A SUCCESSFUL ATTEMPT TO HIJACK THE UNION'S LIBERAL PROMISE: *COMMISSION V MALTA*

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The decision in Commission v Malta *is an alarm bell signalling the continued construction of an illiberal union in Europe with the growth of arbitrary power constrained neither by democracy nor legality. This case marks the conclusion of an orchestrated political campaign of questionable legality that has resulted in the drastic expansion of the Court of Justice's (CJEU) powers in the domain of nationality law at the expense of foundational EU values and citizens' rights. None of the European Commission's three main arguments in its action against Malta – regarding EU competence in the field of citizenship, 'genuine links', and the illegality of the Maltese citizenship programme – have any foundations in EU, international, or national law. Rather, the case is an unwelcome solidification of the 'Eurowhiteness' ideal of belonging underpinning the Union in Europe since its inception, and which had never so openly been endorsed by the institutions. The CJEU needed no law or legal arguments to brush away many of the achievements of EU citizenship law with the U-turn in its ruling of 29 April 2025. It has abandoned legal reasoning by establishing a thick version of EU citizenship unwarranted by the Treaties, with a solitary reference to 'solidarity'. This notion has however acquired a new meaning: the construction of a solidarity of thick nationalist identities, policed from Kirchberg at the expense of EU citizens' status and rights – a development that contrasts with the established meaning of solidarity within the EU legal order. EU citizenship is significantly altered as a result, as the essence of citizenship is no longer a legal bond between a person and public authority, but also includes other, undisclosed, primordial extra-legal factors not enumerated in any act and thus potentially open for unconstrained deployment by the Court in future attacks against rule-based EU constitutionalism grounded in the rule of law and the respect of democratic values, as well as against the dignity of EU citizens and their legal status in the Union.*

1 INTRODUCTION AND STRUCTURE

As we learn from the actions of the European Commission,[1] millionaires can also be

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[1] Including, but not limited to Case C-181/23 *European Commission v Republic of Malta* EU:C:2025:283 (*Commission v Malta*); European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Investor Citizenship and Residence Schemes in the European Union' COM(2019) 12 final (European Commission's Report on EU Investment Migration Programmes), and the accompanying European Commission, Commission Staff Working Document SWD (2019) 5 final; European Commission, 'Recommendation of 28.3.2022 on immediate steps in the context of the Russian invasion of Ukraine in relation to investor

a problem for 'Fortress Europe', especially if they 'buy' the sacred privileges of Europeanness instead of winning them in life's 'birthright lottery'[2] or 'earning' them by cultivating 'genuine links' alongside the many 'others' who are not fortunate enough to qualify for citizenship by blood connections and towards whom the European Union (EU) is carefully calibrated to keep at bay.[3] In 2023, the Commission launched a case against Malta, alleging an infringement of Articles 20 TFEU and 4(3) TEU and challenging the Maltese citizenship-by-investment (CBI) programme.[4] In 2025, the Court of Justice of the European Union (CJEU) ruled in favour of the Commission,[5] contrary to the Opinion of Advocate General (AG) Collins and its previous case law, signalling a worrying departure from the founding principle of the Rule of Law,[6] opting instead for a 'miracle'[7] standing for an arbitrary exercise of power unchecked by democracy or legality.[8]

While legal scholars might have anticipated a drastically different ruling from the CJEU,[9] the Commission's decision to bring Malta to court was hardly unexpected. The Commission has been behind efforts to curb the acquisition of citizenship through citizenship-by-investment programmes.[10] It first responded to the launch of the Malta Individual Investor Programme (IIP) in 2013, when it began by clarifying that Maltese citizenship was none of its business,[11] only to offer an abrupt U-turn to push Malta to

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citizenship schemes and investor residence schemes' C(2022) 2028 final para 13 (European Commission's Recommendation on EU Investment Migration Programmes). See also Ursula von der Leyen, 'State of the Union Address by President von der Leyen at the European Parliament Plenary' (16 September 2020) <https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655> accessed 26 February 2026.

[2] Ayelet Shachar, *The Birthright Lottery* (Harvard University Press 2009).

[3] On the problematic ideology of 'integration' of the 'wrong' Europeans, see e.g. Sarah Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne. Critique d'une intégration choisie* (Larcier 2021); Adrian Favell, 'Integration: Twelve Propositions after Schinkel' (2019) 7(21) Comparative Migration Studies; Sarah Ganty, 'Race and Merit in the Context of Citizenship and Residence by Investment' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[4] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU) Art 20; Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU) Art 4(3).

[5] *Commission v Malta* (n 1).

[6] On the rule of law as a bulwark against unchecked arbitrary power, see e.g. Martin Krygier, 'Tempering Power' in Maurice Adams et al (eds), *Bridging Idealism and Realism in Constitutionalism and the Rule of Law* (Cambridge University Press 2016); Gianluigi Palombella, 'Beyond Legality–before Democracy: Rule of Law Caveats in the EU Two-Level System' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

[7] Luke Dimitrios Spieker and Ferdinand Weber, '*Commission v Malta* (C-181/23): a "Miracle" of Union Citizenship?' (2025) 50(4) European Law Review 487.

[8] See for the broader context of this overreach in contemporary EU constitutionalism, Dimitry Kochenov and Jacquelyn Veraldi, 'Supremacy Rule of Law in the Service of a Depoliticised Democracy: Pondering the Nature of the EU's "Social Contract"' (2026) 32(1) ELJ 144.

[9] See for an exhaustive literature overview, Dimitry Kochenov and Elena Basheska, 'It's All about Blood, Baby! The EU's Attack against Investment Migration in the Context of EU Law, International Law and the War in Ukraine' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[10] Shah Guido, 'Divertissement Investment Citizenship: A Berlaymont Fantasia' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[11] Which is true, based on an honest reading of the law: Daniel Sarmiento and Martijn van den Brink, 'EU Competence and Investor Migration' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023); Petra Weingerl and Matjaž Tratnik, 'Relevant Links: Investment Migration as an Expression of National Autonomy in Matters of Nationality?' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023); Matjaž Tratnik and Petra Weingerl, 'State Autonomy versus "Genuine Links": *Nottebohm* and beyond' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025); Daniel Sarmiento and Guillermo Íñiguez, 'Investor

conduct 'negotiations' on a matter outside the Commission's competence, citing the lack of a 'genuine link' (outlawed by the CJEU long-ago in *Micheletti*)[12] and non-compliance with the principle of sincere cooperation enshrined in Article 4(3) TEU. Malta agreed at that time to amend its IIP to introduce a legal residence requirement for those seeking citizenship through investment.[13] While the matter seemed closed – notwithstanding the fact that the compromise seemed more of a strategy to appease the Commission and sidestep a potential escalation of the issue than a decision rooted in fact and law, as there is no and has never been such thing under EU law as a residence requirement to obtain nationality of a Member State[14] – the Commission did not take its own agreement with Malta seriously and continued its escalation.

The Commission enjoyed the support of the European Parliament in its efforts to combat investment migration programmes. The Parliament had passed several obviously non-binding resolutions – all of them strictly outwith the field of its competences (as the Resolutions themselves diligently recorded) – calling on EU Member States to put an end to such programmes.[15] Furthermore, a small but opinionated body of moral panic literature had also mushroomed around the issues of whether citizenship should be 'for sale'.[16] This literature steered clear of established practice and international, EU, or national law, and concerned itself rather with the innate suspicion of investment migration felt among the acolytes of good old blood-based citizenship ideologies:[17] a 'streetlight effect' in the words of Suryapratim Roy.[18] Naturalisation through investment has even been compared to the 'passport trade',[19] a trade that, strictly speaking, does not exist outside clandestine Pacific passport markets and other criminal circles that provide counterfeited official documents.[20] The Commission chose to shove the law aside in favour of poorly-engineered

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Citizenship under EU Law: Recent Trends and Constitutional Implications' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[12] Case C-369/90 *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria* EU:C:1992:295 (*Micheletti*); cf Tratnik and Weingerl, 'State Autonomy vs "Genuine Links"' (n 11).

[13] For a detailed analysis of the legal residence in the legal practice of the EU Member States as compared to physical presence, see Dimitry Kochenov and Martijn van den Brink, 'Legal Residence and Physical Presence' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[14] ibid; Elena Basheska, 'Why the EU's Top Court Should Clarify EU Law' (*Investment Migration Council,* 23 April 2021) <https://investmentmigration.org/articles/why-the-eus-top-court-should-clarify-eu-law/> accessed 26 February 2026.

[15] European Parliament, 'Resolution of 10 July 2020 on a Comprehensive Union Policy on Preventing Money Laundering and Terrorist Financing – The Commission's Action Plan and Other Recent Developments' 2020/2686(RSP); European Parliament, 'Resolution of 9 March 2022 with Proposals to the Commission on Citizenship and Residence by Investment Schemes' 2021/2026(INL).

[16] E.g. Ayelet Shachar, 'Dangerous Liaisons: Money and Citizenship' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018); Ana Tanasoca, 'Citizenship for Sale: Neomedieval Not Just Neoliberal' (2016) 57(1) European Journal of Sociology 169. Cf also Jelena Džankić, 'The Maltese Falcon, or: my Porsche for a Passport!' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018).

[17] Dimitry Kochenov, 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018).

[18] Suryapratim Roy, 'The "Streetlight Effect" in Commentary on Citizenship by Investment' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023).

[19] See e.g. Dimitry Kochenov, '"Passport Trade": The Vicious Circle of Nonsense in the Netherlands' (*Verfassungsblog*, 8 June 2020) <https://verfassungsblog.de/passport-trade-a-vicious-cycle-of-nonsense-in-the-netherlands/> accessed 13 January 2026.

