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**Combating Investor Citizenship Schemes  
in the European Union**

Diploma Thesis

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In Bergen on 21 October 2025 / V Bergenu dne 21. října 2025

Jakub Svoboda, v. r.

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## Introduction

On 29<sup>th</sup> of April 2025, the Court of Justice of the European Union ('the Court') handed down a judgment in the infringement proceedings against the Republic of Malta for operating a citizenship by investment ('CBI') scheme ('the judgment'). The Court decided that by implementing such a scheme, Malta has failed to fulfil its obligations under Article ('Art.') 20 of the Treaty on the Functioning of the European Union ('TFEU') and Art. 4(3) of the Treaty on European Union ('TEU')<sup>1</sup>. This decision is the culmination of the Commission's efforts to prevent Malta from offering its citizenship for a predetermined payment going back to 2013 when the first version of the scheme was introduced<sup>2</sup>.

The decision has been highly anticipated because laying down citizenship acquisition criteria is in the full competence of each Member State; the European Union ('EU') does not possess even a supporting competence in this area.<sup>3</sup> EU citizenship is designed as merely complementary to national citizenship of Member States and does not replace it<sup>4</sup>. Despite this auxiliary nature of EU citizenship, the Court concluded that the scheme run by the Maltese government '*amounts to the commercialisation of the grant of the nationality of a Member State and, by extension, that of Union citizenship.*'<sup>5</sup> By concluding that Malta violated the TEU and the TFEU (collectively as 'the Treaties') by implementing the scheme, the Court begins to place a greater emphasis on the role and purpose of EU citizenship by stressing that it has intrinsic value which cannot be for sale.

The aim of this thesis is to critically examine the decision and its implications on the division of competences between the EU and Member States as well as to develop a test for compliance of CBI schemes with EU law that would balance the need to protect the integrity of EU citizenship on the one hand with Member States' right to determine who their citizens are on the other. The topic is relevant because the reaction of Member States and their courts to this decision depends on the strength and persuasiveness of the Court's arguments. While the case law of the Court is binding upon Member States, should the arguments prove deficient and/or lacking firm legal basis, a reaction similar to that of the German Constitutional Court in the

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<sup>1</sup> 'Judgment of 29 of April 2025, Commission v Malta, C-181/23, ECLI:EU:C:2025:283' para. 121.

<sup>2</sup> 'Case C-181/23: Action Brought on 21 March 2023 - European Commission v Republic of Malta, OJ C 173, 15.5.2023, CELEX: 62023CN0181'.

<sup>3</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, CELEX:02016E/TXT-20250315, Arts. 2-6 a contrario.

<sup>4</sup> *ibid* Art. 20.

<sup>5</sup> Commission v Malta (n 1) para. 121.

*Solange* saga to the supremacy of EU law established by the judgment in *Costa/ENEL*<sup>6</sup> might follow.<sup>7</sup>

The first part of the thesis will introduce CBI schemes in general and illustrate their operation on the example of the Maltese CBI scheme. The second part will describe the opinion of the Advocate General („AG’) and the judgment itself and highlight the most important conclusions. The third part reviews existing literature and identifies a research gap. The fourth part develops a theoretical basis for the compliance test, contrasting the judgment with the AG opinion, since the AG reached the opposite conclusion from the Court, i.e. that Malta did not breach EU law by operating the scheme,<sup>8</sup> and discusses the absence of temporal limitations of the judgment and additional points of law relevant for the design of the test - principle of prohibition of abuse of EU law and the relationship between the principle of sincere cooperation in EU law and the principle of good faith in public international law. The fifth part proposes a test for compliance of CBI schemes with EU law, balancing state sovereignty on the one hand and integrity of EU citizenship on the other.

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<sup>6</sup> ‘Judgment of 15 July 1964, *Costa/ENEL*, C-6/64, ECLI:EU:C:1964:66’ p. 594.

<sup>7</sup> In its decisions in the *Solange* saga, the German Constitutional Court (Bundesverfassungsgericht) placed limits on the principle of primacy of EU law stating that it applies so long as EU law protects basic human rights to the same extent as the German constitution; should EU law protect basic human rights to a lesser extent, then German courts can disapply that body of EU law which threatens fundamental rights as protected by the German constitution.

<sup>8</sup> Opinion of Advocate General Collins in Case C-181/23 *Commission v Malta*, 4 October 2024, ECLI:EU:C:2024:849, para. 58.

# 1 Investor citizenship schemes and the example of Malta

## 1.1. Investor citizenship schemes in general

According to Art. 3 of the European Convention on Nationality, *'each state shall determine under its own law who are its nationals and such determination then shall be accepted by other (s)tates in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality.'*<sup>9</sup>

The way to obtain citizenship is usually by birth. The two rules being *ius soli*, when citizenship is granted to anybody who is born on the sovereign territory of a particular country, and *ius sanguinis*, when citizenship is granted to those persons whose one or both parents are citizens of a particular country. If a person wishes to obtain citizenship of a different country later in life, they need to go through a naturalisation process which often involves residency requirement for a number of years, security background checks and examinations proving knowledge of language, government and culture of the country the person wishes to become a citizen of.

However, in some countries, the process of naturalisation can in certain circumstances be expedited. One of the ways to achieve faster naturalisation is by taking advantage of so called CBI programmes on which this thesis is focused on. The idea being that the applicant invests a pre-determined amount of money into the country's economy or state budget and in return obtains a passport. The usual requirements tied to naturalisation enumerated above are either reduced or completely eliminated; this led to such schemes being colloquially known as 'golden passport' schemes. While there are a few countries operating these schemes, only EU member states will be taken into consideration in the following text.

The four freedoms of EU citizens associated with the EU single market, i.e. free movement of goods, persons, services and capital, are particularly attractive to third country nationals. Since Art. 20 of the TFEU states that *'(e)very person holding the nationality of a Member State shall be a citizen of the Union'*, the easiest way to get access to these benefits is to obtain an EU passport through a CBI scheme.

In its 2019 report on investor citizenship and residence schemes in EU Member States, the Commission highlighted key areas of concern which such schemes pose to the EU – security

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<sup>9</sup> European Convention on Nationality of 6 November 1997, ETS No. 166, Art. 3.

threats, money laundering, circumvention of EU rules and tax evasion.<sup>10</sup> While the member states operating CBI schemes have put in place measures that mitigate some of those risks (for example Maltese authorities follow the due diligence standard outlined in the Anti Money Laundering Directive)<sup>11</sup>, certain areas remain insufficiently protected. For example, confusion can arise about the legitimate tax residence of the successful applicant. This can then lead to financial documents being sent to the wrong state. The income in question can then end up being taxed at a lower rate or escape taxation entirely.<sup>12</sup>

## **1.2. Maltese investor citizenship scheme**

Malta launched the first version of its CBI scheme in 2013.<sup>13</sup> The applicants were required to purchase or rent an immovable property in Malta, make an exceptional direct investment into among others stocks, bonds, securities and other types of investment published in the Government Gazette as well as cover the administrative fees associated with the application process. All investors must have been over the age of 18 and covered by comprehensive health insurance. If they wished to bring family members to Malta, additional investment was required for each dependent. As for residence requirements, the applicant was required to be present in Malta only to provide biometric data for a residence permit and to take the oath of allegiance.<sup>14</sup>

Following informal discussions with the Commission, Malta introduced a new version of the CBI scheme in 2020 with added residency requirement of 36 months (12 months if the invested amount was increased by EUR 150,000)<sup>15</sup>. Further, it was necessary to obtain a validation of eligibility and authorisation to submit an application for naturalisation.<sup>16</sup> However, the degree of enforcement of the residency requirement is questionable. A joint investigation by the Daphne Caruana Galizia Foundation, The Guardian, Dossier Center and five independent media

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<sup>10</sup> ‘Investor Citizenship and Residence Schemes in the European Union, European Commission, Brussels 2019’ <[https://commission.europa.eu/document/download/8606453f-7ee7-432b-b49d-f4b9feebee97\\_en?filename=com\\_2019\\_12\\_final\\_report.pdf](https://commission.europa.eu/document/download/8606453f-7ee7-432b-b49d-f4b9feebee97_en?filename=com_2019_12_final_report.pdf)> accessed 5 October 2025.

<sup>11</sup> ‘Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing (AMLD IV), CELEX: 02015L0849’.

<sup>12</sup> ‘Investor Citizenship and Residence Schemes in the European Union, European Commission, Brussels 2019’ (n 10) p. 17.

