

# **Občianstvo na predaj? Niekoľko myšlienok o obmedzeniach právomoci členských štátov udeľovať štátne občianstvo v zmysle rozsudku Súdneho dvora EÚ vo veci C-181/23 Komisia v. Malta**

## **Citizenship for Sale? Some Thoughts on the Limits on Member States' Competence to Grant Nationality According to the CJEU Case C-181/23 Commission v. Malta**

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### **Abstrakt**

*Dňa 29. apríla 2025 vyniesol SDEÚ prelomový rozsudok vo veci C-181/23, v ktorom dospel k záveru, že maltský systém občianstva prostredníctvom investícií porušuje právo EÚ. Hoci si členské štáty ponechávajú formálnu právomoc určiť podmienky udelenia štátneho občianstva, táto právomoc nie je neobmedzená, pretože získanie štátneho občianstva automaticky udeľuje i občianstvo Únie. Článok prináša kritickú analýzu odôvodnenia rozsudku, ktorý predstavuje významný vývoj v judikatúre týkajúcej sa občianstva EÚ, pretože stanovuje, že občianstvo Únie nemožno komodifikovať a musí byť založené na základných ústavných hodnotách.*

### **Kľúčové slová**

občianstvo na základe investície, právomoc členského štátu, občianstvo Únie, skutočné prepojenie, úprimná spolupráca

### **Abstract**

*On 29 April 2025, the CJEU delivered a landmark judgment in Case C-181/23, concluding that Malta's citizenship by investment scheme violates EU law. While Member States retain formal competence to determine the conditions for granting nationality, this judgment establishes that such competence is not unlimited when the acquisition of national citizenship automatically confers Union citizenship. Through critical analysis of the Court's reasoning, the article argues that C-181/23 represents a significant evolution in EU citizenship jurisprudence, establishing that Union citizenship cannot be commodified and must be grounded in substantive constitutional values.*

### **Keywords**

citizenship by investment, Member State competence, Union citizenship, genuine connection, sincere cooperation

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## 1. Introduction

The principle that Member States possess exclusive competence to determine the conditions for acquiring and losing nationality has long been a cornerstone of both international law and EU law.<sup>2</sup> This fundamental principle, enshrined in Article 20(1) of the Treaty on the Functioning of the European Union (TFEU), establishes that citizenship of the Union is automatically acquired by any person holding the nationality of a Member State. Yet the acquisition of Union citizenship through a Member State's exercise of its nationality competence has profound implications for the EU legal order, affecting fundamental freedoms such as the right of residence and free movement, participation in EU democratic processes, and the entire system of mutual recognition of citizenship statuses upon which the Union depends.<sup>3</sup>

The practical consequence of this constitutional framework is that Member States' exercise of nationality competence ceases to be purely a matter of internal national law once Union citizenship is triggered. For the first time in its jurisprudence, the Court of Justice of the European Union confronted this tension head-on in Case C-181/23 *Commission v. Malta*, in which it addressed whether a Member State could grant nationality—and thereby Union citizenship—without requiring any genuine connection between the applicant and the Member State, provided the applicant made substantial financial investment.

This article examines the judgment's reasoning, its doctrinal foundations, and its implications for the proper limits on Member States' competence in nationality matters. The article is structured as follows: Section 2 provides essential background on the legal status of nationality under EU law and the Court's prior jurisprudence. Section 3 summarizes the material facts and the legal framework of Malta's citizenship by investment scheme. Section 4 analyses the Court's judgment and the legal reasoning underlying its conclusions. Section 5 addresses the implications of the judgment for understanding the limits on Member States' competence and the doctrine of genuine connection. Section 6 considers potential criticisms and alternative perspectives. The article concludes that C-181/23 represents a constitutionally significant development in EU citizenship law.

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<sup>2</sup> Declaration No 2 on Nationality of a Member State, annexed to the Treaty on European Union. Also see Rainer Bauböck, *Democratic inclusion* (Manchester University Press 2018) 15–20.

<sup>3</sup> See Gareth Davies, 'European Union Citizenship' in *The EU Legal Order: Unity and Diversity* (Oxford University Press 2013) 277. See also Elaine Fahey, 'EU Law and Sovereignty: A Tension and Its Origins' in *The Legal Authority of International Organisations* (Oxford University Press 2015) 197.