[20] Georgi Gotev, 'Thousands obtained EU citizenship for €5000 in Bulgarian scam' (*Euractiv*, 30 October

moral panic, and the Court embraced this Orwellian approach as well.[21]

Accordingly, the CJEU decision in *Commission v Malta* results from a concerted, large-scale political campaign against several essential elements of EU constitutionalism, using the fight against investment migration programmes as a pretext. The European Commission has overstepped its authority by waging war on a handful of core EU law principles, from non-discrimination to conferral, to redefine EU citizenship as a legal status based on 'genuine links' in direct conflict with the key CJEU case law and the Treaties.[22] Worse still, the CJEU bowed to the Commission's requests and to ongoing efforts to misrepresent investment migration as an unjust means of acquiring citizenship. The Court has done so contrary to its earlier rulings and with recourse to no law at all, starring, again, as a 'high priest of lawlessness law'[23] (Section 2). Going into more detail, we unpack the CJEU's ruling in *Commission v Malta* in the light of the core legal arguments of the Commission's long-standing and empty moral panic narrative, addressing each claim individually – a job the Court has not done, as it preferred *not* to rule on any of the arguments submitted, as Guillermo Íñiguez perceptively noticed,[24] offering a decision seemingly in some *other* case, which neither Malta nor the Commission had argued before the Court.[25] Accordingly, we focus on the EU's competence (Section 3); the fictitious 'genuine links' requirement (Section 4); and the legality of the Maltese CBI programme (Section 5). Finally, we draw conclusions (Section 6) in light of the dangerous legal space created by the decision in *Commission v Malta*. To agree with Xavier Groussot and Matteo Valera, 'in EU law, there is now a day before and after the 29th of April 2025 […] [when the CJEU] delivered its "spring bombshell" in the case of *Commission v Malta*'.[26]

2 THE BETRAYAL OF LEGALITY: THE CJEU WILLINGLY LOSING ITS WAY

In *Commission v Malta*, the CJEU held on 29 April 2025 that Malta's citizenship-by-investment

2018) <www.euractiv.com/section/justice-home-affairs/news/thousands-obtained-eu-citizenship-for-e5000-in-bulgarian-scam/> accessed 13 January 2026.

[21] On the Orwellian approach of the Commission to keep on repeating falsehoods until and as if they become 'the law', see Joseph H H Weiler, 'Postscriptum: Citizenship for Sale (*Commission v Malta*): Who of the Two Is Selling European Values?' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[22] 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)' (*EU Law Live,* 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/> accessed 26 February 2026; Martijn van den Brink, 'Why Bother with Legal Reasoning? The CJEU Judgment in *Commission v. Malta (Citizenship by Investment)*' (*Verfassungsblog*, 5 May 2025) <https://verfassungsblog.de/why-bother-with-legal-reasoning/> accessed 26 February 2026.

[23] Sarah Ganty and Dimitry Kochenov, 'EU Lawlessness Law' (2024) 30(1) Columbia Journal of European Law 78, 119.

[24] Íñiguez, 'On Genuine Links, Burdens of Proof, and Declaration No 2' (n 22).

[25] This astonishing disregard of the most basic procedural imperatives is thus akin to what we have witnessed in the *Sharpston* cases: Dimitry Kochenov and Graham Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2021) 27(1-3) European Law Journal 262.

[26] Xavier Groussot and Matteo Valera, 'The Metamorphosis of EU Law through Article 19(1) TEU: From Loyalty to Value-Laden Interpretation' (2025) 4 Europarättslig Tidskrift 567.

programme violates EU law.[27] In doing so, the Court disagreed entirely with seemingly every single aspect of the Opinion of its Advocate General Collins, released on 10 October 2024.[28] Unlike the Advocate General, who recommended dismissing the case and ordering the Commission to pay the costs – effectively hinting at an abuse of procedure, given both the absence of EU competence in this field and the absence of any violation of EU law – the Court found the opposite, also dismissing virtually all the academic literature on the subject, including the analyses of Hans Ulrich Jessurun d'Oliveira,[29] Daniel Sarmiento, and Martijn van den Brink,[30] Matjaž Tratnik and Petra Weingerl,[31] Joseph H.H. Weiler,[32] and the present authors.[33] The voices to the contrary mostly, but not exclusively,[34] came from outside the legal field and did not engage with EU law at all.[35]

The divergence of views between the AG and the Court suggests a poor state of EU rule of law and the politicisation of basic legality.[36] Legality and legal certainty apparently are not guaranteed, and the rules remain unclear, particularly in light of this surprising judgment. *Commission v Malta* outlaws the 'commercialisation' of EU citizenship and hints at a possible U-turn away from the liberal conception of EU citizenship, celebrated in earlier case law as a legal link between the individual and authority capable of protecting the individual against any 'absence of genuine links' claims: that the ties that bind are procedural, rather than substantive, is the core added-value of liberal citizenship.[37]

This vision, at least at the EU level, is now gone. For the first time, instead of attempting – at least rhetorically – to defend the rights of Europeans, the Court does exactly the opposite: it assaults a group of European citizens attempting to strip them of dignity and rights. Rights and values aside, the move is obviously an attack on the very idea of democracy. We mean this not only in the sense of not respecting the outcome of Maltese decision-making in the national sphere of competence. The problem is much deeper, as the whole rationale for denaturalising a group of citizens turns European institutions, including the

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[27] See Dimitry Kochenov and Guillermo Íñiguez, 'EU Citizenship's New Essentialism' (2025) 50(4) European Law Review 455, for one of the authors' initial reactions.
[28] Opinion of AG Collins in Case C-181/23 *Commission v Malta* EU:C:2024:849.
[29] Hans Ulrich Jessurun d'Oliveira, 'Golden Passports: European Commission and European Parliament Reports Built on Quicksand' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).
[30] Sarmiento and van den Brink (n 11).
[31] Weingerl and Tratnik, 'Relevant Links' (n 11); Tratnik and Weingerl, 'State Autonomy versus "Genuine Links"' (n 11).
[32] Weiler, 'Postscriptum: Citizenship for Sale' (n 21).
[33] Kochenov and Basheska, 'It's All about Blood, Baby!' (n 9).
[34] Luke Dimitrios Spieker and Ferdinand Weber, 'Bonds without Belonging? The Genuine Link in International, Union, and Nationality Law' (2024) 43 Yearbook of European Law 56; Simon Cox, 'The EU Free Market Does Not Extend to Citizenship' (*Verfassungsblog*, 30 April 2025) <https://verfassungsblog.de/the-eu-free-market-does-not-extend-to-citizenship/> accessed 6 August 2025.
[35] See also, for instance, Transparency International, 'Golden passports on trial: Can the EU stop countries from selling citizenship?' (25 April 2025) <https://www.transparency.org/en/news/eu-golden-passports-on-trial-malta-court-of-justice-citizenship> accessed 26 February 2026. For literature overviews, see e.g., Dimitry Kochenov and Kristin Surak, 'Learning from Investment Migration' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023); Dimitry Kochenov, Madeleine Sumption, and Martijn van den Brink, 'Introduction: Advancing Investment Migration Scholarship' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).
[36] For a critical overview of key literature supporting this worrying trend in the broader context of troubled EU constitutionalism, see e.g. Martijn van den Brink, 'Constitutionalism without Principle: Article 2 TEU and the Doctrinal Construction of EU Values' (2026) European Law Open (early view).
[37] Christian Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51(1) European Journal of Sociology 9.

Commission and the Court, from being the custodians of popular democratic power acting in the name of the sovereign citizens into a questionable locus of all available normativity. Indeed, in the absence of any law able to justify such moves, either theoretically or from the point of view of the substance and procedure in the available law *sensu stricto*, the EU institutional duo emerges as a collective tyrant in disagreement with the idea of popular sovereignty and *refusing to serve the people*. Instead the Court and the Commission view themselves as in possession of a right to pick the 'right' Europeans first, thereby brushing aside the idea of accountability. As a consequence, the ECJ has emerged as the direct opposite of the Supreme Court of the US in *Afroyim v Rusk*,[38] the latter protecting US citizens from expatriation using democratic logic, while the former is assaulting European citizens' dignity and rights with no regard for democracy or the rule of law.

This power grab by the EU comes without any kind of convincing demonstration of any harm having been caused by the national policy in question, no rule of EU law breached, thus hinting at the continuing intense politicisation of the EU legal order, where arbitrary power not grounded in the law goes unchecked.[39] This politicisation does not signal the glorious entry of politics on the EU's centre-stage, of course, since the EU's authoritarian liberalism,[40] in Michael Wilkinson's apt wording, is designed precisely to switch democratic politics off, rendering our continent largely 'apolitical'.[41] This significantly tames its moral appeal and constitutional ambition, in Andrew Williams' analysis.[42] What we are facing, instead, is politicisation in the sense of a robust departure from the rule of law: an unchecked rise of arbitrary power. This departure also plagues other fields,[43] from the independence of the judiciary[44] and judicial dialogue,[45] and the respect for dispute resolution through arbitration[46] and arrest warrants – which sometimes carry a presumption of guilt,[47] to the safeguarding of essential rights at the EU's borders,[48] unleashing what one of the authors writing with Sarah Ganty branded as the EU's 'death machine',[49] resulting in the infamous