<sup>13</sup> ‘Milieu Law and Policy Consulting, Factual Analysis of Member States’ Investor Schemes Granting Citizenship or Residence to Third-Country Nationals Investing in the Said Member State, Study Overview, Brussels July 2018’ <[https://commission.europa.eu/document/download/e5ae8330-646b-49b5-9651-16aef54f21d9\\_en?filename=deliverable\\_d\\_final\\_30.10.18.pdf](https://commission.europa.eu/document/download/e5ae8330-646b-49b5-9651-16aef54f21d9_en?filename=deliverable_d_final_30.10.18.pdf)> accessed 2 October 2025 p. 11.

<sup>14</sup> *ibid* pp. 12-14.

<sup>15</sup> Originally promulgated text of the ‘Granting of Citizenship for Exceptional Services Regulations of 20th of November 2020, S.L. 188.06’ (2020) <<https://legislation.mt/eli/ln/2020/437/eng/pdf>> accessed 2 October 2025 part. IV, art. 16(1)(a).

<sup>16</sup> *ibid*.

organisations in Malta: Lovin Malta, Malta Today, The Malta Independent, the Times of Malta and The Shift found that the applicants spent on average only 16 days in Malta during their one year of residency requirement before receiving citizenship.<sup>17</sup> Moreover, the CEO of Identity Malta Jonathan Cardona has admitted that only legal and not actual residency is required.<sup>18</sup>

Table 1 summarises the financial requirements to obtain Maltese citizenship at each step of the naturalisation procedure. They were laid down in the First Schedule of the originally promulgated text of the Granting of Citizenship for Exceptional Services Regulations.<sup>19</sup> For the applicants' convenience, they were also published by the Community Malta Agency, which is responsible for administering all citizenship-related matters<sup>20</sup>, in the official Maltese Citizenship by Naturalisation for Exceptional Services by Direct Investment Handbook from which the table is adapted:

Stage	Reason	Amount
Residency	Non-refundable deposit	EUR 10,000
Residency	Residency permit	EUR 5,000
Residency	Residency card	EUR 27.50
Eligibility	Due diligence fee	EUR 15,000
Eligibility	Administrative fee	EUR 1,000
Citizenship	Exceptional direct investment	EUR 590,000 or EUR 740,000
Citizenship	Administrative fee	EUR 500
Citizenship	Purchase or lease an immovable residential property	min. EUR 700,000 or EUR 16,000 / year
Citizenship	Donation to a public benefit organisation	EUR 10,000

Table 1: Overview of pre-determined payments in each stage of the Maltese investor citizenship scheme<sup>21</sup>.

<sup>17</sup> Daphne Caruana Galizia Foundation, 'Newspaper Subscriptions and Six-Hour Visits to Malta, 21 April 2021' <<https://www.daphne.foundation/passport-papers/2021/04/genuine-links-sham>> accessed 19 August 2025.

<sup>18</sup> 'Let's Not Fool Ourselves – No Effective Residency Required to Purchase Maltese Citizenship, 15 March 2015' *Malta Independent* <<https://www.independent.com.mt/articles/2015-03-15/local-news/Let-s-not-fool-ourselves-no-effective-residency-required-to-purchase-Maltese-citizenship-6736132177>> accessed 30 September 2025.

<sup>19</sup> Originally promulgated text of the 'Granting of Citizenship for Exceptional Services Regulations of 20th of November 2020, S.L. 188.06' (n 15) Schedule of Fees; the regulation has since been amended by Legal Notice 159 of 2025 published in the Government Gazette of Malta No. 21,478 on 29 July 2025 which repealed the scheme; citizenships granted before the amendment remain valid and any pending applications submitted prior to 29 April 2025 ceased to have effect.

<sup>20</sup> 'Community Malta Agency Official Website Homepage': <<https://komunita.gov.mt>> accessed 2 October 2025.

<sup>21</sup> Adapted from: Aġenzija Komunità Malta, 'The Maltese Citizenship by Naturalisation for Exceptional Services by Direct Investment Handbook' (November 2020) <<https://komunita.gov.mt/wp-content/uploads/2020/11/The-Maltese-Citizenship-by-Naturalisation-for-ESDI-Handbook.pdf>> accessed 2 October 2025 pp. 5-7.

On 29 April 2025, following the judgment in *Commission v Malta*, the Government of Malta issued a press release where it stated that it respects the Court judgment and is now analysing its legal implications. It nevertheless reasserted its position, citing AG Collins' opinion, that there is no case against Malta, since '*issues related to citizenship fall entirely within the national sphere of competence*'.<sup>22</sup> On 29 July 2025, the provisions regulating the scheme were repealed by Legal Notice 159 of 2025 amending the Maltese Citizenship Act<sup>23</sup> and its subsidiary legislation.<sup>24</sup> This notice also states that citizenships granted before the amendment remain valid and that any pending applications submitted prior to 29 April 2025 shall cease to have effect.<sup>25</sup>

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<sup>22</sup> Government of Malta, 'Press Release PR250702en of 29 April 2025' (2024) <<https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2025/04/29/PR250702en.aspx>> accessed 19 August 2025.

<sup>23</sup> 'ACT XXX of 1965 Maltese Citizenship Act, Chapter 188' <<https://legislation.mt/eli/cap/188>> accessed 2 October 2025.

<sup>24</sup> 'Legal Notice 159 of 2025 - Granting of Citizenship for Exceptional Services (Amendment) Regulations, Government Gazette of Malta No. 21,478' (29 July 2025) <<https://legislation.mt/eli/ln/2025/159/eng>> accessed 2 October 2025 Art. 16.

<sup>25</sup> *ibid* Art. 25.

## 2 AG opinion and judgment in C-181/23 Commission v Malta

Investor citizenship schemes can take many forms and as a result, each one will have different parameters. One can be more strict requiring only slightly shorter residency requirements and conducting comprehensive security background checks. Another can de facto waive the residency requirement altogether and require only basic check of the applicant's criminal history. It is therefore helpful to look at the case of Malta since it has already been litigated before the Court and see how the concerns of the Commission and the defence of Maltese government have been addressed.

The aim of this chapter is to summarize the legal reasoning in both the opinion of the AG and the judgment itself. This serves as a preparatory stage for the comparison in a following chapter which will identify key differences and assess the strengths and weaknesses of each argument against the other. The comparison is useful because the Court and the AG reached opposite conclusions. While an AG opinion is not binding and the Court can therefore choose not to follow it, it is still a valuable source of legal reasoning. Advocates General are acclaimed legal scholars and often also legal practitioners who are called upon in more difficult cases before the Court to offer their opinions as to how a case should be decided. An advantage of writing an AG opinion is that an AG does not have to reach a unanimous verdict; rather they can express their thoughts without having to negotiate compromises as to the final text. This is not to say that AG opinions are more persuasive than judgments. Just that an AG opinion should not be disregarded only because the Court decided not to follow it.

### 2.1. AG Opinion

The first point AG Anthony Michael Collins raises in his analysis is that the Court should not examine the alleged breach of the duty of sincere cooperation enshrined in Art. 4(3) TEU, because the conduct that breaches this duty according to the Commission is identical to the conduct which allegedly breaches Art. 20 TFEU, i.e. the establishment and operation of a CBI scheme described in the previous chapter.<sup>26</sup> To support this conclusion, he cites the Court's decision in Case C-316/19 Commission v Slovenia.<sup>27</sup>

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<sup>26</sup> Opinion of AG Collins (n 8) para. 40.

<sup>27</sup> 'Judgment of 17 December 2020, Commission v Slovenia, C-316/19, ECLI:EU:C:2020:1030' para. 121 and the case law cited.

The second and main point of the opinion concerns the requirement of a genuine link between the applicant for naturalisation and the country they wish to become a citizen of. It is examined both from the point of view of EU law and public international law. Firstly, AG Collins notes that the Commission bases the success of its action on the premise that to preserve the integrity of EU citizenship, a genuine link between a Member State and its nationals must exist.<sup>28</sup> He goes on to stress the inseparable link between national citizenship and EU citizenship calling it an essential condition sine qua non for being an EU citizen.<sup>29</sup> He notes the settled case law that it is for each Member State acting within its exclusive competence to lay down conditions for acquisition and loss of citizenship provided it has due regard to international law.<sup>30</sup> He further cites one of his other opinions in Case C-673/20 *Préfet du Gers* where he notes that Member States have not chosen to confer upon the EU the power to determine who becomes an EU citizen and that therefore such power cannot even be implied.<sup>31</sup> Finally, the first sentence of Declaration no. 2 on nationality of a Member State ('Declaration no. 2') annexed to the TEU is cited:

*'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.'*<sup>32</sup>

The principle of mutual recognition of citizenship is then pointed out – a state cannot require any additional conditions to recognise that a person is a citizen of another state and therefore neither can the EU institutions.<sup>33</sup> Nevertheless, the laying down of rules on the acquisition and loss of citizenship as a state's prerogative must not breach international law and (in situations covered by it) EU law and both legal systems '*may, in principle, constrain its exercise*'.<sup>34</sup> AG Collins further raises the point of the prohibition of relying on EU law for abusive or fraudulent

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<sup>28</sup> Opinion of AG Collins (n 8) para. 41.