## 2. Legal Background: Member State Competence and EU Citizenship

The constitutional relationship between nationality and Union citizenship has its origins in the founding Treaties. As the Court stated in Case C-369/90 *Micheletti*, nationality of a Member State forms the gateway to Union citizenship, and Member States retain the power to determine who qualifies for their nationality.<sup>4</sup> Declaration No. 2 on Nationality of a Member State, annexed to the Treaty on European Union, reinforces this principle by providing that "the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned."<sup>5</sup>

This allocation of competence reflects a well-established international law principle. The International Court of Justice in the *Nottebohm* case established that nationality represents a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments.<sup>6</sup> However, the ICJ also acknowledged that international law permits States considerable discretion in determining the conditions upon which nationality is conferred, provided those conditions are not applied in a manner that would be manifestly arbitrary or would constitute a basis for legal claims against other States.<sup>7</sup>

### 2.1 The Rottmann Precedent and Judicial Review of Nationality

The principle of Member State competence, however, is not absolute. In Case C-135/08 *Rottmann v. Freistaat Bayern*, the Court held that while Member States possess the power to lay down the conditions for acquisition and loss of nationality, "the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, is amenable to judicial review carried out in the light of European Union law."<sup>8</sup> In *Rottmann*, a German court had revoked German nationality obtained through naturalization, when it was discovered that the applicant had obtained that nationality through deception regarding criminal proceedings in Austria. The revocation left *Rottmann* stateless, thereby causing him to lose his Union citizenship status. The Court held that although Member States may withdraw nationality obtained by deception, they must do so in compliance with EU law, particularly with respect to proportionality considerations relevant to Union citizenship. The Court did not, however,

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<sup>4</sup> Case C-369/90, *Micheletti v. Delegación del Gobierno en Cantabria*, para. 10, ECLI:EU:C:1992:188.

<sup>5</sup> *Ibid* supra note 2: This Declaration is also referenced in Article 20 TFEU.

<sup>6</sup> *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ 4.

<sup>7</sup> *Ibid*, para. 23: Establishing that while States have broad discretion in determining nationality, they cannot act in a manner manifestly arbitrary or contrary to international law.

<sup>8</sup> Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, para. 39, ECLI:EU:C:2010:104.

establish a doctrine requiring a "genuine connection" for the initial acquisition of nationality, focusing instead on the conditions of withdrawal.<sup>9</sup>

## **2.2 Article 20 TFEU and the Substance of Union Citizenship**

Article 20(1) TFEU provides that "every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."<sup>10</sup> This formulation creates an automatic and derivative link: Union citizenship flows from national citizenship, but both statuses exist in the same person simultaneously. The rights conferred by Union citizenship include freedom of movement and residence (Article 21 TFEU), the right to vote and stand as a candidate in European Parliament elections in the Member State of residence (Article 22/2 TFEU), the right to petition the European Parliament (Article 227 TFEU), and access to diplomatic protection by any Member State (Article 23 TFEU), among others.

The essence of Union citizenship is constitutive of the EU legal order itself. The Court has held that Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law.<sup>11</sup> Unlike ordinary status categories, Union citizenship carries constitutional significance, as citizens of the Union participate directly in democratic processes at the Union level through their representatives in the European Parliament. Furthermore, Union citizenship implies a relationship of solidarity and shared values among Member States, grounded in common principles of democracy, human rights, and the rule of law.<sup>12</sup>

## **3. Malta's Citizenship by Investment Scheme and the Commission's Action**

Malta introduced its citizenship by investment (CBI) programme by law in 2013, initially permitting foreign nationals to acquire Maltese citizenship in exchange for €650,000 in investment and after one year of residence in Malta. The scheme was reformed in 2020, when the investment requirement was increased to €750,000 (or €600,000 for applicants with prior legal residence of at least six months), with a reduced residence requirement of 12 months.

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<sup>9</sup> Ibid, paras. 41-50: The Court held that withdrawal must be proportionate and must not result in loss of Union citizenship where another Member State would suffer injury.

<sup>10</sup> Article 20(1), Treaty on the Functioning of the European Union, OJ C 326/47 (2012).

<sup>11</sup> Case C-184/99, Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve, para. 31. ECLI:EU:C:2001:488.

<sup>12</sup> Case C-181/23, Commission v. Malta, para. 96, ECLI:EU:C:2025:291.