[38] *Afroyim v Rusk* 387 US 253 (1967).
[39] For the crudest version of this, see, Omer Shatz, *EU Crimes against Humanity* (JSD Dissertation, Yale Law School, 2023).
[40] Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).
[41] For a detailed discussion and further literature, see, Kochenov and Veraldi (n 8).
[42] Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010).
[43] Joelle Grogan and Barbara Grabowska-Moroz (eds), *Rule of Law beyond the EU Member States: Assessing the Union's Performance* (2nd edn, CEU Democracy Institute 2025).
[44] Dimitry Kochenov and Petra Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe' (2023) 60 Journal of Common Market Studies 150.
[45] Dimitry Kochenov, 'Restoring Dialogical Rule of Law in the European Union: Janus in the Mirror' (2024) CYELS (early view).
[46] Dimitry Kochenov and Nicolaos Lavranos, '*Achmea* versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States' (2022) 14 Hague Journal on the Rule of Law 195; Wojciech Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' (2018) 55(4) Common Market Law Review 1025.
[47] Petra Bárd and Dimitry Kochenov, 'What Article 7 is Not: The European Arrest Warrant and the *de Facto* Presumption of Guilt – Protecting EU Budget Better than Human Rights?' in Adam Łazowski and Valsamis Mitsilegas (eds), *The European Arrest Warrant at Twenty* (Hart Publishing 2026).
[48] Sarah Ganty et al, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"' (2024) 16 Hague Journal on the Rule of Law 739.
[49] Dimitry Kochenov and Sarah Ganty, 'The Death Machine: EU Lawlessness Law that Rules' in Catherine Barnard et al (eds), *The Pursuit of Legal Harmony in a Turbulent Europe. Essays in Honour of Eleanor Sharpston* (Hart Publishing 2024) 67; Sarah Ganty and Dimitry Kochenov, 'How the EU Death Machine Works' (*Verfassungsblog*, 27 February 2024) <https://verfassungsblog.de/how-the-eu-death-machine-works/>

'EU Crimes against Humanity'.[50] With *Commission v Malta* EU lawlessness law, which is behind the EU-procured and orchestrated death-trap in the Mediterranean among innocent non-citizens, is now moving closer to home: as Europeans too are arbitrarily targeted, the CJEU is opening the doors of Balibarian *apartheid européen*, which used to be reserved for non-citizens only, to all.[51] It is in this sense that we can agree with the Court that the case is about 'solidarity'.

While the stakes in *Commission v Malta* were seemingly significantly lower than the dozens of thousands of deaths resulting from the EU's carefully designed and lavishly funded criminal efforts,[52] upon a closer examination what we are dealing with could actually be more far-reaching: the Union where classical democracy is unavailable and the rule of law is so weak now turns away from its own citizens whom it was purported to serve since its inception.[53] It is now clear that even if you are a European citizen, the EU can be your enemy – pursuing[54] the legal undoing of your status and your rights with no legal basis relying on no previously disclosed rules, and in a context where the victims of such lawless attacks have no legal or democratic means to defend themselves. The unchecked, arbitrary power of Wilkinson's authoritarian liberalism has now revealed its punishing face better than ever before, moving a step further than mere 'adversity' or rendering rights an 'illusion', as diagnosed by Charlotte O'Brien.[55] The EU law of personhood has thus reached a high point of a smooth evolution: what started as mere exclusion of the 'Other' in the Balibarian '*apartheid européen*'[56] has progressed to become a strict division between the 'good' and 'bad' Europeans[57] based on 'internal market' hermeneutics[58] beyond considerations of ordinary

accessed 26 February 2026.

[50] Shatz (n 39).

[51] Étienne Balibar, *Nous, citoyens d'Europe?* (La Découverte 2001) 192. See also Sarah Ganty, 'Neo-Ethnicization of Citizenship: The EU's Internal and External Governance of Citizenship by Investment' (2026) Fudan Journal of Humanities and Social Sciences (early view).

[52] Shatz (n 39); Ganty and Kochenov, 'EU Lawlessness Law' (n 23); Joyce De Coninck, *The EU's Human Rights Responsibility Gap* (Hart Publishing 2024).

[53] Remember the 'legal heritage' mantras of *van Gend en Loos* and all the hopeful literature on the EU and the individual: Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68(2) The Modern Law Review 233; Gianluigi Palombella, 'Whose Europe? After the Constitution: A Goal-Based Citizenship' (2005) 3(2-3) International Journal of Constitutional Law 357.

[54] Rather than merely assisting a Member State willing to attack and destroy your rights and/or status, as was the case, for instance, in Case C-391/09 *Runevič-Vardyn v Lithuania* EU:C:2011:291 and in Case C-221/17 *Tjebbes* EU:C:2019:189. The former case is analysed in this vein in Dimitry Kochenov, 'When Equality Directives Are Not Enough: Taking an Issue with the Missing Minority Rights Policy in the EU' in Uladzislau Belavusau and Kristin Henrard (eds), *EU Anti-Discrimination Law beyond Gender* (Hart Publishing 2018). Cf Adam Łazowski, Egle Dagilyte, and Panos Stasinopoulos, 'The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights' (2015) 11 Croatian Yearbook of European Law and Policy 1. The latter case is analysed in: Dimitry Kochenov, 'The *Tjebbes* Fail' (2019) 4(1) European Papers 319; Katja Swider, 'Legitimizing Precarity of EU Citizenship: *Tjebbes*' (2020) 57(4) Common Market Law Review 1163.

[55] Charlotte O'Brien, 'The Great EU Citizenship Illusion Exposed: Equal Treatment Rights Evaporate for the Vulnerable' (2021) 46 European Law Review 6; Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017).

[56] Balibar (n 51) 192; Dimitry Kochenov and Martijn van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' in Daniel Thym and Margarite Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill-Nijhoff 2015); Ganty and Kochenov, 'EU Lawlessness Law' (n 23) 88-98.

[57] Gareth Davies, 'How Citizenship Divides: A New Legal Class of Transnational Europeans' (2019) 4(3) European Papers 675.

[58] Maria Haag, 'The *coup de grâce* to the Union Citizen's Rights to Equal Treatment: *CG v. The Department for*

equality and respect,[59] and eventually resulted in an assault on the lives of 'Others' and the betrayal of own citizens alike,[60] which has now allowed a totally different, less benevolent face of the Union to emerge: *apartheid européen* is not only about the foreigners – after *Commission v Malta*, EU citizens are equally in danger.

The CJEU's ruling in *Commission v Malta* is thus just a new, albeit regrettably no longer surprising, step in the troubling evolution charted above – a reminder that the law does not matter much in the EU as it stands, as it can also mean 'EU law without the rule of law'[61] or 'EU Lawlessness Law'.[62] As viewed by Groussot and Valera, *Commission v Malta* 'constitutes "bad law" since it promotes rule by law rather than rule of law, expanding the scope of EU law regardless of the division of competences by Article 20 TFEU, Article 4(1)-(2) TEU and Declaration 2 Annexed to the Treaty'.[63] While we see what they mean, we respectfully disagree: there can be no 'rule by law' when no law has been disclosed in advance. We are thus bound to side with Martijn van den Brink: legal references or reasoning were simply not provided by the Court, which has manifestly failed to fulfil its only function. The outcome is thus far removed from rule 'by law': it is solely based on the petty considerations of empty prejudice apparently entertained by the Court, *replacing* the law and attempting, illegally, to disqualify citizens from the legal protections owed to them not only by the Union, but also by their state of nationality as a Member State of the EU. *Commission v Malta* is a triumph of frivolous and unlawful prejudice underpinning an abuse of power unchecked by law in a Union said to be an emanation of 'integration through law'.

What makes this finding even more troubling is the poor state of democratic self-governance across the levels of the law in Europe: precisely the nebulous uncertainty exploited by politicians to establish and keep the killing machine in the Mediterranean running.[64] In a Union where democracy is not in the legal system's 'DNA',[65] values emerge as purely textual[66] and the rule of law does not tame those in power – especially not at

Communities in Northern Ireland' (2022) 59(4) Common Market Law Review 1081; Dion Kramer and Anita Heindmaier, 'Administering the Union Citizen in Need: Between Welfare State Bureaucracy and Migration Control' (2021) 31(4) Journal of European Social Policy 380; O'Brien, 'The Great EU Citizenship Illusion Exposed' (n 55); Roxana Barbulescu and Adrian Favell, 'Commentary: A Citizenship without Social Rights? Freedom of Movement and Changing Access to Welfare Rights' (2020) 58 International Migration 151; Dimitry Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union' in Fabian Amtenbrink et al (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019).

[59] Dimitry Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2010) Jean Monnet Working Papers (NYU Law School) No 08/10.

[60] O'Brien, 'The Great EU Citizenship Illusion Exposed' (n 55); O'Brien, *Unity in Adversity* (n 55).

[61] Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34(1) Yearbook of European Law 74.

[62] Ganty and Kochenov, 'EU Lawlessness Law' (n 23).

[63] Groussot and Valera (n 26) 590.

[64] Elena Basheska and Dimitry Kochenov, 'The True Show of Unity: Supremacy Rule of Law at the Service of Eurowhiteness Solidarity' in Stéphanie Laulhé Shaelou and Andreas Marcou (eds), *Rule of Law and European Values in Turbulent Times* (Springer, forthcoming 2026).

[65] Joseph H H Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016); Štefan Auer, *European Disunion: Democracy, Sovereignty and the Politics of Emergency* (Hurst 2022).

[66] Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29(3) Oxford Journal of Legal Studies 549.

the EU level which is marked by 'supremacy rule of law'[67] – we can expect many more sudden U-turns like this, further damaging the fabric of fundamental legality and pro-actively undermining the future of the integration project, holding Europhiles and Eurosceptics alike hostage of dubious arbitrariness immune to law, values, and principles.