<sup>29</sup> *ibid* para. 42

<sup>30</sup> *ibid* para. 44 and the case law cited.

<sup>31</sup> Opinion of Advocate General Collins in Case C-673/20 *Préfet Du Gers*, 24 February 2022, ECLI:EU:C:2022:129.' para. 22.

<sup>32</sup> 'Treaty on European Union - Declaration on Nationality of a Member State, Official Journal C 191, CELEX:11992M/AFI/DCL/02'.

<sup>33</sup> Opinion of AG Collins (n 8) para. 47.

<sup>34</sup> *ibid* para 49 and the case law cited.

ends. However, since the Commission does not claim a breach of this principle, it is not examined in the opinion.<sup>35</sup>

Since the Court has not yet decided a case relating to the acquisition of citizenship, the opinion goes on to examine the relevance of the case law on the loss of citizenship to the present case. The key difference, AG Collins points out, is that the loss of national citizenship (and consequently EU citizenship) would mean that the person would lose the right afforded to them by the Treaties and by the Charter of Fundamental Rights of the European Union and possibly rendering them stateless. The AG therefore agrees with the Republic of Malta that it is impossible to equate loss of citizenship with its acquisition.<sup>36</sup>

The Opinion illustrates this fact on two judgments of the Court: *Micheletti*<sup>37</sup> and *Tjebbes*<sup>38</sup> and concludes, that genuine link is only countenanced by EU law as a requirement by a Member State in the context of retention of its nationality.<sup>39</sup> However, the AG writes, EU law itself neither requires such a link, nor does it define it. As for the international law point of view, he cites the judgment of the International Court of Justice ('ICJ') in *Nottebohm*<sup>40</sup> and notes that the judgment allowed for a non-recognition of citizenship between an individual and the state he claims to be a citizen of based on the absence of a genuine link. However, he stresses that the ICJ still held in this judgment that it is for every sovereign state to determine who their nationals are.<sup>41</sup>

The AG concludes that the Commission has failed to prove that Art. 20 TFEU requires a genuine link between a Member State and its citizens and that therefore the Court should dismiss the action.<sup>42</sup>

## 2.2. The judgment

The Court's analysis begins with recalling that every person holding a nationality of a Member State is to be an EU citizen.<sup>43</sup> It further stresses that while Declaration no. 2 states that whether a person is a citizen of a particular Member State should be settled solely by reference to

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<sup>35</sup> *ibid* para. 51.

<sup>36</sup> *ibid* para. 52

<sup>37</sup> 'Judgment of 7 July 1992, *Micheletti*, C-369/90, ECLI:EU:C:1992:295' para. 10.

<sup>38</sup> 'Judgment of 12 March 2019, *Tjebbes*, C-221/17, ECLI:EU:C:2019:189' paras. 35, 40 and 41.

<sup>39</sup> Opinion of AG Collins (n 8) para. 55.

<sup>40</sup> 'Nottebohm Case (Second Phase), Judgment of April 6th, 1955: I.C.J. Reports 1955, p. 4.'

<sup>41</sup> Opinion of AG Collins (n 8) para. 56.

<sup>42</sup> *ibid* para. 58

<sup>43</sup> 'Commission v Malta' (n 1) para. 79.

national law, settled case law of the Court says that this power must be exercised with due regard to EU law.<sup>44</sup>

The Court then rejects the argument made by the Republic of Malta that judicial review of procedures granting citizenship of a Member State should be limited only to serious breaches of EU law which are general and systematic in nature. The Court states that there is nothing in the wording of the Treaties to suggest that their drafters intended to create any exception to the obligation of national legislation to comply with EU law. Existence of such an exception would limit the effects of the essential principle of primacy of EU law.<sup>45</sup>

The Court goes on to reaffirm that EU citizenship forms an integral part of the constitutional framework of the EU.<sup>46</sup> This assertion stems from the following observations: (i) the obligation of the EU to provide all EU citizens with an area of freedom, security and justice ('AFSJ') and the principles of mutual trust and mutual recognition necessary for its functioning, (ii) the existence of the free movement rights necessary for the attainment of the AFSJ and their specific expression in the TFEU and (iii) the existence of political rights given to EU citizens allowing them to participate on the democratic life of the EU.<sup>47</sup> Based on these observations, the Court concludes that *'the exercise by the Member States of their power to lay down the conditions for granting their nationality has consequences for the functioning of the European Union as a common legal order.'*<sup>48</sup>

The Court further reaffirms that since the status of EU citizen derives automatically from a person's national citizenship, EU citizenship: *'constitutes the fundamental status of nationals of the Member States'*<sup>49</sup> and that it is *'one of the principal concrete expressions of the solidarity which forms the very basis of the process of integration (...) and which is an integral part of the identity of the European Union as a specific legal system, accepted by the Member States on a basis of reciprocity'*<sup>50</sup> The exercise of the power to lay down conditions for citizenship acquisition is not therefore, like with the conditions for its loss, unlimited. The Court bases EU citizenship on the common values in Art. 2 TEU and on the mutual trust between Member

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<sup>44</sup> *ibid* paras. 80 – 81 and the case law cited.

<sup>45</sup> *ibid* paras. 82 – 83.

<sup>46</sup> *ibid* para. 91 and the case law cited.

<sup>47</sup> *ibid* paras. 84 – 89.

<sup>48</sup> *ibid* para. 89.

<sup>49</sup> *ibid* para. 92.

<sup>50</sup> *ibid* para. 93.

States that each Member State will not use this power in a way that goes against the nature of EU citizenship.<sup>51</sup>

In its case law, the Court has defined citizenship (or rather bond of nationality) as a *'special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties'*<sup>52</sup> Since EU citizenship is entirely dependent on the existence of national citizenship, it is this special relationship that forms the basis of the rights and duties that EU citizens derive from the Treaties.<sup>53</sup> Despite Member States having *'a broad discretion in the choice of criteria to be applied'*<sup>54</sup>, the Court found that a Member State *'manifestly disregards'* such special relationship by implementing a purely transactional investor citizenship scheme.<sup>55</sup> Such a form of naturalisation is then found to be contrary to the principle of sincere cooperation since other Member States are required to recognize such a person to be a citizen of the Member State operating a CBI scheme.<sup>56</sup>

The theoretical conclusions above are then applied to the Maltese CBI scheme. After observing the obvious transactional nature of the requirements of a direct investment into the Maltese government, purchasing or renting a residential property in Malta and a contribution to a public benefit organisation, the Court examines the residency requirement and the validation of eligibility requirements.<sup>57</sup>

It follows from the explanations provided by Malta, that the condition of prior residency only relates to legal residency. The only time an applicant has to be present in Malta is to provide biometric data for the purposes of their application and to take an oath of allegiance.<sup>58</sup> The fact that the required length of residency is reduced from three years to just one year if the invested sum is increased by EUR 150,000 is evidence of a close link between the residency requirement and the transactional nature of the scheme.<sup>59</sup> Further, evidence presented by Malta of a few applicants being actually present during their period of residency requirement is irrelevant, since the legal framework itself does not require physical presence in Malta for the application to be successful.<sup>60</sup> It is also important to note that if an applicant were to follow the ordinary

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<sup>51</sup> *ibid* para. 95.

<sup>52</sup> 'Judgment of 2 March 2010, Rottman, C-135/08, ECLI:EU:C:2010:104' para. 51.

<sup>53</sup> *Commission v Malta* (n 1) para. 97.

<sup>54</sup> *ibid* para. 98.

<sup>55</sup> *ibid* para. 99.

<sup>56</sup> *ibid* para. 101.

<sup>57</sup> *ibid* paras. 102 - 104.

<sup>58</sup> *ibid* para. 106.

<sup>59</sup> *ibid* para 109.