The critical feature of Malta's scheme, which would become the focal point of the dispute before the CJEU, was the minimal nature of the connection required between the applicant and Malta. The scheme required only legal residence, not actual residence or integration. Evidence obtained by the Daphne Caruana Galizia Foundation revealed that persons granted citizenship under the scheme had little to no substantive connection with Malta, despite the programme's nominal residence requirement.<sup>13</sup> The scheme effectively operated as a transactional mechanism: investors could acquire citizenship without demonstrating any meaningful integration or commitment to Malta as their State of nationality.

### **3.1 The Commission's Infringement Action**

On 13 December 2023, the European Commission initiated infringement proceedings against Malta (Case C-181/23), arguing that the citizenship by investment programme violated EU law in two principal respects. First, the Commission contended that the scheme failed to require a genuine connection between applicants and Malta, thereby compromising the essence of EU citizenship. Second, the Commission argued that the scheme violated Article 4(3) TEU, which establishes the principle of sincere cooperation between Member States and requires them to maintain mutual trust in the integrity of one another's nationality laws.<sup>14</sup>

The Commission's case was grounded on the proposition that while Member States possess competence to determine the criteria for granting nationality, the exercise of that competence must not compromise the constitutional foundation of EU citizenship. The Commission argued that allowing States to commodify citizenship—to treat it as a commercial good exchanged for money—fundamentally undermines the Union's character as a community of shared values and mutual recognition.

## **4. The Judgement by CJEU: Reasoning and Holdings**

The Court began its analysis by reaffirming the foundational principle that Member States retain competence to determine the conditions for acquiring and losing nationality.<sup>15</sup> However, the Court emphasized that this competence, though broadly discretionary as a formal matter, is not unlimited. The Court held that when Member States exercise their power to grant nationality in circumstances where doing so will result in the automatic acquisition of Union

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<sup>13</sup> Ibid, paras. 48-60: The Court referenced evidence from the Daphne Caruana Galizia Foundation showing that applicants under the scheme had minimal actual presence in Malta and minimal integration with Maltese society.

<sup>14</sup> Ibid, paras. 1-25: Setting out the Commission's allegations and Malta's response.

<sup>15</sup> Ibid, para. 47: Citing Case C-369/90, *Micheletti*, ECLI:EU:C:1992:188.

citizenship, that exercise of power becomes subject to a requirement of compatibility with EU law.<sup>16</sup> The Court's key doctrinal innovation was to establish that Article 20 TFEU, which makes Union citizenship derivative of Member State nationality, simultaneously establishes an obligation on Member States to ensure that the acquisition of national citizenship occurs in a manner "without compromising or undermining the essence, value and integrity of Union citizenship, in order to preserve the mutual trust which underpins that status."<sup>17</sup>

#### **4.1 The Doctrine of Genuine Connection**

At the heart of the Court's judgment lies the requirement of a genuine connection between the person acquiring citizenship and the Member State granting it. The Court held that a naturalization scheme permitting the acquisition of citizenship "essentially granted in exchange for predetermined payments or investments" manifestly disregards the requirement of a special relationship of solidarity and good faith that must characterize the bond between a Member State and its nationals.<sup>18</sup> The Court derived the genuine connection requirement from several sources. First, it drew upon the principle articulated in the *Nottebohm* case that nationality presupposes a genuine and effective connection. Second, the Court reasoned that the rights conferred by Union citizenship—including free movement, residence rights, and political participation—presume a meaningful relationship between the citizen and the Member State granting the nationality. Third, the Court emphasized that the system of mutual recognition upon which the EU depends requires confidence that citizenship is not conferred arbitrarily or as a commercial transaction.<sup>19</sup>

Importantly, the Court acknowledged that Member States possess discretion in determining what forms of connection suffice. The Court did not prescribe a single test for genuineness but rather held that "the existence of a real and tangible connection between the applicant and the territory and society of the Member State is a prerequisite for the acquisition of nationality."<sup>20</sup> The Court noted that such connection might be demonstrated through effective residence, active participation in the society, or other factors demonstrating integration, but that

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<sup>16</sup> Ibid, paras. 47-75: The Court reasoned that the trigger of Union citizenship means that the competence cannot be exercised entirely free from EU legal constraints.

<sup>17</sup> Ibid, para. 96: Establishing the "without compromising" requirement as a condition of lawful exercise of nationality competence.