3 EU COMPETENCE

The Commission's first argument concerned the existing division of competence in the field of citizenship – the proverbial 'federal bargain'.[68] While acknowledging that Member States have competence to establish the conditions for the acquisition and loss of citizenship, the Commission emphasised the need for Member States to adhere to EU law when exercising this authority. More specifically, Member States may not exercise their competence in a way that would compromise or undermine 'the essence, value and integrity of Union citizenship, to preserve the mutual trust which underpins that status'.[69] The Commission linked these requirements to the principle of sincere cooperation set out in Article 4(3) TEU and to the status of Union citizen set out in Article 20 TFEU. The Commission particularly emphasised that a Member State's nationality is the only requirement for access to EU citizenship and the wealth of rights enjoyed by EU citizens by virtue of EU law.[70]

The Commission's first argument is particularly problematic. Citizenship and territory are the essential starting points of the concept of state sovereignty.[71] The ABC of global citizenship law is that states are free to confer citizenship on whom they consider qualified under the Hague Convention of Nationality[72] and unquestionably under EU law – as Shaw,[73]

[67] Dimitry Kochenov, 'Supremacy Rule of Law Undermines the European Union' in Marek Safjan (ed), *The Revival of the Rule of Law* (Intersentia 2024).
[68] Niamh Nic Shuibhne, 'Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).
[69] *Commission v Malta* (n 1) para 42.
[70] ibid para 43.
[71] On sovereignty of states, see among many authors, Leo Gross 'The Peace of Westphalia: 1648–1948' (1948) 42(1) The American Journal of International Law 20; Henry Wheaton, *Wheaton's Elements of International Law*, Coleman Phillipson (ed) (5th edn Steven and Sons Ltd 1916); Hans Kelsen, *Principles of International Law* (Rinehart and Company 1952; repr by The Lawbook Exchange, Clark, NJ 2003); Charles E Merriam, *History of the Theory of Sovereignty Since Rousseau* (Faculty of Political Science of Columbia University, NY 1900; repr by The Lawbook Exchange, Clark, NJ 1999); Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton University Press 2001); cf Randall Lesaffer, 'International Law and Its History: The Story of an Unrequired Love' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff 2007) 27-42; Stéphane Beaulac, *The Power of Language in the Making of International Law* (Martinus Nijhoff 2004); Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth' (2001) 55(2) International Organization 251 etc.
[72] See Article 1, Convention on Certain Questions Relating to the Conflict of Nationality Laws (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 89 (*The Hague Convention*).
[73] Jo Shaw, 'Citizenship for Sale: Could and Should the EU Intervene?' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018).

Kochenov,[74] Jessurun d'Oliveira,[75] Sarmiento,[76] and Tratnik and Weingerl[77] have demonstrated. By extension, this applies to EU citizenship, which remains an essentially derivative[78] – *ius tractum* – citizenship.[79] The importance of this consideration is significantly reinforced by the Declaration on the Nationality of a Member State,[80] which made the ratification of the Treaty of Maastricht and the formal introduction of the EU citizenship status into the system of EU law possible in the first place. The Declaration, which is an essential element of the legal nature of the citizenship of the EU as agreed by the *Herren der Verträge* alongside respect *vis-à-vis* Irish citizenship by investment at that time, reads as follows:[81]

> DECLARATION on nationality of a Member State
> The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, 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. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.

The Court mentions none of this. In fact, it is not preoccupied by EU law in its decision: not in the part where arbitrary power should be constrained by any principle[82] – not a new transgression from the Baron Lenaerts Court,[83] but an important first nevertheless, since what is now under attack is not a member of that very Court,[84] not a lawfully appointed judge of a Member State in trouble,[85] nor a significant investment

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[74] Dimitry Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship' (2010) EUI RSCAS Working Paper No 2010/21.
[75] Hans Ulrich Jessurun d'Oliveira, 'Union Citizenship and beyond' in Nathan Cambien et al (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill-Nijhoff 2020). See also Jessurun d'Oliveira, 'Golden Passports' (n 29).
[76] Daniel Sarmiento, 'EU Competence and the Attribution of Nationality in Member States' Investment Migration Working Papers 2019/2.
[77] Weingerl and Tratnik, 'Relevant Links' (n 11); Tratnik and Weingerl 'State Autonomy vs "Genuine Links"' (n 11).
[78] Gareth Davies, 'Humiliation of the State as a Constitutional Tactic' in Fabian Amtenbrink and Peter van den Bergh (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press 2010); cf Kochenov, 'Rounding up the Circle' (n 74).
[79] Dimitry Kochenov, '*Ius Tractum* of Many Faces' (2009) 15 Columbia Journal of European Law 169.
[80] For a more detailed discussion of this aspect of the case, 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)" (*EU Law Live*, 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/> accessed 14 April 2026; Kochenov and Íñiguez, 'EU Citizenship's New Essentialism' (n 27) 466-468.
[81] Official Journal C 191, 29/07/1992, 98.
[82] On this worrying trend, from different angles, see e.g. Kochenov, 'Janus in the Mirror' (n 45); van den Brink, 'Constitutionalism without Principle' (n 36).
[83] E.g, Dimitry Kochenov, 'EU Rule of Law Today: Limiting, Excusing, or Abusing Power?' in Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS 2023) 18.
[84] As in the *Sharpston* cases: Kochenov and Butler (n 25).
[85] As in *T.B. v C.B.*: Dimitry Kochenov, 'Fake Judges Are Great Administrators! A New Word on Judicial Independence from CJEU in *T.B. v C.B.*' (*EU Law Analysis*, 2 October 2025) <https://eulawanalysis.blogspot.com/2025/10/fake-judges-are-great-administrators.html> accessed 1 May 2026.

deprived of any protection,[86] or basic accountability for unlawful international agreements.[87] At issue is the *undoing* of Europeans without a legal basis: something the Court has not attempted in the past.

The essential expression of the Rule of Law in the Union is that the principle of conferral governs the limits of the EU competences. This means that the EU lawfully acts only within the limits of the competences that EU Member States have conferred upon it in the Treaties, and nationality is not among them.[88] As per CJEU case law, the limitations on the principle of conferral are interpreted strictly and require close involvement of the Member States:[89] the Union can only intervene in such areas to safeguard the rights of Europeans and ensure the effectiveness of EU law, as has been the case until April 2025, and could be demonstrated by recourse to countless examples, from *Rottmann*[90] and *Micheletti*[91] to *Tjebbes*[92] and *JY*.[93]

The legal situation is clear: matters of nationality, including the loss of nationality and naturalisations of those who are not 'natural born' citizens, including a subtype of investment naturalisations, fall squarely within the national legal framework, and exceptions are made in the cases when EU citizens' *rights* are potentially threatened. The academic consensus is well-articulated and undisputed, and in the EU the division of competencies had been confirmed unequivocally prior to *Commission v Malta*, from *Micheletti*,[94] and *Zhu & Chen*[95] to *Tjebbes*.[96] Furthermore, EU citizenship is complementary to, but does not replace, national citizenship.[97] Put differently, EU citizenship protects the rights of EU citizens not granted by the Member States but by the Union itself.[98] It is, however, for the EU Member States to

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[86] As in *Achmea* and its progeny: Kochenov and Lavranos (n 46); Sadowski (n 46).
[87] As in *EU-Turkey Deal*: Bas Schotel, 'The EU-Turkey Statement and the Structure of Legal Accountability' in Eva Kassoti and Nadin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (TMC Asser Press 2022) 73; Ganty and Kochenov, 'EU Lawlessness Law' (n 23) 145 et seq.
[88] Article 5 TEU. For the historic development of the principle, see René Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30(1) Common Market Law Review 85; and Kieran Bradley, 'The European Court and the Legal Basis of Community Legislation' (1988) 13(6) European Law Review 379.
[89] See, in greater detail, Sarmiento and van den Brink (n 11); Sarmiento and Íñiguez (n 11).
[90] Case C-135/08 *Janko Rottman v Freistaat Bayern* EU:C:2010:104. Gareth Davies, 'The Entirely Conventional Supremacy of Union Citizenship and Rights' in Jo Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* EUI Working Papers RSCAS 2011/62, 5; Dimitry Kochenov, 'Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47(6) Common Market Law Review 1831; Hans Ulrich Jessurun d'Oliveira, 'Ontkoppeling van nationaliteit en Unieburgerschap?' (2010) 16 Nederlands Juristenblad 1028.
[91] *Micheletti* (n 12); Weingerl and Tratnik, 'Relevant Links' (n 11); Jessurun d'Oliveira, 'Union Citizenship and beyond' (n 75).
[92] *Tjebbes* (n 54). Cf Kochenov, 'The *Tjebbes* Fail' (n 54); Hans Ulrich Jessurun d'Oliveira, '*Tjebbes* en aanhangend nationaliteit' [2019] Nederlands Juristenblad 37; Swider (n 54).
[93] Case C-118/20 *JY v Wiener Landesregierung* C:2022:34; Dimitry Kochenov and David de Groot, 'Helpful, Convoluted, and Ignorant in Principle: EU Citizenship in the Hand of the Grand Chamber in *JY*' (2022) 47 European Law Review 699.
[94] *Micheletti* (n 12).
[95] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* EU:C:2004:639. Dimitry Kochenov and Justin Lindeboom, 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).
[96] *Tjebbes* (n 54).
[97] Article 20(1) TFEU. See also Declaration No. 2 discussed earlier.
[98] As stated by the CJEU many times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States: Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-*

regulate who qualifies as a national, having 'due regard to [EU] law'[99] – a limitation introduced by *Micheletti* precisely to safeguard the rights of EU citizens against Member State overreach. Ensuring the effective and uniform protection of the rights and status of EU citizens is key in all the relevant available case law cited above.[100] The EU has normally intervened in matters of nationality only when Member States have enacted measures that restrict the rights of EU citizens, or endanger the status itself.[101] *Commission v Malta* is truly remarkable in this context, indeed, it 'unsettles long-standing assumptions',[102] as it comes down to *problematising* the use of EU citizenship rights by a specific group of Europeans, using this as a pretext to announce them outwith the ambit of 'solidarity' and attempting to annihilate their status.[103] It is the reliance on the rights and protections provided by law and making them known to the potential applicants for naturalisation, rather than undermining such rights and protections, which is a problem in the unprincipled view of the Commission shared by the Court.