<sup>60</sup> *ibid* para. 107.

naturalisation procedure without providing an investment incentive, the period of residency would have to be significantly longer – twelve months prior to naturalisation plus at least four out of the six years preceding the twelve month period.<sup>61</sup> This fact is also cited by the Court as supportive of the conclusion that the scheme is purely transactional.<sup>62</sup>

The requirement of obtaining a validation of eligibility requirements by the applicant also does not change the Court’s initial conclusion about the transactional nature of the scheme. Malta describes the procedure as follows:

*‘checks concerning that applicant, his or her business and corporate affiliations, his or her political exposure, the source of his or her wealth, his or her reputation, the legal and regulatory matters relating to that applicant and the relative impact on that applicant’s immediate network.’*<sup>63</sup>

The checks are intended as a way to make sure that the scheme does not undermine Maltese security and public image.<sup>64</sup> However, according to the Court’s view, these requirements merely narrow the scope of the CBI scheme rather than justify the granting of Maltese citizenship.<sup>65</sup> Those conditions neither serve the purpose of examining any ties of the applicant to Malta nor do they impose the requirement to have developed such ties with Malta after the naturalisation procedure is completed.<sup>66</sup>

Lastly, the Court emphasises that the Maltese CBI scheme has been marketed by Malta as a way to obtain EU citizenship. Malta contested this by claiming that such marketing is being done by private third parties and therefore Malta as a Member State cannot have responsibility for their actions. The Court nevertheless observed that the advertising comes from websites of agents authorised by Malta and that it is only through those agents that an application for naturalisation under the CBI scheme can be submitted.<sup>67</sup>

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<sup>61</sup> ‘ACT XXX of 1965 Maltese Citizenship Act, Chapter 188’ (n 23) Art. 10(1).

<sup>62</sup> Commission v Malta (n 1) para. 110.

<sup>63</sup> *ibid* para. 112.

<sup>64</sup> *ibid* para. 113.

<sup>65</sup> *ibid* para. 114.

<sup>66</sup> *ibid* paras. 116 – 118.

<sup>67</sup> *ibid* para. 119.

In light of the argumentation above, the Court ruled that by establishing and operating the 2020 investor citizenship scheme, the Republic of Malta failed to fulfil its obligations under Art. 20 TFEU and Art. 4(3) TEU.<sup>68</sup>

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<sup>68</sup> *ibid* para. 121.

### 3 Literature review

This chapter looks at existing literature dealing with the judgment in *Commission v Malta*. Since the judgment at the time of writing is relatively new, the majority of the cited opinions are published as blog posts, mostly on Verfassungsblog and EU Law Live. The discussion is divided by topic into four sections. First section addresses the nature of EU citizenship after the judgment, second section deals with the relationship between EU citizenship and fundamental values of the EU as developed by the Court, third section looks into whether there is in EU law the requirement of a genuine link (as understood by public international law) or other similar bond between a Member State and its citizens and the fourth section examines the practical implications of the judgment both for the EU and the Member States. The fifth section identifies a research gap which this thesis will attempt to fill.

#### 3.1. Nature of EU citizenship post *Commission v Malta*

Even after the Court's ruling that EU citizenship is an expression of solidarity as a fundamental value of the EU, there is still an ongoing debate about whether citizenship is exclusively a legal status that anyone should be able to get, or if it also signifies that there is a relationship between the citizen and the state that extend beyond rights and obligations – a sense of belonging.

Kochenov takes the former view insisting that no other extra-legal conditions such as residency, language proficiency or knowledge of history curricula are to be imposed; he claims that the judgment's bottom line is that *'law is not enough to make a citizen in any national democracy.'*<sup>69</sup> Van den Brink concurs and heavily criticizes the Court's reasoning. He calls out the Court for prioritising *'rhetoric and political expediency'*<sup>70</sup>, refuses the idea that EU citizenship is the fundamental status of nationals and instead claims that national citizenship is fundamental while EU citizenship is derivative,<sup>71</sup> finds the logic of linking EU citizenship to solidarity impossible to follow,<sup>72</sup> and claims the Court's definition of citizenship as a bond of solidarity and good faith is a conceptual statement which the judgment turns into a legal one

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<sup>69</sup> Dimitry Kochenov, 'EU Citizenship's New Essentialism' (*Verfassungsblog*, 5 May 2025) <<https://verfassungsblog.de/eu-citizenships-new-essentialism/>> accessed 6 September 2025, The Solidification of the Illiberal Union, para. 2, 'Make no mistake: the Court hints – for the first time – that EU citizenship bond is not only legal in nature.'

<sup>70</sup> Martijn van den Brink, 'Why Bother with Legal Reasoning?' (*Verfassungsblog*, 5 May 2025) <<https://verfassungsblog.de/why-bother-with-legal-reasoning/>> accessed 6 September 2025, Introduction, para. 1, 'Hindsight can make one look naive'.

<sup>71</sup> *ibid* Eleven mind bending paragraphs, on Paragraph 92, 'because of 'the scope of the rights attaching to Union citizenship' and 'the fact that that status derives automatically from the fact of being a national of a Member State, ...!'

<sup>72</sup> *ibid* on Paragraph 93, 'Union citizenship is thus one of the principal concrete expressions of the solidarity which forms the very basis of the process of integration'.

without convincing argumentation.<sup>73</sup> Íñiguez expresses his surprise that while earlier case law used the phrase ‘destined to be the fundamental status of nationals of the Member States’<sup>74</sup> (i.e. is in the process of becoming), in *Commission v Malta* the Court says that it *is* the fundamental status of nationals of the Member States.<sup>75</sup>

The latter view is supported by O’Neill who says that the Court correctly links citizenship to mutual trust.<sup>76</sup> He reaches this conclusion by understanding mutual trust as not only pertaining to the distribution and marketing of goods but also to mutual recognition of judicial and administrative decisions i.e. not only the citizen can travel freely but also the documents granting their citizenship are recognised as well as the procedure preceding their issuance.<sup>77</sup> Further, he states that mutual trust resides in the centre of EU constitutional framework holding together constitutional identities and actors.<sup>78</sup> He therefore disagrees with Van den Brink who worries that this view of EU citizenship bends constitutional law ‘*without offering a minimum of legal reasoning.*’<sup>79</sup>

Spieker meanwhile sets out to resolve van den Brink's confusion about the connection between EU citizenship and solidarity. Citing AG Capeta's opinion in *GV v Ireland*<sup>80</sup>, he argues that solidarity is based on a certain belonging to a community (in this case to European society) and that to share a burden with those not belonging to such a community would be unreasonable.<sup>81</sup>

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<sup>73</sup> *ibid* on Paragraph 97, ‘in accordance with Article 20(1) TFEU, the special relationship of solidarity and good faith between each Member State and its nationals also forms the basis of the rights and obligations reserved to Union citizens by the Treaties...’.

<sup>74</sup> ‘Judgment of 20 September 2001, Grzelczyk, C-184/99, ECLI:EU:C:2001:458’ para. 31.

<sup>75</sup> Guillermo Íñiguez, ‘Op-Ed: “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 6 September 2025, What is the Status of Union Citizenship?, para. 2, ‘In *Commission v. Malta*, the Court of Justice seems to have departed from Grzelczyk by taking its reasoning one step further...’.

<sup>76</sup> Ruairi O’Neill, ‘A Stitch in Time? Mutual Trust as the EU’s Fix-All in Case C-183/23 *Commission v Malta*’ (2025) 10 *European Papers-A Journal on Law and Integration* 463, p. 476.

<sup>77</sup> *ibid*.

<sup>78</sup> Ruairi O’Neill, ‘The Silent Engine of European Citizenship’ (*Verfassungsblog*, 7 May 2025) <<https://verfassungsblog.de/the-silent-engine-of-european-citizenship/>> accessed 6 September 2025, A surprise only for some, para. 2, ‘The intrinsic limitation that mutual trust applies through other, normative provisions of EU law belies its significance as a structural constitutional principle...’.

<sup>79</sup> van den Brink (n 70), *Have the constitutional guardrails come off?*, para. 1, ‘It should worry EU lawyers that EU institutions have in recent years so often circumvented the EU’s constitutional framework when political necessity so required’.

<sup>80</sup> ‘Opinion of Advocate General Capeta in Case C-488/21 *GV v Ireland*, 16 February 2023, ECLI:EU:C:2023:115’ para. 134.

<sup>81</sup> Luke Dimitrios Spieker, ‘It’s Solidarity, Stupid!’ (*Verfassungsblog*, 7 May 2025) <<https://verfassungsblog.de/its-solidarity-stupid/>> accessed 6 September 2025, Underlying reasoning: Its solidarity, stupid!, para. 4, ‘Such an understanding, that solidarity is based on a certain form of belonging, finds support in conclusions by Advocate General Capeta’.

Therefore, Spieker claims that such belonging is a central precondition for solidarity between Member States and that is why the Court based EU citizenship on common values in Art. 2 TEU.<sup>82</sup> Finally, De Falco notes that by basing access to free movement rights on genuine ties, the Court sets a precedent for interpreting EU citizenship as a political and not merely an economic bond.<sup>83</sup>

This thesis will be working with the theory that citizenship is not merely a set of rights and duties but requires a bond between the citizen and their state. To accept the opposite conclusion would go against the very reason EU citizenship was established - to lay the foundations of an ever closer union among the peoples of Europe.<sup>84</sup>

### **3.2. Citizenship and EU fundamental values**

The persuasiveness of the Court's argumentation of EU citizenship being an expression of the values in Art. 2 TEU is debated. While some see the logic behind this reasoning, others dispute it and do not see the connection between the two.