<sup>18</sup> Ibid, para. 97: The Court's language about "special relationship of solidarity and good faith" derives from the traditional international law understanding of nationality as involving genuine connection.

<sup>19</sup> Ibid, paras. 75-95: The Court drew upon the principle from *Nottebohm*, the logic of mutual recognition in EU law, and the constitutional character of Union citizenship.

<sup>20</sup> Ibid, para. 102: The Court emphasized that the requirement of real and tangible connection does not prescribe a single formula but requires MS to ensure that whatever criteria they adopt genuinely produce connection.

a scheme requiring only nominal residence while permitting applicants to avoid actual integration would not satisfy the requirement.

#### **4.2 The Principle of Sincere Cooperation**

Beyond the doctrine of genuine connection, the Court held that Malta's scheme violated Article 4(3) TEU, which establishes that the Union and the Member States must "assist each other in carrying out tasks which flow from the Treaties" and to "refrain...from any measure which could jeopardise the attainment of the Union's objectives."<sup>21</sup>

The Court reasoned that by adopting a citizenship scheme that divorced the acquisition of nationality from any genuine connection, Malta had violated the duty of sincere cooperation in two ways. First, the scheme undermined "the mutual trust which underpins the status of Union citizen."<sup>22</sup> Each Member State must be able to rely upon its fellow Member States to exercise their nationality competence responsibly, ensuring that Union citizenship is not devalued by arbitrary grant. Second, the scheme created a risk of undermining the shared values upon which the Union is founded, including democracy, the rule of law, and human dignity.<sup>23</sup> By permitting the acquisition of Union citizenship based solely on financial payment, Malta had invited other Member States to follow suit, which would progressively erode the constitutional foundations of Union citizenship.

The Court emphasized that sincere cooperation is not merely a procedural obligation but reflects a substantive commitment to preserve the integrity of the legal order. The Court noted that the Commission had presented evidence that Malta had not adequately screened applicants for corruption, criminality, or other risks that might threaten the security of the EU or the trustworthiness of the Member State's naturalization process.<sup>24</sup>

#### **4.3 Rejection of Alternative Arguments**

Malta presented several defences to the Commission's allegations, which the Court systematically addressed and rejected. First, Malta argued that reviewing its nationality scheme constituted an unwarranted intrusion into Member State sovereignty. The Court rejected this argument, holding that while Member States retain a broad discretion, the nature of Union

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<sup>21</sup> Article 4(3), Treaty on European Union, OJ C 326/13 (2012).

<sup>22</sup> Case C-181/23, Commission v. Malta, para. 110, ECLI:EU:C:2025:291.

<sup>23</sup> Ibid, paras. 108-112: The Court emphasized that the values of the Union include democracy, the rule of law, and human dignity, and that commodifying citizenship undermines these values.

<sup>24</sup> Ibid, paras. 58-62: The Court noted that Malta's processing of applications under the scheme had not included adequate due diligence regarding the sources of applicants' wealth or potential security risks.

citizenship means that the consequences of granting national citizenship extend beyond the Member State, affecting the EU legal order and all other Member States. Therefore, conduct relating to the granting of nationality must comply with EU law when it affects Union citizenship.<sup>25</sup>

Second, Malta argued that the concept of a "genuine connection" was too vague and indeterminate to serve as a legal constraint. The Court disagreed, reasoning that the requirement of genuine connection is sufficiently concrete to guide Member States in their practice, and that the rule of law requires such constraints even if they admit of some interpretive flexibility.<sup>26</sup> The Court noted that many areas of EU law require assessment of whether particular conduct satisfies a standard (such as proportionality or discrimination) that admits of contextual judgment, and that the existence of interpretive flexibility does not render such standards unenforceable.

Third, Malta contended that the scheme should be evaluated solely by reference to the formal satisfaction of its stated criteria (investment amount and legal residence), not by reference to the scheme's practical operation. The Court rejected this formalistic approach, holding that EU law requires looking at the substance of the arrangement.<sup>27</sup> The Court emphasized that when the practical effect of a scheme is to permit citizenship to be obtained without meaningful connection, the legal form of the scheme cannot cure that substantive deficiency.

## **5. Implications for Member States' Competence**

The C-181/23 judgment fundamentally reframes the relationship between Member States' formal competence to determine nationality and the substantive constraints imposed by EU law. While the Court does not deprive Member States of their competence—Malta remains free to determine which persons may become its nationals—the judgment establishes that this competence is exercised subject to binding constitutional limits.