The Commission argued in its submission that its action was limited to a specific matter of granting Member State nationality to investors.[104] Specifically, the Commission's problem has clearly been the 'commodification' of EU citizenship, or the transactional nature of citizenship-by-investment programmes which enable the systematic – i.e. organised – grant of citizenship in exchange for predetermined payments or investments. It can, therefore, be distilled from the Commission's argument that the legislative competences of Member States in the field of citizenship are constrained by the commodification of Union citizenship. While 'commodification' of Union citizenship has not been analysed in detail by the Commission, its understanding of the term may be deduced in the context of other claims in the case, particularly regarding the transactional nature of the citizenship-by-investment programmes and the possibility for acquisition of citizenship in return for predetermined payments or investments.[105] Such understanding sits uneasily with the established pattern of departure from the principle of conferral to protect EU citizens' status and rights:[106] the use of rights by 'commodified' citizens, on the contrary, emerges as an implicit sign of transgression for reasons that are never disclosed. This intuition aligns with the CJEU's finding in the case, which is as inimical to the law in force as it is to the legal history of EU citizenship and the very idea of attaching any usable rights to this legal status. It is well

Neuwe EU:C:2001:458 para 31; *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493 para 82; *Carlos Garcia Avello v Belgian State* EU:C:2003:539 para 22; *Zhu and Chen* (n 95) para 25; and Case *Janko Rottman* (n 90) para 43. Until it started bringing EU citizens down, that is, which coincided with dropping 'intended': *Commission v Malta* (n 1) para 100. See also, Kochenov and Íñiguez, 'EU Citizenship's New Essentialism' (n 27) 464-465.

[99] *Micheletti* (n 12) para 10.

[100] See e.g. *Janko Rottman* (n 90) para 60; Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* EU:C:2011:124 para 45.

[101] Dimitry Kochenov, 'A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18(1) Columbia Journal of European Law 56.

[102] Alina Tryfonidou, 'Selling (EU) Citizenship or Exercising Sovereignty?' in this special issue of the Nordic Journal of European Law.

[103] At least it seems clear that the case has no legal effect as to the actual enjoyment of EU citizenship by all the Europeans included by the Court into this group of presumed violators of solidarity: Kochenov and Íñiguez, 'EU Citizenship's New Essentialism' (n 27).

[104] *Commission v Malta* (n 1) para 44.

[105] *Commission v Malta* (n 1) para 54.

[106] E.g. *Janko Rottman* (n 90). See also Dimitry Kochenov, 'Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47(6) Common Market Law Review 1831.

known that Irish citizenship was available for sale at the moment when the supranational citizenship was created by the Masters of the Treaties with the Maastricht revision, which was itself only ratified, once again, upon the promise to the Danish voters that anything like *Commission v Malta* would be absolutely impossible.[107] 'Commodification' has thus always been one of the *founding ways of acquiring EU citizenship*: a fact that neither the Commission nor the Court happen to mention or discuss.

We speak of an 'intuition', since both the Commission and the Court failed to clarify how the attributes of EU citizenship could be compromised when citizenship is obtained through investment as opposed to, say, blood or talent.[108] Instead, the questionable assumption that 'commodifying Union citizenship undermines the integrity of that status in a manner which constitutes a particularly serious infringement of EU law'[109] is never unpacked, especially in the context of EU citizenship's history, where the problem lies not in commodification, but rather in its blood-based, racist underpinnings.[110]

Arguing before of the Court, Malta distinguished between situations in which citizens are deprived of rights and those concerning the grant of nationality by a Member State.[111] In the case of granting citizenship, a breach of EU law would exist according to Malta, 'only where a Member State's naturalisation policy amounts in a general and systematic way to a serious breach of the values and objectives of the European Union',[112] which was not the case with the citizenship-by-investment programme. This reasoning is largely consistent with the CJEU's prior practice, since the *Commission v Malta* judgment has no precedent in EU law, whereas the EU has frequently intervened when the rights of EU citizens have been restricted.

The Court primarily confirmed that Member States must comply with EU law while exercising their competencies in the field of citizenship,[113] noting also that the examination of procedures for the acquisition of citizenship cannot be limited to significant breaches of EU values and objectives.[114] The Grand Chamber identified a new form of EU citizenship that is both illiberal and restrictive, downgrading the status's dignity and promise in a sharp disregard of the Treaty text, earlier case law, and prior national practice, especially in Ireland.

It cited Article 3(2) TEU on the area of freedom, security, and justice that the Union offers its citizens.[115] The Court listed the rights of EU citizens, including freedom of movement within the EU, consular protection outside the EU,[116] and rudimentary political rights (precisely those that underpin the Union's infamous democratic deficit).[117] It further noted that EU citizens participate in the democratic life of the EU through political rights,

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[107] Íñiguez, 'On Genuine Links, Burdens of Proof, and Declaration No 2' (n 22).
[108] Ganty, 'Race and Merit' (n 3); Sarah Ganty, 'Merit as a Racial Device: The Ambiguous Case of Citizenship and Residence by Investment' (2026) Journal of Ethnic and Migration Studies (early view).
[109] *Commission v Malta* (n 1) para 44.
[110] Hanna Eklund, 'Peoples, Inhabitants and Workers' (2023) 34(4) European Journal of International Law 831; Hans Kundnani, *Eurowhiteness* (Hurst, London 2023); Peo Hansen and Stefan Jonsson, *Eurafrica: The Untold Story of European Integration and Colonialism* (Bloomsbury Academic 2014).
[111] *Commission v Malta* (n 1) para 65.
[112] ibid para 66.
[113] ibid para 81.
[114] ibid para 82.
[115] ibid para 84.
[116] ibid para 90.
[117] ibid para 88.

thereby giving concrete expression to democracy as a value, which, under Article 2 TEU, is one of the Union's foundational values.[118] It concluded from the existence of these rights that grants of Member State nationality affect the 'functioning of the EU as a common legal order'.[119] This unquestionable finding, which is entirely unrelated to the particular nature of the naturalisation regime in question, was further linked to EU law: EU citizenship rights were found by the Court to underpin the *raison d'être* of EU citizenship in the context of the EU[120] as a 'fundamental status of the nationals of the Member States'.[121] Fair enough.

From this, the Court drew the conclusion that we are dealing with the 'primary expression of solidarity' among the Member States, requiring the Member States not to exercise their competences in the field of nationality law 'in a way that is manifestly incompatible with the very nature of EU citizenship':[122] we have heard all this from *Micheletti*, which the Court was, however, expressly minded to overrule. The Court underlined the 'special relationship of solidarity and good faith'[123] – which we had already heard in *Rottmann*[124]– as being the only reason for the Court to invoke all this to extinguish this 'special relationship' with regard to a particular clearly identifiable group of Europeans following the *ultra vires* attack by the European Commission. The special relationship between Member States and their nationals underpins the exercise of rights and (so far absent)[125] duties under EU law, which is why compatibility with EU law is required despite the Member States' discretion.[126] While it is up to the Member States to establish the materialisation of the relationship of solidarity and good faith,[127] the Grand Chamber took it upon itself to overrule national democracy acting within its sphere of competence. The CJEU has thus invoked an unwritten and previously unheard of presumption which nonetheless takes priority over democracy, the rule of law, and the protection of EU citizens' rights – to say nothing of the bonds of solidarity and good faith. The CJEU presumed that offering citizenship for 'predetermined payments or investments' – just as Ireland did when this status was negotiated and entered EU law – amounts to a manifest disregard of what EU law apparently now demands.

The Court is thus willing to rely on a previously unpublished law to revise the decisions of a Member State acting within its sphere of competence, and citizens alike. The Court's pronouncement of what solidarity and good faith imply is entirely lacking in good faith, if you pardon the calambour: a direct violation of the principle of conferral and the duty of loyalty, as well as the rule of law and basic legality.[128] The Court has thereby created 'only legal' citizens previously unknown to EU law, who are presumed to be lacking the 'bond of solidarity and good faith' and are thus not quite Europeans (the Court never mentioned its

[118] *Commission v Malta* (n 1) para 89.
[119] ibid para 89.
[120] ibid para 91.
[121] ibid para 92.
[122] ibid para 95.
[123] ibid paras 96, 97.
[124] *Rottmann* (n 90).
[125] Dimitry Kochenov, 'EU Citizenship without Duties' (2014) 20 European Law Journal 482; Christian Joppke, 'Liberal Citizenship Is Duty-Free' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 199.
[126] *Commission v Malta* (n 1) paras 96-99.
[127] ibid para 98.
[128] Weiler, 'Postscriptum: Citizenship for Sale' (n 21).

own case law prohibiting discrimination based on the mode of acquisition of nationality).