O'Neill finds it difficult to find such meaning and writes that citizenship is a deeply personal relationship between a citizen and a state and cannot be reduced to a legal test meant to review Member State's naturalisation laws.<sup>85</sup> He nevertheless points out that the majority of rights attached to EU citizenship manifest themselves when a citizen exercises their free movement rights. The Court could have therefore limited the scope of the judgment to mutual recognition of Maltese citizenship (rather than the granting of Maltese citizenship itself). The legal solution would then be to potentially deprive Maltese citizens, who got their citizenship through a CBI scheme, of their free movement rights on the basis that they do not possess the necessary bond of solidarity with the European community as a fundamental value of the EU without questioning their status as a Maltese citizen.<sup>86</sup> Lastly, he proposes a judicially sanctioned suspension of mutual trust should a Member State be found in breach of Art. 2 values and describes it as an alternative to the (political) suspension of rights by the Council enshrined in

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<sup>82</sup> *ibid.*

<sup>83</sup> Emanuela De Falco, 'Op-Ed: "The End of Citizenship for Sale? A Legal Turning Point in Commission v. Malta (C-181/23)" - EU Law Live' (30 April 2025) <<https://eulawlive.com/op-ed-the-end-of-citizenship-for-sale-a-legal-turning-point-in-commission-v-malta-c-181-23/>> accessed 6 September 2025, para. 13, 'Commission v. Malta is therefore more than an enforcement case'.

<sup>84</sup> Denis Martin, 'Article 21 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) p. 442.

<sup>85</sup> O'Neill (n 76) p. 484.

<sup>86</sup> *ibid.*

Art. 7 TEU. He however warns of the unprecedented implications of this ‘nuclear’ option since it can lead to the suspension of the entirety of the free movement rights.<sup>87</sup>

Cox, meanwhile, proposes far reaching consequences of grounding EU citizenship in fundamental values. He writes that this ruling potentially opens a way to challenge other, not purely transactional national rules that imposes obstacles to obtain citizenship such as administrative fees significantly exceeding the actual cost incurred by the State or ‘*practices which make acquiring citizenship unreasonably slow or difficult.*’<sup>88</sup> De Falco observes that the Court chose to base its reasoning on constitutional principles to avoid importing the contested public international law principle of genuine link<sup>89</sup> which will be discussed in the next section. Van den Brink, once again, does not see the connection between fundamental values and EU citizenship.<sup>90</sup> Spieker sees the judgment as the Court's larger turn to Art. 2 TEU that may foreshadow future rulings such as the upcoming decision considering the violation of LGBTQ+ rights in Hungary.<sup>91</sup>

This thesis follows the reasoning that EU citizenship is grounded in fundamental values. The proposed test will therefore screen those CBI schemes that disregard this connection and consequently are capable of calling into question the mutual trust between Member States.

### **3.3. The genuine link requirement**

There is a debate about whether the Court avoided the genuine link requirement as envisaged in *Nottebohm* by basing EU citizenship on mutual trust and fundamental values, or if the Court's argumentation merely tries to disguise the effort to require that a citizen has actual ties to a state without referring to a problematic and not universally accepted principle of public international law.

Both De Falco<sup>92</sup> and Cox<sup>93</sup> say that the Court does not rely on the genuine link principle. Íñiguez goes a step further and states that the Court violated Malta's right to defend itself – when the

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<sup>87</sup> *ibid* p. 486.

<sup>88</sup> 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 September 2025, A silver lining?, para. 1, ‘While the judgment is a bitter pill for states and businesses that sell citizenship...’.

<sup>89</sup> De Falco (n 83), para. 7, ‘The Court criticizes the Maltese scheme not for failing to establish a genuine link per se...’.

<sup>90</sup> van den Brink (n 70), Eleven mind bending paragraphs, on Paragraph 95, ‘Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States...’.

<sup>91</sup> Spieker (n 81), Introduction, para. 3 in fine, ‘Has this hard case made bad law then?’.

<sup>92</sup> De Falco (n 83), para. 7, ‘The Court criticizes the Maltese scheme not for failing to establish a genuine link per se...’.

<sup>93</sup> Cox (n 88) The future of investor citizenship schemes in the EU, para. 1, ‘The CJEU’s ruling does not require states to impose a genuine link requirement...’.

Court found the Commission's argument unpersuasive, it should have dismissed the action instead of looking for alternative justifications.<sup>94</sup> Van den Brink observes that since *Nottebohm* concerned recognition and not acquisition of citizenship, it is not relevant to the case and neither, by extension, the genuine link principle developed in it.<sup>95</sup>

Kochenov disagrees and states that in every practical sense, the judgment amounts to the introduction of the genuine link logic. He argues that the Court introduces the idea of 'thick identity and belonging' and completely disregards both the Treaty text and all prior case law.<sup>96</sup> Similarly, Spieker says that the Court has not abandoned genuine link but disguised it.<sup>97</sup> He sees genuine link as a requirement of public international law as an expression of the prohibition of abuse of rights. He further argues that if the incompatibility of the scheme with EU law limit only the recognition of Maltese citizenship by other Member States or only the acquisition of EU citizenship, then it can be seen as '*a form of non-recognition in case of an abusive practice and thus reconciled with Nottebohm's genuine link.*'<sup>98</sup>

This thesis argues that there is little difference in practice between the genuine link principle and the Court's 'special relationship' reasoning.<sup>99</sup> Some kind of bond between the citizen and the State has to exist in both cases. The next chapter deals with this topic in more detail.

### **3.4. Practical implications of the judgment**

Malta did not ask to Court to limit the temporal scope of the judgment so it now has *ex tunc* effects.<sup>100</sup> The debate therefore centres around the question what are the consequences of this for those passport holders who applied for the Maltese scheme in good faith that it is lawful, for Malta itself and for other Member States.

O'Neill begins by reiterating, citing AG Medina's opinion in *Commission v Hungary*,<sup>101</sup> that judgments in infringement proceedings cannot require a Member State to change its laws in a

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<sup>94</sup> Íñiguez (n 75), *The Mystery of the (Missing) Genuine Link*, para. 4, 'The substantive merits of relying on the principle of solidarity – or, indeed, on the "genuine link" requirement – fall beyond the scope of this Op-Ed'.

<sup>95</sup> van den Brink (n 70), *The disappearance of the genuine link*, para. 1 in fine, 'While the Court agreed with the Commission that Malta's CBI scheme violated Articles 4(3) TEU and Article 20 TFEU...'

<sup>96</sup> Kochenov (n 69), *Away with liberal tolerance*, para. 3, 'Now the Commission v. Malta's bottom-line is this: law is not enough to make a citizen in any national democracy'.

<sup>97</sup> Spieker (n 81) *Concrete requirement: The genuine link in disguise*, para 1 et seq., 'Now the Commission v. Malta's bottom-line is this: law is not enough to make a citizen in any national democracy'.

<sup>98</sup> *Ibid*, para. 4 in fine, 'First, Union citizenship emerges from an interaction of two legal orders – EU and national'.

<sup>99</sup> *Commission v Malta* (n 1) para. 96 et seq.

<sup>100</sup> Cox (n 88), *Some may lose their golden passports*, para. 3, 'The judgment therefore has effect *ex tunc*...'

<sup>101</sup> 'Opinion of Advocate General Medina in Case C-271/23 *Commission v Hungary*, 27 February 2025, ECLI:EU:C:2025:128.', para. 33 and the case law cited.

particular way or even at all.<sup>102</sup> He goes on to say that the judgment has theoretically made it possible for national authorities of other Member States to refuse to recognise the rights of certain Maltese citizens based on the violation of mutual trust by Malta. However, such an alternative is unlikely and, in any case, difficult to execute in practice since there is no way to tell which Maltese citizens obtained their passports through the CBI scheme.<sup>103</sup> After all, their passports aren't 'literally golden' as Peers aptly points out and adds, rather provocatively, that immigration authorities might profile Maltese citizens with the biggest Rolexes, although this is almost certainly a hyperbole on his part.<sup>104</sup>

Van den Brink is of the opinion that the Court should have limited the temporal scope of the judgment of its own initiative.<sup>105</sup> He also writes that many other citizenship acquisition models are violating EU law at this point, such as the practice of Spain and Portugal granting nationality to descendants of Sephardic Jews exiled in the 15<sup>th</sup> and 16<sup>th</sup> century without generational limitations.<sup>106</sup> Cox anticipates that other Member States may pressure Malta into revoking the passports of problematic individuals but says that it would be complicated and decisions by Malta revoking nationality of those individuals would face legal challenges and demands for the restitution of the money spent. The affected individuals might even cite general principles of EU law in their defence such as legal certainty and legitimate expectation.<sup>107</sup> Finally, Fripp wonders what length of residence would satisfy the Court and negate the purely transactional nature of the scheme – a weekend? A week?<sup>108</sup> This thesis addresses the question whether the Court should have introduced an *ex nunc* limitation on its own motion in the next chapter.