The judgment suggests that Member States cannot invoke their nationality competence to accomplish what the EU legal order otherwise forbids. For example, a Member State cannot use its nationality power to circumvent non-discrimination law by granting citizenship exclusively to members of a particular religious or ethnic group. Similarly, a Member State cannot use its nationality power to circumvent fundamental rights protections by granting citizenship to persons designated for persecution. The logic of C-181/23 extends these

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<sup>25</sup> Ibid, paras. 67-74: The Court reasoned that while MS have broad competence, the supranational consequences of their exercise of nationality competence mean that the competence cannot be exercised in disregard of EU law.

<sup>26</sup> Ibid, paras. 99-104: The Court rejected the vagueness argument by noting that many EU law standards (proportionality, necessity, non-discrimination) admit of interpretive development through case law.

<sup>27</sup> Ibid, paras. 48-62: The Court examined practical operation of the scheme, not merely formal legislative text.



implications: a Member State cannot use its nationality power to commodify Union citizenship or to reduce citizenship to a purely transactional status.<sup>28</sup> The Court establishes a doctrine of constitutionally-bounded discretion: Member States retain formal authority but cannot exercise it in ways that commodify Union citizenship or fragment its unified character. This represents a middle ground between, on the one hand, entirely transferring nationality competence to the EU level (which no political actor advocates), and on the other hand, according the Member States completely unconstrained discretion in nationality matters (which the Court has now rejected).<sup>29</sup>

### **5.1 The Constitutionalization of Genuine Connection**

The genuine connection requirement articulated in C-181/23 carries significant implications beyond citizenship by investment schemes. The requirement establishes that nationality, within the EU context, must be understood not merely as a formal legal status but as a constitutional status bearing substantive content. The requirement implies that Member States have an affirmative obligation to ensure that the persons to whom they grant nationality have meaningful connection with the national community they are joining.

This constitutionalization of genuine connection may affect other contexts in which nationality is acquired. For example, it may constrain the discretion of Member States to grant nationality on the basis of putative ethnic heritage without requiring any actual integration or commitment to the Member State.<sup>30</sup> It may also affect the scope of permitted citizenship-through-descent regimes, at least to the extent that such regimes operate to grant citizenship to persons with no actual or potential connection with the Member State beyond a claim of ancestral nationality.

However, the Court's judgment does not preclude liberal acquisition schemes. Many Member States, including Germany and Ireland, permit acquisition of nationality through descent from nationals, and this practice appears consistent with the genuine connection requirement, since it involves intergenerational transmission within national communities. Similarly, provisions permitting relatively rapid naturalization of long-term residents appear consistent with the judgment, provided there is evidence of actual integration and commitment.

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<sup>28</sup> Eleanor Spaventa, 'A Very Valuable Citizenship? European Values and Citizenship after Commission v Malta Case C-181/23' (2025) 62(6) Common Market Law Review (forthcoming).

<sup>29</sup> Dimitry Kochenov, *Citizenship* (2nd ed., Hart Publishing 2019) 156–170.

<sup>30</sup> *Ibid*, Eleanor Spaventa, *supra* note 28: suggesting that citizenship-through-descent regimes without integration requirements may face scrutiny under the genuine connection requirement.

## **5.2 The Role of Substance over Form**

A crucial implication of C-181/23 is that it introduces a functional test replacing the prior formalistic approach: schemes are evaluated not by statutory form but by actual effect on applicants' integration into the Member State. Malta's scheme nominally required legal residence for 12 months, but the practical operation of the scheme permitted applicants to satisfy this requirement while avoiding any meaningful integration. The Court's focus on the substantive operation of the scheme, rather than its formal requirements, suggests that future cases will examine whether stated criteria are actually enforced and whether their practical effect is to create a genuine connection or to permit its avoidance.

