aussiedlerinnen und (Spät)Aussiedlern, SVR-Studie, Berlin 2021.

94 *Francesco L. Gatta*, The If and the How: Losing the EU Citizenship, but with Due Regard to the Due Process of (EU) Law, in: 9 European Papers 2024, p. 143.

95 See *Norbert Reich*, Union Citizenship—Metaphor or Source of Rights?, in: 7 ELJ 2001, pp. 4–23.

96 See *Hans Ulrich Jessurun d'Oliveira*, 'Union Citizenship: Pie in the Sky?' in: *Allan Rosas*/*Esko Antola* (eds.), A Citizen's Europe: In Search of a New Order, 1995, p. 82.

97 See *Joseph H.H. Weiler*, The Selling of Europe, Jean Monnet Working Paper 1996/3, p. 11.

98 "Mehr Schein als Sein", as stated by *Josef Isensee*, in: Europäische Union – Mitgliedstaaten. Im Spannungsfeld von Integration und nationaler Selbstbehauptung, Effizienz und Idee, in: Konferenz der deutschen Akademien der Wissenschaften. Akademie der Wissenschaften und der Literatur Mainz (ed.), Europa – Idee, Geschichte, Realität. 2. Symposium der deutschen Akademien der Wissenschaften, Mainz 1996, p. 93.

99 See n. 98, p. 95.

EU law and which are designed to protect individual positions and are, in particular, expression of the principle of proportionality.[100]

While in the past it could be argued, that no similar consideration would apply for the concession of citizenship, the judgment in C-181/23 changed this notion: It is not only the individual who acquires rights to see his or her rights resulting from Union citizenship protected up to a certain point. Union citizenship as such is to be protected also at the moment of its conferral (together with the national citizenship of a MS) in order to make sure that the cause of its conferral does not devaluate its very nature, ultimately in the interest not only of the European Union but also of each and any Union citizen. In a common area of values, a non-harmonized law of citizenship, that affects so strongly a concept as pivotal to EU law as Union citizenship, builds on mutual trust that needs control and in case of disrespect sanctions in the form of non-recognition of conflicting measures.[101] As shown, this approach to citizenship has also been informed by international law elements, but ultimately an autonomous concept of EU law has morphed out.[102]

As it is often said, Union citizenship does only provide rights, no duties.[103] This continues to hold true with regard to the relationship of the individual towards the European Union. With regard to his or her home country, however, the duties in this reciprocal relationship of solidarity become more accentuated.

The willingness and the ability to fulfil these duties has to be assessed by the naturalizing MS, always in a prospective evaluation. The MS on their part are obliged towards the European Union to carry out this assessment in a responsible manner so to make sure, as far as possible, that the prospective citizen will come up to his or her obligation of solidarity. This obligation of solidarity gives expression to a plethora of reciprocal rights and duties that are closely intertwined and which gain particular value exactly because they are not commoditized. It is this what AG *Jacobs* might had in mind when he expressed in a few words what Union citizenship should be about: The Union citizen should be entitled to state "Civis europeus sum"[104] and to take advantage of all the associated rights (GA *Jacobs* referred in that context to the "common code of fundamental values" within the Community).

These words were said before the Union citizenship became a legal term in EU law and they proved to be astonishingly prescient of what the Court in 2025

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100 See, in particular, ECJ, C-135/08, *Rottmann*, EU:C:2010:104; ECJ, C-221/17, *Tjebbes*, EU:C:2019:189 and ECJ, C-118/20, Wiener Landesregierung, EU:C:2022:34.

101 In the same vein *Ruairi O'Neill* (n. 2).

102 *Simon Cox*, EU Citizenship Should Not Be Sold … Even if National Citizenship Can Be, in: VerfBlog, 20 February 2025, https://verfassungsblog.de/eu-citizenship-should-not-be-sold/, DOI: 10.59704/b2940911a1deb4d2. See also *Luke Dimitrios Spieker*/*Ferdinand Weber*, Bonds without belonging? The genuine link international, union and nationality law, in: Yearbook of European Law, 2025, p. 30.

103 See *Peter Hilpold* (n. 78), p. 862, para. 179.

104 ECJ, C-168/91, *Konstantinidis*, Opinon of AG *Jacobs*, 9 December 1992, para. 146.

identified as an essential part of this concept: a set of immaterial values of immeasurable importance, exactly because they are not tradable while having proven to be indispensable for successful integration.

On the basis of the judgment in European Commission v. Malta this formula needs, perhaps, a little refinement as already anticipated in the title of this article: "Civis europeus, civis solidaris sum"! In fact, as also amply shown, the solidarity principle gains ever more importance and, seen from the opposite side, the lack of a genuine solidarity perspective should also stand in the way of naturalization.

As the Court did not limit the temporal effect of its interpretation of EU law it takes effect ex tunc.[105] This does not mean that all Maltese passports assigned on the basis of the CBI program here at issue would have to be revoked. An individual assessment of all cases will be necessary and each investor citizen may invoke to his or her defense considerations of legal certainty and legitimate expectation.[106]

Maybe some might argue that also the selling of passports for money might create the basis for a relationship based on solidarity, like an arranged marriage based on economic considerations might turn, over time, into a relationship of true love. The ECJ does not, however, want to rely on such vague hopes and retains that the commodification of citizenship constitutes a defect in the naturalization process that is deemed incurable and not capable of being remedied.

In the Golden Passport case the ECJ has drawn a clear red line that shall help to preserve ideals in a community of recognized values, without which the European integration project is bound to fail.

As mentioned above, the ICJ in 1955 stated "[n]aturalization is not a matter to be taken lightly".[107] In hindsight, this admonishment seems astonishingly modern, albeit in a context that is, contrary to the situation in 1955, characterized by a strong emphasis on the protection of fundamental rights and liberties in a unique future-oriented regional setting aspiring at becoming a value-guided order wherein solidarity should become one of the most characterizing principles.[108] Already at the moment, an individual aspires to become member of this

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105 See *Simon Cox* (n. 102), p. 3.

106 See *Simon Cox* (n. 102), p. 4, referring, however, also to the limits of such a defense in view of the fact that the European Commission had warned, long before of the entry into force of Malta's current CBI regime, against its incompatibility with EU law.

107 ICJ, *Nottebohm* Case (Liechtenstein v. Guatemala) (Second Phase), ICJ Rep 1955, p. 24.

108 It might be interesting to note that also in this perspective a flashback to the ICJ *Nottebohm* case and the concomitant discussion is useful. In fact, in this context it was remarked (see *Josef L. Kunz* (n. 16) at p. 545, referring to PCIJ 1923, Ser. B, No. 4, Nationality Decrees), that exclusive jurisdiction is "an essentially relative question; it depends upon the development of international relations". Referred to EC v. Malta this statement can be interpreted in the sense, that the high degree of integration in the EU requires a new look on the MS competence in citizenship issues, taking into account the paramount importance the value issue has gained in the meantime in the European integration process.

society, no doubts shall exists as to such a non-negotiable orientation of the applicant for national and Union citizenship.[109]

109 After all, it shall not be forgotten that European citizenship was introduced at the suggestion by the then Spanish Prime Minister *Felipe Gonzalez* exactly to overcome the legitimacy crisis of the European Communities in the early 1990 (see *Joseph H.H. Weiler*, Liber Amicorum Federico Mancini, 1998, p. 1067, p. 1078). Seen in this context in can be opined that to strengthen Union citizenship means also to further enhance the legitimacy of the European Union.