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<sup>102</sup> O'Neill (n 76), p. 478.

<sup>103</sup> *ibid* p. 480.

<sup>104</sup> Steve Peers, 'EU Law Analysis: Pirates of the Mediterranean Meet Judges of the Kirchberg: The CJEU Rules on Malta's Investor Citizenship Law' (*EU Law Analysis*, 30 April 2025) <<https://eulawanalysis.blogspot.com/2025/04/pirates-of-mediterranean-meet-judges-of.html>> accessed 6 September 2025, Comments - Investor citizenship schemes, para. 4, 'But can another Member State now refuse to recognise the investor citizenship granted by Malta?'

<sup>105</sup> van den Brink (n 70), Unrestricted in time and scope?, para. 2, 'First, unless provided otherwise, CJEU judgments have automatic retroactive effect'.

<sup>106</sup> *ibid* para. 4, 'Moreover, while the case is about the legality of one specific CBI scheme, the reach of the Court's reasoning is much wider'.

<sup>107</sup> Cox (n 88), Some may lose their golden passports, para. 5, 'Individuals who are faced with losing their investor citizenship because of the judgment may advance arguments based on general principles of EU Law...'

<sup>108</sup> Erick Fripp, 'EU Court of Justice Finds Malta "Golden Passports" Scheme Incompatible with EU Law' (*EJIL: Talk!*, 9 May 2025) <<https://www.ejiltalk.org/eu-court-of-justice-finds-malta-golden-passports-scheme-incompatible-with-eu-law/>> accessed 6 September 2025, para. 9 in fine, 'It is a marked feature of its decision that the Court does not even suggest the separate existence of any "genuine link" requirement in international law'.

### **3.5. Research gap**

The academic discussion about the judgment in *Commission v Malta* has focused mainly on the nature of EU citizenship, its relationship with fundamental values of the EU, the genuine link requirement, and practical implications of the Court's decision. So far, the issue of how the Court might rule on a different version of the scheme, should Malta change the parameters to lessen its transactional nature or another Member State introduces its own, has not been addressed. This thesis will therefore attempt to design a test the Court might use to determine whether a particular investor citizenship scheme violates EU law. It will balance the sovereignty of Member States with the aim of preserving the integrity of EU citizenship, focusing on the degree to which EU fundamental values are being violated, whether the transactional nature is so dominant for the scheme to be classified as 'purely transactional' and whether the overall design of the scheme is capable to call into question mutual trust between Member States.

## 4 Theoretical basis

This chapter develops a theoretical basis for the design of the test for CBI schemes and their compatibility with EU law in the following chapter. It will look at the main differences between the argumentation of the AG and the Court. The purpose of this is to assess the persuasiveness of each argument to then better develop the test and find balance between state sovereignty and EU citizenship integrity. The issue of whether the Court should have allowed for an *ex nunc* temporal limitation of the judgment despite Malta not asking for it is then examined. The chapter will also look at other relevant points of law which were not addressed in the judgment and are relevant to the design of the test: (i) principle of prohibition of abuse of EU law (mentioned by the AG, but not dealt with since it was not part of the Commission's argumentation)<sup>109</sup>, and (ii) the relationship between the principle of sincere cooperation in EU law and the principle of good faith in public international law.

### 4.1 Main points of difference between the judgment and the AG opinion

#### 4.1.1 *The role of the sincere cooperation principle in connection to Art. 20 TFEU*

The AG advises the Court in his opinion not to examine Malta's compliance with Art. 4(3) TEU enshrining the principle of sincere cooperation since the conduct that allegedly breaches this provision is not distinct from the conduct allegedly breaching Art. 20 TFEU according to the Commission's action.<sup>110</sup> The Court nevertheless went on to conclude that Malta has indeed violated both Art. 4(3) TEU and Art. 20 TFEU by the same conduct, i.e. operating a purely transactional CBI scheme.<sup>111</sup>

To support his claim, the AG cites the Court's decision in *Commission v Slovenia* where the Court ruled that:

*'(A) failure to fulfil the general obligation of sincere cooperation following from Article 4(3) TEU is distinct from a failure to fulfil the specific obligations in which that general obligation manifests itself. Therefore an infringement of that general obligation may be found only in so far as it covers conduct distinct from that which constitutes the infringement of those specific obligations.'*<sup>112</sup>

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<sup>109</sup> Opinion of AG Collins (n 8) para. 51.

<sup>110</sup> *ibid* para. 40.

<sup>111</sup> *Commission v Malta* (n 1) para. 121.

<sup>112</sup> *Commission v Slovenia* (n 27) para. 121 (emphasis added).

He then infers from this that breach of sincere cooperation should not be examined since the same conduct is covered by breach of a specific obligation based on Art. 20 TFEU.<sup>113</sup> However, this thesis reaches a different conclusion from the cited case law and claims that the criterion for exclusion of assessment under Art. 4(3) is not whether the conduct breaching the two articles is the same but rather whether the conduct already breaches an article which is a specific expression (manifestation) of Art. 4(3) TEU (see the underlined passage). If so, there is indeed no need to also include the breach of the general principle of sincere cooperation since that would be redundant. The breach of the principle is already established by referring to its specific expression in a different article. In *Commission v Malta* however, the Court ruled that Art. 20 TFEU is an expression of the values in Art. 2 TEU and not the duty of sincere cooperation in Art. 4(3) TEU.<sup>114</sup> Consequently, the condition of applying the rule cited by the AG is not fulfilled and the AG's objection that the Commission alleges breaches of both articles by the same conduct is therefore made irrelevant. Based on the foregoing, this thesis submits that breach of Art. 20 TFEU can stand alongside the breach of Art. 4(3) TEU because Art. 20 TFEU is not a specific expression of the principle of sincere cooperation.

Art. 4(3) TEU has been in the past relied upon by the Court in the process of constitutionalising EU law<sup>115</sup>, be it e.g. establishment of supremacy,<sup>116</sup> direct effect of directives<sup>117</sup>, or state liability.<sup>118</sup> Furthermore, it provides a duty of abstention with regard to any measure which could jeopardize the attainment of the Union's objectives.<sup>119</sup> It is on these bases that the Court uses the principle of sincere cooperation to provide for judicial review of naturalisation proceedings and prevent Malta from jeopardising the attainment of the AFSJ by offering EU citizenship for a predetermined payment.

#### 4.1.2 *Genuine link*

So far, the Court saw genuine link as a requirement Member States can impose on their nationals in order to retain their nationality.<sup>120</sup> Although the literature is divided whether the Court in *Commission v Malta* either does not rely on the genuine link principle or if the principle is merely concealed in the reasoning behind references to constitutional principles, the reference

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<sup>113</sup> Opinion of AG Collins (n 8) para. 40.

<sup>114</sup> *Commission v Malta* (n 1) para. 93.

<sup>115</sup> Marcus Klamert, 'Article 4 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights : a commentary* (Oxford University Press 2019), p. 55.

<sup>116</sup> *Costa/ENEL* (n 6) p. 594.

<sup>117</sup> 'Judgment of 20 September 1988, Moormann, C-190/87, ECLI:EU:C:1988:424', para. 24.

<sup>118</sup> 'Judgment of 19 November 1991, Francovich, C-6/90 and C-9/90, ECLI:EU:C:1991:428', paras. 33-4 and 36.

<sup>119</sup> Klamert (n 115), p. 56.

<sup>120</sup> See for example *Tjebbes* (n 38) para. 39.

to solidarity and good faith suggests that the Court does not believe that citizenship is only a legal bond without any extra-legal conditions to be imposed as argued by Kochenov.<sup>121</sup> Conversely, AG Collins, relying on the principle of mutual recognition and the text of Declaration no. 2, found no such requirement in EU law and recommended to dismiss the action.<sup>122</sup> However, the literature on genuine link in EU law before the judgment (albeit on case law relating to loss of citizenship rather than its acquisition) already observed that the Court does not give Member States an absolute discretion in matters of national citizenship.