Thousands of people can thus be disowned by the EU (and quite possibly, by the Member States, although this remains unclear) at the whim of the Court's frivolous, ahistorical, and anti-democratic presumption with no legal basis, competence, or indeed reference to any rule in force. The meaning of being European, previously expansive and open, has been hijacked by blood solidarity enthusiasts afraid of money and unwilling to take the law into account, for whom solidarity and good faith are but rusty rhetorical tools to denigrate a class of cosmopolitan Europeans, speaking in terms borrowed from the age of high nationalism, which the EU had been created to overcome – but ended up upgrading to a new level. A Member State, according to the Court

> manifestly disregards the requirement for such a special relationship of solidarity and good faith, characterised by the reciprocity of rights and duties between the Member State and its nationals, and thus breaks the mutual trust on which Union citizenship is based, in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU, when it establishes and implements a naturalisation scheme based on a transactional procedure between that Member State and persons submitting an application under that programme, at the end of which the nationality of that Member State and, therefore, the status of Union citizen, is essentially granted in exchange for predetermined payments or investments.[129]

As is well known, there is nothing in international (*Nottebohm*),[130] EU, or Maltese law (or the history of these legal systems – especially the established Irish citizenship-for-sale scheme that ran during the negotiation of the Maastricht Treaty and directly informed what EU citizenship is actuaally about)[131] which would somehow call investment citizenship into question. Not for the first time – not the last either, no doubt – the CJEU invented the law. This time, however, it was done to victimise and humiliate Europeans in violation of Article 2 TEU values. Once again: Professor JHH Weiler is right – only in the EU does the Orwellian principle apply that repeating a lie many times makes it the law:[132] for the Court in *Commission v Malta*, listing the rights of EU citizens and offering the repetition of a word unrelated to the legal framework in question sufficed. As noted by Groussot and Valera, the CJEU's overreach of its authority is a prime example of 'over-constitutionalisation and rule by law', as is the value-laden interpretation of EU law. This interpretation leads to more constitutional law, at the expense of democracy,[133] and is not guided by any principle.[134] One should definitely add legality – and, more generally, the rule of law – to the list of values

[129] *Commission v Malta* (n 1) para 99.
[130] Peter J Spiro, '*Nottebohm* and "Genuine Link": Anatomy of a Jurisprudential Illusion' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025). Quite astonishingly, notwithstanding the prohibition of mass expulsions in international law – and a mass expulsion of the thousands of Europeans attacked by the Court is definitely a possibility under the new case law – the judgment lacks a single reference to international law.
[131] Maarten Prak, 'Citizenship for Sale in Pre-modern Europe' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023).
[132] Weiler, 'Postscriptum: Citizenship for Sale' (n 21).
[133] Groussot and Valera (n 26) 595.
[134] van den Brink, 'Constitutionalism without Principle' (n 36); Kochenov, 'Janus in the Mirror' (n 45).

flushed down the drain by our illustrious judges, before stopping for a second to ponder a question: is this about any law at all? Given that no law is cited to attack and humiliate thousands of law-abiding citizens, the abuse of power we are dealing with is particularly hideous. No help to restore legality, democracy, and dignity seems to be forthcoming from the EU constitutional set-up as we know it today,[135] illuminating our own 'agreement with Hell,'[136] to borrow a phrase from Jack Balkin.

4 THE SHAME OF 'GENUINE LINKS'

The Commission's second argument concerned the lack of a 'genuine link' in the context of citizenship-by-investment programmes, which involve predetermined payments or investments.[137] This, according to the Commission, 'compromises and undermines the essence and integrity of Union citizenship established in Article 20 TFEU, and infringes the principle of sincere cooperation enshrined in Article 4(3) TEU'.[138] The Commission has been repeating this baseless claim since the inception of the first Maltese citizenship-by-investment programme, pushing AG Collins to hint at the abuse of procedure and ask the Commission to pay the costs, so absurd and outlandishly dumb was this argument.

The Commission pretended to rely on international law in general, and on the ICJ decision in the *Nottebohm* case in particular, to establish the necessity of a 'genuine link'. Yet, contrary to the allegations of the Commission that *Nottebohm* imposes an obligation on states to adhere to the 'genuine link,' or to residence requirements in cases of naturalisation, such a requirement has never been a binding rule of international law.[139] States have broad discretion, if not complete exclusivity, in deciding who qualifies as a citizen and under what circumstances. The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930 clarified this point in Article 1: 'It is for each State to determine under its own law who are its nationals'.[140] It further stipulates, however, that: '[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'.[141] Article 3 of the European Convention on Nationality (ECN) uses almost identical words to define the nationals of a state and the conditions under which a state's citizenship law should be recognised.[142] CBI naturalisations are fully recognised and practised in numerous states worldwide. It is thus unquestionable that CBI programme-based citizenship is lawfully acquired nationality in the eyes of international law.

The only rule that could stand in the way of states implementing investment migration programmes, as far as international law is concerned, is the requirement of the individual's consent to acquire citizenship, as non-consensual naturalisation is precluded. Non-

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135 See also Kochenov and Veraldi (n 8).
136 John Balkin, 'Agreements with Hell and Other Objects of Our Faith' (1997) 65(4) Fordham Law Review 1703.
137 *Commission v Malta* (n 1) para 46.
138 ibid.
139 See e.g. Dissenting opinion of Judge Klæstad in *Nottebohm*.
140 Article 1, Convention on Certain Questions Relating to the Conflict of Nationality Law (adopted 12 April 1930, entered into force 1 July 1937), vol 179, p 89.
141 ibid.
142 Article 3, European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS No 166 (*European Convention on Nationality*).

consensual naturalisations have been consistently ruled out as breaching international law, at least since the attempts of Latin American nations to start regarding European expats born outside of their territory – like Mr Nottebohm – as if they were local citizens, as Peter Spiro reports.[143] All CBI naturalisations in the EU and its immediate vicinity have been unquestionably consensual.[144] Furthermore, the differential treatment of persons in similar situations is prohibited under international law unless it is reasonably justified and the measures taken are proportionate to a legitimate aim. In accordance with Article 5 of the UN Convention on the Elimination of All Forms of Racial Discrimination and Article 5 of the ECN, the conferral of citizenship may not discriminate against citizens based on their national or ethnic origin. Lastly, discrimination on the grounds of sex in the conferral of nationality is equally prohibited.[145] While other requirements have also often been discussed in the context of possible constraints on state sovereignty in the field of citizenship, none of them has developed into binding international law that can affect a states' competence in citizenship matters.

Undoubtedly, the Commission has learnt that relying on international law in general, and on the *Nottebohm* case in particular, to justify its claims may not be an effective strategy and may even backfire. Consequently, it steered clear of *Nottebohm* in its arguments for the case. Instead, it entered into discussion about the foundations of the European Union, democratic principles, values, objectives, and interests, the *raison d'être* of the latter, and citizenship and associated rights as reflections of solidarity and mutual trust between Member States.[146] According to the Commission, such mutual trust between Member States in the field of EU citizenship is based 'on a common basic understanding of the nationality of a Member State, namely that nationality is the expression of a genuine link between a Member State and its nationals'.[147]

It is only on the understanding of Member States that citizenship is granted based on a 'genuine link' that they have agreed to extend, automatically and unconditionally, rights to citizens of other Member States.[148] If citizenship is granted in the absence of a genuine link, Member States would not be able to trust each other's decisions, ultimately undermining unconditional acceptance.[149] To support its claim, the Commission relied wrongly, yet

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[143] Peter J Spiro 'Investment Citizenship and the Long Leash of International Law' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023) (and the literature cited therein).

[144] The only possible example of a non-consensual CBI programme can be found in the Comoros: the island state used to offer wholesale naturalisation options to the Gulf monarchies seeking to reduce statelessness among the Bidoon population. This CBI programme has been subject to clear criticism in the literature for potentially breaching international law, e.g. Spiro, 'Investment Citizenship and the Long Leash of International Law' (n 143).

[145] ibid.

[146] *Commission v Malta* (n 1) paras 47-49. Compare with a leading scholarly account: Andrea Sangiovanni, 'Debating the EU's *Raison d'Être*: On the Relation between Legitimacy and Justice' (2018) 57(1) Journal of Common Market Studies 13.

[147] *Commission v Malta* (n 1) para 50.

[148] ibid para 51.

[149] ibid.

unsurprisingly,[150] on the *Micheletti* case,[151] which obliges Member States to recognise each other's decisions in citizenship matters.[152] Pushing its argument further, it claimed that actual residence is one of the means for establishing a 'genuine link', albeit recognising that it cannot 'prescribe the connecting factors which must be prioritised by the Member States in awarding their nationality'.[153]

In what followed, the Commission explained the scope of constraints applicable to Member States in the field of citizenship:

> the establishment of an investor citizenship scheme of a *transactional nature*, which allows for the *systematic grant*, in return for *predetermined payments or investments*, of the nationality of a Member State to applicants who do not have *a genuine link* with a Member State and who are thus manifestly outside the class of persons which the authors of the Treaties intended to be beneficiaries of Union citizenship, is in contradiction with the very essence of the status of Union citizen.[154]

It is specifically citizenship-by-investment programmes to which the 'genuine link' requirement has been applied. Such programmes, according to the Commission, 'would jeopardise the integrity of the status of Union citizen and the mutual trust that underpins that status and the rights attaching to that status',[155] in breach of the negative duty included in Article 4(3) TEU to refrain from taking measures that could compromise the EU's objectives.[156] However, the reference to Article 4(3) TEU, which imposes duties on Member States arising from the principle of sincere cooperation, appears misplaced.

Article 4(3) TEU concerns the achievement of EU objectives and genuine compliance with EU law, neither of which seems to be related to investment migration.[157] In its previous case law, the CJEU has characterised the principle of sincere cooperation as a general principle that may be invoked in infringement proceedings only after a violation of a more specific obligation under EU law.[158] A possible infringement of that provision could arise in the context of mass naturalisation, which may have a significant negative impact on the internal market,[159] which has not been the case with the Maltese citizenship-by-investment programme. It is unclear precisely how the Maltese investment programme jeopardised the integrity of the status of Union citizen. The suggestion that 'genuine links' are the essence of EU citizenship in this context cannot be further from

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150 See e.g. European Commission's Report on EU Investment Migration Programmes (n 1). For analyses, see e.g. Costanza Margiotta, 'Ricchi e poveri alla prova della cittadinanza europea. Annotazioni sulla Relazione della Commissione europea sui programmi di cittadinanza per investitori' (2020) 55 Ragion Pratica 513; Dimitry Kochenov, 'Genuine Purity of Blood: The 2019 Report on Investor Citizenship and Residence in the European Union and Its Litigious Progeny' (2020) LEQS Paper No 164/2020; Jessurun d'Oliveira, 'Golden Passports' (n 29).