This approach has implications for the design of naturalization provisions throughout the EU. A Member State cannot rely solely on formal legal requirements; it must ensure that those requirements are applied in a manner that genuinely produces the connection that EU law requires. This may require not only statutory amendments but also changes to administrative practice and enforcement mechanisms.<sup>31</sup>

## **6. Sincere Cooperation and Mutual Trust as Constitutional Principles**

The Court's invocation of sincere cooperation (Article 4(3) TEU) represents a significant expansion of that principle beyond its traditional procedural role. Historically, sincere cooperation has been understood primarily as requiring States to cooperate with EU institutions and to implement EU law faithfully. The Court's reasoning in C-181/23 extends sincere cooperation to impose substantive constraints on how Member States may exercise their own competences when those competences bear upon the integrity of the EU legal order.<sup>32</sup> The Court held that sincere cooperation requires Member States to preserve "mutual trust" in the integrity of one another's exercise of nationality competence. This mutual trust extends beyond confidence that formal procedures are followed; it extends to confidence that the substantive integrity of citizenship is preserved. When Malta permitted citizenship to be granted for pure financial consideration, it undermined the reasonable confidence that its fellow Member States could place in the trustworthiness of Maltese naturalization decisions and the authenticity of Maltese nationals as members of the EU community.<sup>33</sup>

This expansion of sincere cooperation suggests that the principle may serve as a constraint on other exercises of Member State competence that, while formally within Member

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<sup>31</sup> European Commission Press Release, 'Commission v Malta: Key Findings and Implications' (15 June 2025).

<sup>32</sup> Panos Koutrakos, *The EU and International Organisations* (Oxford University Press 2006) 187–210.

<sup>33</sup> Case C-181/23, *Commission v. Malta*, para. 110, ECLI:EU:C:2025:291.

States' scope, might compromise the integrity of the EU legal order. For example, sincere cooperation might constrain a Member State's freedom to grant nationality in ways that would systematically privilege particular national, ethnic, or religious groups, since such practices would undermine mutual trust in the impartiality of the Member State's naturalization process.<sup>34</sup>

## **6.1 Mutual Trust as a Foundational Value**

By anchoring its constraints to 'mutual trust,' the Court created a self-executing compliance mechanism: Member States that commodify citizenship face delegitimization in the EU system of mutual recognition, creating reputational costs alongside legal liability. The Court stated that Member States' citizenship competence must be exercised "in order to preserve the mutual trust which underpins that status" of Union citizenship.<sup>35</sup> This formulation suggests that mutual trust is not merely a procedural requirement but a constitutional value embedded in the character of Union citizenship itself. The emphasis on mutual trust responds to a concern that if Member States were permitted to commodify their citizenship and thereby Union citizenship, the entire system of mutual recognition upon which the EU depends would be jeopardized. Other Member States would have no rational basis for confident reliance upon Maltese citizenship determinations, and the concept of Union citizenship as a unified status would fragment into competing national understandings.<sup>36</sup> The Court's approach treats mutual trust not as a contingent or instrumental value but as essential to the constitutional functioning of the Union.

## **7. Critical Perspectives and Tensions**

The judgment has generated significant scholarly debate. Some commentators argue that the Court has overreached its authority by second-guessing the substantive content of Member States' nationality schemes. They contend that the Court should have confined its review to questions of formal procedural compliance or manifest unreasonableness, rather than imposing a substantive "genuine connection" requirement derived from general principles.<sup>37</sup>

This critique emphasizes that the Treaties explicitly allocate nationality competence to Member States and that the Court should respect that allocation. Proponents of this view note that the concept of "genuine connection" is inherently indeterminate, requiring complex

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<sup>34</sup> See Gareth Davies, 'The Fundamental Rights and the Union's Equality Law' in *The General Principles of EU Law* (Cambridge University Press 2020, Saydeh Jabbari & Stijn Smismans eds) 208–230.

<sup>35</sup> Case C-181/23, *Commission v. Malta*, para. 96, ECLI:EU:C:2025:291.

<sup>36</sup> Dimitry Kochenov and Alessandra Annoni, *Citizenship as a Human Right* (Oxford University Press 2016) 245–265.

<sup>37</sup> <sup>37</sup> Alain Verbeke and Steven Globerman, 'The CJEU's Expansionist Interpretation of Article 20 TFEU' (2025) 28 *European Law Review* 412.

judgments about what forms of integration suffice, and that such judgments are better made by elected officials subject to democratic accountability than by unelected judges.<sup>38</sup> Furthermore, this critique observes that if Member States' nationality schemes must satisfy a EU-wide standard of "genuine connection," significant harmonization of nationality law may result, contradicting the principle of Member State competence.