In his commentary on the Court's decision in *Udlændinge- og Integrationsministeriet*<sup>123</sup>, Wagner stresses that the Court has rejected the idea that Member States retain an absolute right to determine the personal scope of the Treaties and that Declaration no. 2 is an interpretative instrument that is not to be construed as a legal basis for Member States to alter the personal scope of EU law.<sup>124</sup> In his view, the understanding of nationality in context of EU citizenship as a special bond of solidarity and good faith not only allows Member States to make nationality dependent on a genuine link, but also *requires* a certain discernible form of it.<sup>125</sup> He goes on to speculate that this '*Unionised understanding of nationality*' may help support the Commission's position in its (then ongoing) infringement action against Malta.<sup>126</sup>

Interestingly, van den Brink observes that supporters and opponents of the genuine link requirement in EU law have been working with different conceptions of it. Supporters wish to use it in the context of acquisition of citizenship but draw on the *Nottebohm* judgment of the ICJ which deals with recognition of citizenship. Similarly, critics go against the idea of requiring genuine link in recognition of citizenship and assume that this criticism automatically transfers to its use in acquisition of citizenship.<sup>127</sup> He goes on to propose the establishment of practical standards and proxies to genuine link<sup>128</sup>, citing Carens, who says that the only

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<sup>121</sup> Kochenov (n 69), *The Solidification of the Illiberal Union*, para. 2, 'Make no mistake: the Court hints – for the first time – that EU citizenship bond is not only legal in nature'.

<sup>122</sup> Opinion of AG Collins (n 8) para. 58.

<sup>123</sup> 'Judgment of 5 September 2023, *Udlændinge- Og Integrationsministeriet*, C-689/21, ECLI:EU:C:2023:626' paras. 10-13 and 28-58.

<sup>124</sup> Lorin Johannes Wagner, 'The Disruptive Influence of EU Law in Nationality Matters: The Genuine Link Trajectory and Judicial Engineering in *Udlændinge- Og Integrationsministeriet*' (2024) 20 *European Constitutional Law Review* 615 pp. 626-627.

<sup>125</sup> *ibid* p. 627.

<sup>126</sup> *ibid* p. 629.

<sup>127</sup> Martijn van den Brink, 'Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?' (2022) 23 *German Law Journal* 79 p. 81.

<sup>128</sup> *ibid* p. 85.

objective criteria are residence and passage of time.<sup>129</sup> He also proposes the following thought process: if it is true that migrants with social membership to the country have a moral claim to acquire citizenship then migrants without such social membership do not have a moral claim to acquire citizenship. However, this does not mean that it is morally impermissible to grant citizenship to migrants without genuine links on other grounds.<sup>130</sup> He concludes by saying that it is morally unacceptable to make recognition of citizenship dependant on genuine link since it would result in unacceptable uncertainty for mobile EU citizens who could lose their rights by exercising their freedom of movement by losing genuine link with their country of origin and at the same time never acquiring nationality of the host Member State.<sup>131</sup>

Wagner's and van den Brink's arguments were selected to represent both sides of the dispute about the requirement of genuine link in EU law. Despite both articles being published before the judgment, they are still relevant since there is a lack of consensus even after the judgment whether the Court relied on the principle or not.

It seems from the foregoing that the collocation '*genuine link*' in the context of acquisition of citizenship has been prudently avoided by the Court for its high degree of controversy. But there seems to be little difference between it and the '*special bond*' line of argumentation that the Court relies on. It is understandable that the Court relied on the Treaties and their core provisions rather than contested principles of public international law. Nevertheless, the result is the same. The judgment effectively calls upon Member States to enforce in their naturalisation proceedings at least some level of bond between the applicant and the state and to refrain from introducing purely transactional investor citizenship schemes.

The AG's argumentation relied on Declaration no. 2 and state sovereignty. But since Declaration no. 2 is only an instrument of interpretation and Member States still have to have due regard to EU law when laying down citizenship acquisition criteria,<sup>132</sup> the Court's argumentation is more persuasive.<sup>133</sup> Therefore, for the purposes of the test that will be proposed in the following chapter, it is necessary to include a step that will assess the existence and extent of bond between the applicant and the Member State.

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<sup>129</sup> Joseph H Carens, 'The Theory of Social Membership', *Ethics of Immigration* (Oxford University Press 2013), p. 165.

<sup>130</sup> van den Brink (n 127) p. 88.

<sup>131</sup> *ibid* pp. 82-83 and 96.

<sup>132</sup> Udlændinge- Og Integrationsministeriet, (n 123), paras. 27-28.

<sup>133</sup> See Wagner (n 124).

## 4.2 Temporal limitation of the Judgment

This section addresses the question posed in the previous chapter, i.e. whether the Court should have limited the temporal scope of the Judgment to have only *ex nunc* effects allowing successful applicants who finished the naturalisation process before the judgment to retain their passports. The section will first enumerate the conditions that have to be met for a judgment of the Court to be able to have such limitation and then discuss its absence in *Commission v Malta*.

### 4.2.1 Conditions for granting temporal limitation

Since there is no legal basis in the Treaties for the Court to limit the temporal effects of its judgments, it came up in its case law with criteria under which it is willing to do so.<sup>134</sup> They are summarised in AG Stix-Hackl's opinion in *Meilicke* as follows:

- (i) there is a risk of serious economic repercussions owing to large number of legal relationships entered into in good faith on the basis of national rules considered to be validly in force, and
- (ii) it must be apparent that individuals and national authorities have been led into adopting practices which do not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions.<sup>135</sup>

For the purposes of the discussion in the next section, it is important to keep in mind that the Court grants a request for temporal limitation of judgments only in exceptional circumstances and usually in financial and taxation matters.<sup>136</sup>

### 4.2.2 Absence of temporal limitation in *Commission v Malta*

As for serious economic repercussions, since free movement rights are essential for accessing the single market, the deprivation of those rights should qualify as a serious economic repercussion. Moreover, if serious economic repercussions are enough for the Court to issue a temporal limitation of its judgment, then loss of the whole status as an EU citizen should *a fortiori* qualify as well. The issue is whether the legal relationship (in this case citizenship) has

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<sup>134</sup> Michael Lang, 'Limitation of Temporal Effects of CJEU Judgments-Mission Impossible for Governments of EU Member States' [2013] WU International Taxation Research Paper Series No. 2013 - 06 p. 2.

<sup>135</sup> 'Opinion of Advocate General Stix-Hackl in Case C-292/04 Meilicke, 5 October 2006, ECLI:EU:C:2005:676.' para. 38.

<sup>136</sup> See for example 'Case 43-75 Defrenne, ECLI:EU:C:1976:56, para. 75; Case C-415/93, Bosman, ECLI:EU:C:1995:463, para. 145; Case C-437/97 EKW and Wein & Co, ECLI:EU:C:2000:110, para. 60'.

been entered into in good faith by the successful applicants of the Maltese CBI scheme. At least until the first notice by the Commission to Malta, the applicants had no way of suspecting that the scheme breaches EU law. But even after the infringement proceedings against Malta began, because of the absence of case law on acquisition of citizenship, there was no way to know whether the scheme could violate EU law, even more so after AG Collins' recommendation to the Court to dismiss the action. Therefore, up to the date of the judgment, the applicants were in good faith that the scheme is legal.

As for objective legal uncertainty, the Court ruled that this condition is satisfied when the Court has not yet ruled on a particular provision.<sup>137</sup> As seen above, there was no case law prior to *Commission v Malta* on the acquisition of citizenship. Genuine link was still just a condition Member States could require but not an obligation.<sup>138</sup> Again, AG Collins' opinion supported the conclusion that the scheme is legal.

Both conditions therefore appear to be satisfied. It is unfortunate that Malta has not asked the Court for a temporal limitation. A ruling outlawing a CBI scheme unlimited in temporal scope has serious consequences for the legal certainty of the successful applicants (potential non-recognition of free movement rights by other Member States) and their legitimate expectations (that their passports have been obtained legally). Therefore, this thesis submits that an *ex nunc* temporal limitation should be granted to such judgments in the future.

### **4.3 Prohibition of abuse of EU law**

Prohibition of abuse of EU law is a general principle of EU law which '*permits and requires national administrative and judicial bodies to not give effect to EU law, in very specific situations on a case-by-case basis, when EU law is sought to be relied upon in an abusive manner*'<sup>139</sup> The Court has developed a two-step test to see whether a given situation amounts to an abuse of EU law. The first step requires a combination of objective circumstances in which, despite formal observance of EU rules, the purpose of those rules has not been

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<sup>137</sup> 'Judgment of 9 March 2000, *EKW and Wein & Co*, C-437/97 ECLI:EU:C:2000:110' para. 58.

<sup>138</sup> Tjebbes (n 38) para. 48.