151 *Micheletti* (n 12).

152 *Commission v Malta* (n 1) para 51.

153 ibid para 54.

154 ibid (emphases added).

155 ibid para 53.

156 ibid.

157 Basheska, 'Why the EU's Top Court Should Clarify EU Law' (n 14).

158 See Case T-626/17 *Republic of Slovenia v European Commission* EU:T:2020:402. See also Brian McGarry, '*Republic of Slovenia v. Republic of Croatia*' (2021) 115(1) American Journal of International Law 101.

159 See e.g. OSCE High Commissioner on National Minorities, 'The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations' (June 2008), recommendation 11.

the truth. The core principle of EU law on persons is non-discrimination on the basis of nationality. It states, to put it very roughly, in simple language that any links – however 'genuine' – with a particular Member State cannot matter; only the legal status of citizenship does. This is the law that both the Commission and CJEU are there to respect, uphold, and promote.

The Commission then broadened its argument by claiming that 'the "genuine link" must exist at the time when the nationality of a Member State is granted'[160] rather than to be developed subsequently, since the latter is 'inconsistent with the objective of strengthening the solidarity between the peoples of the European Union'.[161] The safeguards in citizenship-by-investment programmes, emphasised by Malta,[162] were largely irrelevant to the Commission's assessment, despite the earlier spotlight it had placed on those aspects.[163] Instead, the Commission found problematic the legal requirements for minimum actual presence in the country at the time of the granting of citizenship.[164] No other models for acquiring citizenship that do not require genuine links with Member States have ever been challenged by the Commission.

Malta rejected the Commission's argument that EU law imposes a legal obligation on Member States to require a 'prior genuine link' in the naturalisation process, notwithstanding the applicant's payments or other commitments.[165] Moreover, the 'genuine link' requirement has previously been expressly outlawed by the CJEU. As lucidly explained by the Court in *Micheletti*, which concerned an Argentinian moving to Spain to establish a business using an Italian passport, checking 'genuine links' is expressly prohibited by EU law.[166] In other words, the Court consistently held that a 'genuine link' is a requirement which *breaches EU law*. In *Commission v Malta*, the CJEU made a notable U-turn, trying to find 'genuine links' outlawed by its own case law in the Maltese CBI, only to dismiss payments and the transactional nature of the scheme, and to underline – in a departure from the dominant law and practice[167] – that 'transactional naturalisation' is not only contrary to the principle of sincere cooperation,

> but is also liable, by its nature, to call into question the mutual trust which underlies that requirement of recognition, since that trust relates to the premiss that the grant of the nationality of a Member State must be based on a special relationship of solidarity and good faith justifying the grant of rights resulting, in particular, from Union citizenship.[168]

While the CJEU has not specifically referred to 'genuine links' in its ruling, it added, without offering any basis for this, general words on 'special relationship' to

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[160] *Commission v Malta* (n 1) para 59.
[161] ibid.
[162] ibid paras 75, 76.
[163] Kochenov and Basheska, 'It's All about Blood, Baby!' (n 9).
[164] *Commission v Malta* (n 1) paras 61-62.
[165] ibid paras 69-70.
[166] *Micheletti* (n 12) paras 10-13.
[167] Dimitry Kochenov and Martijn van den Brink, 'Legal Residence and Physical Presence: The Law and Practice of Naturalization in EU Jurisdictions' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).
[168] *Commission v Malta* (n 1) para 101.

the Commission's argument on 'sincere cooperation' to establish a ground for banning citizenship by investment.[169] Rather than demonstrating logically sound insights, the Court seems to have used a budget thesaurus, replacing the non-starter argument of 'genuine links' with an equivalent wording unknown to the substance of EU law. By doing so, as Eric Fripp rightly observed, the Court established a genuine link requirement under the guise of sincere cooperation.[170]

Mutual trust has once again been viewed as a fundamental aspect of EU citizenship, without further analysis of how effectively the rule of law operates across Member States, and without the Court's earlier observation that blind trust is unnecessary.[171] In line with the Commission's stance, the due diligence checks of the candidates were less important to the Court, as they did not affect 'the commercialisation of the grant of Maltese nationality, following a transactional procedure'.[172]

5 LEGALITY OF THE MALTESE CBI

The third argument of the Commission concerned the Maltese investment programme: the CBI programme is unlawful because it permits the systematic granting of citizenship in exchange for predetermined substantial payments or investments and as such is transactional.[173] Such a claim was rejected by Malta, which considered that the country's CBI programme did not undermine the EU's objectives, and that 'the Commission's portrayal of that scheme as an automatic and unconditional access route to Maltese nationality, providing for the systematic granting of nationality in exchange for predetermined payments or investments'[174] is unfounded in law or in fact.[175]

Pronouncements about the 'immorality' of citizenship 'sales' do not constitute the only available approach to understanding the issue of investment migration, as the overwhelming popularity of investment migration among the EU Member States testifies. Acquiring citizenship in exchange for investment or donation is a historically mainstream practice[176] conducted entirely in accordance with the law.[177] CBI programmes are a mainstream application of a states' sovereign ability to decide who their nationals are.

Furthermore, the Commission's claim is inconsistent with the current practice of the vast majority of EU Member States, which legally practice investment migration. While only Malta faced the Commission in Court, more than twenty other Member States permit discretionary naturalisation for 'special achievements', including in most instances economic contributions. Yet the differences between the Maltese CBI programme and discretionary

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[169] Guillermo Arranz Sánchez, 'Is EU citizenship for sale – or for keeps? A critical analysis of the CJEU's Golden Visa ruling' (*European Student Think Tank*, 2 July 2025) <https://esthinktank.com/2025/07/02/is-eu-citizenship-for-sale-or-for-keeps-a-critical-analysis-of-the-cjeus-golden-visa-ruling/> accessed 16 January 2026.

[170] Eric Fripp, 'EU Court of Justice finds Malta 'golden passports' scheme incompatible with EU law' (*EJIL Talk*, 9 May 2025).

[171] See in greater detail Groussot and Valera (n 26) 583.

[172] *Commission v Malta* (n 1) para 113.

[173] ibid para 55.

[174] ibid para 73.

[175] ibid.

[176] Maarten Prak, *Citizens without Nations: Urban Citizenship in Europe and the World, c. 1000–1789* (Cambridge University Press 2018).

[177] Weingerl and Tratnik, 'Relevant Links' (n 11).

naturalisation for economic contributions in other countries are formal rather than substantial and concern primarily one matter: *transparency*.[178] Make no mistake: it is transparency that has been sacrificed by the unprincipled *ultra vires* Court decision on the altar of the activist Commission's Eurowhiteness populism – not CBI *per se*. All the countries that naturalise by 'merit' – which frequently equals a donation as merit can legitimately be presented as financial wealth[179] – do so in secret. The Commission decided that, unlike numerous co-existing forms of naturalisation, only transparent investment migration programmes infringe the principle of sincere cooperation and undermine the essence of EU citizenship, and the CJEU confirmed that. Without amending the Treaties, the Commission has acquired a right to investigate and punish those who are citizens only by law: to conjure and then immediately destroy the 'wrong Europeans'.

The truth is that the Commission routinely demonised investment migrants prior to *Commission v Malta*. The core argument could be summarised as follows: third-country nationals who invest in Member States may be criminals and therefore, investment migration programmes create security risks; the fact that EU citizenship provides for cross-border rights further increases these risks.[180] The Commission has made assumptions about investors, primarily based on their status as beneficiaries of CBI programmes: wealthy individuals who wish to invest and become EU citizens are likely criminals, and this likelihood is even higher given the qualities of EU citizenship, which allow unrestricted movement in the EU. The same assumptions were notably missing concerning EU citizens who naturalise, because of kin blood connection, family links (even in cases where such naturalisations do not require any presence in the EU, as French or Dutch law would allow, for instance), or those who naturalise based on the discretion of the Member States – including following the payment of large *undisclosed* amounts of money. Only CBI clients naturalising transparently based on clear and pre-announced criteria are presumed criminals in the Commission's mind – and the presumption of innocence apparently does not enter the picture. This is entirely contrary to the EU Charter and broader EU law, particularly given that discrimination on the basis of the mode of acquisition of citizenship is prohibited. Based on the Commission's repeatedly expressed views, its approach to CBI appears to be driven solely by discrimination on the basis of the mode of acquisition of EU citizenship. To complicate matters further, the Commission repeatedly underscored the risks associated with the freedom of movement between Member States for these new citizens following naturalisation.[181] Interestingly, and as we already clarified earlier, the Commission did not dispute the safeguards provided in the Maltese citizenship programme, despite its obviously baseless claims in the past that 'citizenship is granted under less stringent conditions than under ordinary naturalisation regimes'.[182] This may well have been because 'ordinary conditions' – as opposed to the frowned-upon 'less stringent' ones – imply a level of due diligence which is significantly lower than what investment citizenship promises: the entirety

[178] Jacquelyn Veraldi and Oskar Gstrein, 'Nothing to Hide? Transparency Requirements, Accountability and Privacy in Investment Migration' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).
[179] Ganty, 'Race and Merit' (n 3).
[180] E.g., European Commission's Report on EU Investment Migration Programmes (n 1) section 4, pp 9–10.
[181] ibid. See also Press Release on infringement procedures, 6 April 2022 <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2068> accessed 13 January 2026.
[182] European Commission Report COM(2019)12 final 2.

of your finances and business connections, as well as your entire life history, would not normally be dug up by independent due diligence providers, unless you are an investor naturalising on that ground.[183] This is only right: different applicants require different standards.