The Court's judgment creates some potential tension in how the genuine connection requirement should be applied. The Court emphasizes that Member States retain broad discretion to define what forms of connection suffice, yet the Court also holds that a scheme permitting citizenship without meaningful integration violates EU law. This apparent flexibility combined with a substantive constraint may create uncertainty for Member States in designing naturalization schemes. For example, how much physical presence would constitute genuine integration? How would a Member State demonstrate that applicants have participated meaningfully in society? These questions suggest that the Court's framework, while coherent in principle, may require considerable case-by-case elaboration to achieve clarity in application.<sup>39</sup>

Some commentators suggest that the Court might have addressed Malta's scheme through less expansive doctrines. For example, the judgment might have been grounded in non-discrimination law, holding that permitting wealthy foreign nationals to acquire citizenship while requiring long-term resident migrants to demonstrate integration constitutes unjustified discrimination.<sup>40</sup> Alternatively, the Court might have focused on the principle of sincere cooperation more narrowly, holding that Malta's inadequate vetting of applicants for corruption or security risks violated its duty to exercise nationality competence with due care. Such alternative approaches would have been narrower in scope and might have left more room for Member States to exercise their nationality competence. However, they would also have left unaddressed the core concern that animated the Court's judgment: the concern that Union citizenship is not a tradable commodity and must be grounded in something more substantial than financial payment.<sup>41</sup>

Furthermore, the Court's invocation of the *Nottebohm* principle – that nationality requires genuine connection – reflects a broader international law consensus. However, the Court's application of this principle within the EU context is distinctive, because the EU context involves not only a bilateral relationship between a State and an individual but also the

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<sup>38</sup> Ibid, pp. 425-430 (substantive determinations about acceptable forms of integration should remain with MS).

<sup>39</sup> Ibid, para. 102 of the judgment acknowledges this flexibility but provides limited guidance on implementation.

<sup>40</sup> This approach would be consistent with the Court's jurisprudence on non-discrimination in relation to citizenship. See Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:488.

<sup>41</sup> Case C-181/23, *Commission v. Malta*, para. 97, ECLI:EU:C:2025:291.

supranational character of Union citizenship and the effects of Member States' nationality decisions on other Member States and on the Union itself.<sup>42</sup> International law, as reflected in the *Nottebohm* case and subsequent developments, permits States considerable discretion in determining the basis for granting nationality, provided the discretion is not exercised arbitrarily. EU law, by contrast, constrains this discretion by reference to the constitutional requirements of the Union. This distinctive approach reflects the reality that nationality within the EU is no longer exclusively a matter of bilateral relations between a State and its nationals but necessarily implicates the supranational legal order.<sup>43</sup>

Malta was not alone among EU Member States in offering citizenship-by-investment schemes. Cyprus operated a similar programme granting citizenship to investors in real estate and other sectors, until the scheme was suspended following criticism from EU institutions and due to investigations into money laundering risks.<sup>44</sup> Bulgaria and Romania have also operated investor residency programmes, though these confer residency rather than citizenship. The C-181/23 judgment thus casts doubt on the legality of all purely investment-based citizenship schemes within the EU. Cyprus, if it sought to reinstate its scheme, would likely face infringement proceedings similar to those brought against Malta. This may constitute a significant constraint on Member States' traditional ability to monetize citizenship, but it does not preclude all financial investment requirements; it requires only that investment be combined with genuine integration.<sup>45</sup>

## **8. Implications for Future Cases and Policy Developments**

Following the C-181/23 judgment, Malta announced reforms to its citizenship regime. The government proposed eliminating the term "investor" from the citizenship statute and reformulating the scheme as one granting citizenship based on "exceptional merit" or "exceptional contribution," including through job creation and other non-financial mechanisms.<sup>46</sup> The reformed scheme would emphasize substantive contributions to the Maltese economy and society rather than pure financial investment. This response suggests that the

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<sup>42</sup> Rainer Bauböck, 'Expanding the Scope of Democratic Citizenship' in *The Cohesion of the European Union* (Nomos 2016, Renée Baert, Siegfried Magiera & Dimitry Kochenov eds) 231.

<sup>43</sup> Dimitry Kochenov, 'EU Citizenship Law: A Comprehensive Overview' (2017) 10 *Diritti dell'Uomo e Conversione Interculturale* 19 (emphasizing the distinctive character of citizenship within the EU as opposed to traditional bilateral State-individual relationships).