What is crucial here is to mention the different ways in which the citizenship laws of all the Member States rationally accommodate the acquisition of citizenship by different categories of applicants. A perusal of any book on citizenship law makes it clear that, when we speak of citizenship acquisition, differentiated treatment of different cases is essential. It is an essential and characteristic part of any properly functioning nationality regulation. Most citizens are created by *ius sanguinis*: they are the sons and daughters of citizens (*de facto*, this is the case even in all the polities, where *ius soli* is the key official vehicle for the distribution of status). This paradigm is broken only by naturalisations, which account for fewer than 2% of citizenship acquisitions worldwide,[184] inviting basic blood privilege or aristocratic justice claims,[185] underpinning the global birthright lottery in today's world[186] and lying at the heart of the passport apartheid.[187]

The requirements for those who naturalise vary greatly. While some countries offer citizenship by investment to individuals through specially designed naturalisation procedures, others allow for discretionary naturalisation on the grounds of 'special achievements' (or similar notions) – often explicitly including the economic achievements of applicants – enshrined in national legislation. The difference between the specially designed programmes and discretionary naturalisation on the grounds of 'special achievements' is formal rather than substantial – the former are specifically designed to attract foreign investors, set clear criteria for applicants, and are marketed by service providers (agents), while the latter are not necessarily exclusively intended for investors, are less transparent in terms of qualification criteria, and not marketed by nor does it involve agents.[188]

The empirical diversity of the predominant naturalisation modes – whether spousal, ancestral, emigrational or other – raises questions about the ideological stakes that seem to underpin the belief held by both the European Commission and the CJEU. They appear to suggest that the pathway from immigrant to citizen serves as the standard against which all other naturalisation processes should be measured. Is boasting the right ancestral pedigree or tracing family origins to a particular area on a map a more just way of distributing the most important rights than money?[189] The focus of any naturalisation discussion thus turns

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183 Mark Corrado and Kim Marsh, 'Investment Migration and the Importance of Due Diligence: Examples of Canada, Saint Kitts and Nevis, and the EU' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023).

184 Cf Dimitry Kochenov, *Citizenship* (MIT Press 2019).

185 Dimitry Kochenov, 'Citizenship as Aristocratic Justice' (2026) Brown Journal of World Affairs (forthcoming).

186 Shachar, *The Birthright Lottery* (n 2).

187 Dimitry Kochenov, 'Ending the Passport *Apartheid*. The Alternative to Citizenship is No Citizenship' (2020) 18(4) International Journal of Constitutional Law 1525.

188 Kristin Surak, *The Golden Passport: Global Mobility for Millionaires* (Harvard University Press 2023).

189 The two obviously overlap, so the question is necessarily tongue-in-cheek: if an investment visa is annulled, a Russian billionaire may be able to visit London again visa-free on an Israeli or a Portuguese passport, acquired via an established Sephardic connection – only 'blood' and no money involved: David Lesperance, 'Even for The Super-Rich, Citizenship by Descent Is Extremely Useful: Lessons from Abramovich' (*Investment Migration Insider*, 5 January 2022); Hans Ulrich Jessurun d'Oliveira, 'Iberian Nationality Legislation and Sephardic Jews' (2015) 11(1) European Constitutional Law Review 13.

precisely on this dilemma and the moral panic it provokes: if EU citizenship is sacred and rooted in the native possession of pure European blood providing a 'genuine link' to Europe, how could someone 'buy' it and forego the necessary humiliation of 'ordinary' naturalisation?[190]

EU Member States recognise hundreds of ways of conferring citizenship on foreigners, and the requirements vary depending on the class of person seeking naturalisation and the jurisdiction in question.[191] Kin groups, for instance, acquire citizenship without residence in the country of naturalisation or knowledge of the language: more than a million Italians, more than a million Hungarians, and hundreds of thousands of Greeks, Irish, Romanians and Bulgarians have been created this way in recent decades. The result is always the same – the acquisition of citizenship by the qualifying candidate, usually with no residence, language, or any other requirements. Getting the right spouse can also count: just get together with a Dutch or French person, and the time spent living together anywhere in the world, not just in the Netherlands or France, will count towards naturalisation. Member States establish what is desirable, and it is not up to the Commission to ask or comment on this. International law, just like European law, is clear: Member States will decide as they see fit. Morality has never played a role in citizenship law, especially in the EU, with its colonial past[192] and the essentially race-based exclusion from EU citizenship[193] approved by the ECJ in *Kaur*.[194] Globally, the picture is no different: citizenship is currently the primary mechanism for perpetuating global inequality, as Branko Milanović, among others, has explained clearly.[195]

6 CONCLUSION

The 'war' of the European Commission against investment migration programmes has brought confusion and uncertainty into previously well-established concepts in EU law. The CJEU sided with the Commission, supporting the questionable spirit of its submission while not engaging with any of its core arguments, which had been previously dismissed with such clarity and persuasion by AG Collins. The ruling in *Commission v Malta* did not meet the expectations that the CJEU would put an end to the over-politicisation of investment migration and the poisonous and half-hearted abuse of EU values inherent in the Commission's double-speak. Instead, it can be seen as a continuation of the Commission's efforts to push a nationalist 'genuine links'-based notion of citizenship onto the Member States. This certainly erodes the core principles of EU law, undermines the rationale for the Union, and annihilates in the process the promise of an anti-nationalist EU citizenship grounded in rights and protections, rather than arbitrary othering not grounded in law, confused by the Grand Chamber with (Eurowhiteness) 'solidarity'.

None of the three main arguments of the Commission was supported in law. The first

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[190] Dora Kostakopoulou, 'Why Naturalisation?' (2003) 4(1) Perspectives on European Politics and Society 85.
[191] Please consult the EUDO database of the European University Institute in Florence, which provides a reliable snapshot of the numerous ways available to acquire EU citizenship.
[192] Hansen and Jonsson (n 110).
[193] Lord Anthony Lester, 'Thirty Years on: The East African Case Revisited' (2002) 47 Public Law 52.
[194] Case C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervener: Justice* EU:C:2001:106; Helen Toner, '*Case C-192/99, R v. Secretary of State for the Home Department, ex parte Kaur*, Judgment of the Full Court of 20 February 2001, [2001] ECR I-1237' (2002) 39(4) Common Market Law Review 881. Cf Kochenov, '*Ius Tractum* of Many Faces' (n 79).
[195] Branko Milanović, *Global Inequality* (Harvard University Press 2016).

problematic aspect is the lack of EU competence in matters of citizenship. It is impossible, with recourse to the law in force, to justify the Commission's position and the CJEU's ruling in *Commission v Malta*, since this justification would require the annihilation of all that the EU stands for: liberal values, non-discrimination based on nationality, human dignity, and equality, *inter* many *alia*. To say, 'never mind the law', protecting a foundational imperative of the EU in the name of equity or justice can be fine – we witnessed this in the case law that introduced human rights into EU law in the first place, in one example.[196] To do this repeatedly, however, and with no pressing identifiable interest in mind, but only obscurantist prejudice, obviously erodes the very foundations of the legal system of the Union, which was once said to be a 'Union of law'.

The only way for the Court to safeguard the success of the Union is to be convincing and respect the letter and the spirit of the law.[197] Yet time is running out to become convincing again, after the countless recent betrayals of expatriated and humiliated EU citizens,[198] as well as the massacred and tortured third-country nationals thrown into the Union's death machine.[199] *Commission v Malta* is yet another public humiliation by the Court of the EU's ideal of the rule of law, showcasing its own limited ability to articulate a clear and dignifying ideal of justice that Europeans could endorse and identify with.[200] This is particularly painful, given that it also throws Maltese democracy under the bus in an area where the European legislator is not competent to act and for the outright illegitimate reason of protecting our 'solidarity' from other Europeans.

The constitutional implications of this case are quite significant. It hints at the further undoing of the Union's liberal heritage and original promise. The Union could thus pose a threat to the Member States, whose nationalities have been guided precisely by this liberal promise. The same applies to Europeans who cannot subscribe to petty illiberal ideals but are also unable to push the Union to change course in the absence of any continent-wide democracy.[201] National liberal constitutionalism and the dignity of Europeans alike came under attack from Kirchberg. The new illiberal Union will now decide for the Member States who their citizens should be, acting on the assumption that a legal link establishing such citizenship is insufficient *per se* and should be backed by an undisclosed set of other factors, which the Court, in deviation from the national law of the Member States, took it upon itself to police *ex post facto*. This creates a dangerous legal space uniquely established to mount assaults against the legal status and rights of indeterminate groups of Europeans on the basis of an official pretext built out of extra-legal considerations. EU citizenship based on the new *Commission v Malta* solidarity stands for an unprincipled *ultra vires* betrayal of our dignity and the EU's promise alike. Listing no arguments based on EU, international, or national law, the Court has attempted to hijack the Union's liberal promise and was successful. Pushing back in the context of such vacant legality and in the absence of consequential democracy

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196 Nicolas JS Lockhart and Joseph HH Weiler, '"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence' (Parts I and II, 1995) 32 Common Market Law Review 51.
197 Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) Law and Ethics of Human Rights 142.
198 O'Brien, 'The Great EU Citizenship Illusion Exposed' (n 55); Swider (n 54).
199 Ganty and Kochenov, 'How the EU Death Machine Works' (n 49).
200 On EU's justice deficit, see, Dimitry Kochenov, Gráinne de Búrca, and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015)
201 Cf. Kochenov and Veraldi (n 8).

will be difficult, but it is necessary to save the Union and the dignity of all Europeans, which is now threatened. Today, the Court has successfully attacked a group of Maltese millionaires based on no law, flying in the face democracy and common sense – tomorrow it could be *you*.

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