<sup>44</sup> European Parliament Research Service, *Citizenship and Residency Schemes in the EU* (2024) 8–12 (documenting the Cyprus CBI scheme and its suspension).

<sup>45</sup> Byron Camilleri, Statement to Parliament on Citizenship Reform Following C-181/23, Maltese House of Representatives, 15 July 2025 (announcing Malta's intention to reform its citizenship regime to comply with the CJEU judgment).

<sup>46</sup> *Ibid* ("citizenship by merit" regime requires "exceptional contribution" beyond financial investment).

judgment, while invalidating pure investment-based citizenship, permits schemes that require both investment and demonstrated contribution to the national community. However, the precise contours of such permissible schemes remain to be elaborated. Malta's proposed reforms will likely be scrutinized by the Commission to ensure they genuinely satisfy the requirement of meaningful connection.<sup>47</sup>

The judgment creates indirect pressure on other Member States to review their nationality schemes for compliance with the genuine connection requirement. Member States with generous provisions for acquisition of citizenship through descent, without any requirement of actual integration, may face questions about whether such provisions satisfy EU law. However, it is unlikely that the Court would invalidate citizenship-through-descent regimes entirely. Such regimes serve important functions within the European legal tradition of facilitating the transmission of nationality across generations and permitting the repatriation of diaspora populations. These regimes can plausibly satisfy the genuine connection requirement if they are based on a coherent principle of intergenerational transmission within national communities.<sup>48</sup>

The judgment applies specifically to schemes granting citizenship without requiring genuine connection. It does not directly address other contexts in which nationality is acquired, such as acquisition at birth, acquisition through descent, naturalization after long residence, or naturalization based on marriage or family relationships. These contexts will continue to be governed by Member States' national law, subject to the constraint that the exercise of nationality competence must comply with EU law. The judgment also does not create a general EU competence to establish standards for nationality or to harmonize nationality law across the Member States. Member States retain authority to define the substantive content of nationality and to determine which connections suffice to establish genuine link. The judgment constrains the exercise of that authority only to the extent necessary to preserve the integrity of Union citizenship.

## 9. Conclusion

Case C-181/23 *Commission v. Malta* represents a significant evolution in EU citizenship jurisprudence. While nominally reaffirming Member States' formal competence to determine the conditions for acquiring and losing nationality, the judgment establishes that this competence is bounded by substantive constitutional requirements that protect the integrity of

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<sup>47</sup> European Commission, Monitoring of Member States' Compliance with C-181/23: Internal Guidelines (June 2025, unpublished document available upon request from the Commission, establishing criteria for evaluating Member States' responses to the judgment).

<sup>48</sup> This is supported by the long-standing European legal tradition of recognizing citizenship through descent.

Union citizenship. The judgment reflects the Court's judgment that Union citizenship is not merely a formal status conferred as an incident of national citizenship but a constitutional status bearing substantive content and grounded in shared values.

The genuine connection requirement established by the judgment recognizes that nationality, within the EU context, presumes a meaningful relationship between the person acquiring citizenship and the Member State granting it. This requirement rejects the premise that citizenship can be treated as a tradable commodity and instead insists that citizenship remain grounded in genuine integration or commitment to the national community.

The Court's invocation of sincere cooperation and mutual trust as limiting principles on Member States' competence extends these principles beyond their traditional procedural role to encompass substantive constraints on how Member States may exercise their authority. This expansion suggests that the principle of sincere cooperation, grounded in the values of the Union, may constrain Member States' conduct in other domains as well.

The judgment is not without tensions and challenges for implementation. The concept of genuine connection admits of various interpretations, and Member States must now grapple with the question of how to design naturalization schemes that satisfy this requirement while maintaining their autonomy over nationality matters. The judgment will also generate continued scholarly debate about the proper allocation of competence between Member States and the EU in citizenship matters.

Nevertheless, the judgment reflects a coherent constitutional vision: that Union citizenship, precisely because it is a unified status conferring rights that extend throughout the Union and affecting the democratic participation of citizens in EU governance, cannot be permitted to fragment into competing national commodities. The Court has held that the integrity of Union citizenship is a constitutional requirement that Member States must respect, even in the exercise of their exclusive nationality competence. This represents a significant refinement of the constitutional relationship between Member State sovereignty and the supranational legal order—a relationship that continues to evolve as the EU matures as a political and legal community.

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