<sup>139</sup> Graham Butler and Karsten Engsig Sørensen, 'The Prohibition of Abuse of EU Law: A Special General Principle' in Katja S. Ziegler, Päivi Johanna Neuvonen and Violeta Moreno Lax (eds), *Research handbook on general principles in EU law: constructing legal orders in Europe* (Edward Elgar Publishing Limited 2022) p. 403.

achieved.<sup>140</sup> The second step requires intention to obtain advantage from EU rules by artificially creating the conditions laid down for obtaining it.<sup>141</sup>

The above-mentioned decision of the ICJ in *Nottebohm* also concerns prohibition of abuse of law. However, it concerns non-recognition of citizenship between states in public international law so its conclusions cannot be automatically applied to intra-EU situations. Yet it can serve as a reminder that the duty to recognise a person as a citizen of a particular country is not absolute even under international law.

Although the Commission has not brought up abuse of EU law in its argumentation, it is still useful to look into it and see, whether the practice of selling EU citizenship can be seen as abuse of EU law. Conveniently, a similar arrangement has already been deemed as abusing EU law by the Commission – marriages of convenience. This section will compare CBI schemes with marriages of convenience and examine if there is any equivalence between the two schemes.

#### 4.3.1 *Marriages of convenience – a comparison*

The Commission defines a marriage of convenience as *'a marriage contracted for the sole purpose of conferring a right of residence under EU law on a non-EU national who would otherwise not be able to benefit from such a right.'*<sup>142</sup> The Citizens' Rights Directive 2004/38/EC ('CRD') specifically mentions marriages of convenience in Art. 35 entitled „Abuse of Rights’<sup>143</sup> CBI schemes are very similar in this regard. With a certain degree of hyperbole, citizenship can be seen as a marriage between a citizen and their State, a relationship of solidarity and good faith. Both marriages of convenience and CBI schemes will be put to the abovementioned test to see if they fulfil both requirements.

Marriages of convenience fulfil the first criterion of the above mentioned test – the rules are formally observed (an EU national and non-EU national entered into a lawful marriage) but the purpose of the rules is not achieved (rights were conferred on a non-EU national despite that person materially having no relationship with or romantic interest in the EU national). As for CBI schemes, the first step is, as with marriages of convenience, quite easily fulfilled. A person

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<sup>140</sup> 'Judgment of 14 December 2000, Emsland-Stärke, C-110/99, ECLI:EU:C:2000:695' para. 52.

<sup>141</sup> *ibid* para. 53.

<sup>142</sup> 'COMMISSION STAFF WORKING DOCUMENT Handbook on Addressing the Issue of Alleged Marriages of Convenience between EU Citizens and Non-EU Nationals in the Context of EU Law on Free Movement of EU Citizens SWD(2014) 284 Final, Document 52014SC0284, CELEX:52014SC0284' <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0284>> accessed 28 September 2025 p. 5.

<sup>143</sup> 'Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States, CELEX: 32004L0038' Art. 35.

formally observes the rules of Art. 20 TFEU by obtaining a Maltese passport but the purpose of the provision is not achieved since citizen's rights are conferred on a person who has little to no connection to Malta.

The second part of the test is subjective. It is true that it is difficult to prove that there is no genuine relationship between two people and also that there is no bond of solidarity and good faith between a citizen and their Member State. Still, the CRD already gives marriages of convenience as an example of abuse of rights and authorises Member States to adopt measures to refuse, terminate or withdraw rights provided such measures are proportionate and have procedural safeguards.<sup>144</sup> Having to prove the existence of a bond is therefore already a part of assessment in one case of abuse of rights. However, since CBI schemes are not explicitly deemed abusive in EU legislation, the general principle of prohibition of abuse of EU law would apply and higher degree of attention to proportionality and procedural safeguards is needed.

When assessing the intention of acquiring citizenship only for EU benefits, it is necessary to rely on indirect indicators since it is highly unlikely that an applicant would disclose such information. Attention could be paid for example to whether the applicant is (self) employed in the Member State, if, as soon as they fulfil the minimum residency requirements, the applicant leaves the Member State and either does not return or returns sporadically, or if they used the assistance of an agency in obtaining citizenship in exchange for remuneration.

Based on the foregoing, this thesis proposes that there is enough similarity between marriages of convenience and CBI schemes to say that in those schemes where the subjective part of the test can be proven, i.e. that such schemes are being used by the applicants solely for the purpose of acquiring EU citizenship and rights connected with it, such schemes can be used to violate the principle of prohibition of abuse of rights. For the purposes of the test proposed in the next chapter, it would therefore be necessary to include a step that will examine whether the scheme is allowing applicants to abuse the link between national citizenship and EU citizenship to obtain EU citizenship, generating revenue for the Member State in return, and what is the position of the Member State towards this situation.

#### **4.4 Relationship between the principles of sincere cooperation and good faith**

This section examines the relationship between the principle of sincere cooperation (further in text also as 'loyalty') in EU law and principle of good faith in public international law. The

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<sup>144</sup> *ibid.*

purpose is to see whether Member States adopting CBI schemes have the duty under EU law to act in good faith when enacting citizenship acquisition criteria. The principle of sincere cooperation obliges Member States and the EU to, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.<sup>145</sup> It is difficult to find one all-encompassing definition of good faith in international law. If we therefore only focus on the relevant area of treaty interpretation, the Max Planck Encyclopedia of Public International Law offers the following characteristic:

*'It requires the parties to a treaty, contract, or any other kind of international transaction to deal honestly and fairly with each other. Each party shall act reasonably, taking into account the just expectations of the other party/parties, truthfully disclosing all relevant motives and purposes. Each party shall finally refrain from taking unfair advantage due to a literal interpretation, if the mere focus on the wording would fall short of respecting the objects, purposes, and spirit of the agreement.'*<sup>146</sup>

Klamert writes that originally, the principle of loyalty was conceived as *'a variation of both pacta sunt servanda/ good faith and the German principle of federal fidelity.'*<sup>147</sup> In his assessment of the relationship between the two principles, he observes that loyalty is an enhanced obligation of good faith since it not only ties Member States together but also ties them to the EU institutions.<sup>148</sup> To support this view, he cites Eckes who says that *'only loyalty requires devotion to the ultimate and overarching cause of making the Union a union'* while good faith *'does not commit actors to any additional cause.'*<sup>149</sup> Also, the Court has in the past referred to loyalty as *'principle of cooperation in good faith'*<sup>150</sup> This approach together with the analysis above suggests that both principles are closely related and that loyalty stems from good faith and is its expression with enhanced duties.

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<sup>145</sup> 'Consolidated Version of the Treaty on European Union, OJ C 202, 7.6.2016, CELEX:02016M/TXT-20250315', Art. 4(3).

<sup>146</sup> Markus Kotzur, 'Good Faith (Bona Fide)' (*Max Planck Encyclopedia of Public International Law*, 2009) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1412?prd=MPIL>> accessed 29 September 2025 para. 20.

<sup>147</sup> Marcus Klamert, 'Loyalty and Solidarity as General Principles' in Katja S Ziegler, Päivi Johanna Neuvonen and Violeta Moreno Lax (eds), *Research handbook on general principles in EU law : constructing legal orders in Europe* (Edward Elgar Publishing Limited 2022) p. 118.

<sup>148</sup> *ibid* p. 120.

<sup>149</sup> Christina Eckes, *EU Powers under External Pressure : How the EU's External Actions Alter Its Internal Structures* (Oxford University Press 2019) p. 46.

<sup>150</sup> See for example 'Judgment of 11 December 2007, Skoma-Lux, C-161/06, ECLI:EU:C:2007:773' para. 41.

In the context of CBI schemes, the prohibition of taking advantage of literal interpretation of a provision which goes against the objectives of the Treaties is especially important. Art. 20 TFEU states that ‘*every person*’ holding a nationality of a Member State shall be a citizen of the Union. A person becomes a citizen of the EU *ex lege* the moment they obtain the nationality of a Member State. There is no administrative procedure and therefore no room for any assessment whether the person in question has any links to the Member State they became a citizen of. This means that Member States rely on and have to have trust in each other’s naturalisation proceedings. A Member State operating a CBI scheme uses this trust and the attractiveness of the rights connected to EU citizenship to generate revenue. It takes the literal meaning of ‘*every person*’ and takes it to mean that it can give out EU passports to anybody willing to offer a sufficient amount of money.

Given that nationality is a bond between a citizen and their state, it does not make much sense to pool sovereignty in this area. Common EU rules on citizenship acquisition would replace these unique systems with one-size-fits-all model which is undesirable since pluralism is one of the fundamental values of the EU.<sup>151</sup> What remains therefore is to leave citizenship in the competence of Member States and trust that they will not abuse it for personal gain, frustrating the objectives of the Treaties, namely attainment of the AFSJ, in the process. By committing to the ‘*additional cause*’ of the EU, Member States willingly accept a higher standard of good faith to sincerely cooperate with the EU and each other to attain the objectives which flow from the Treaties. The test of compliance of CBI schemes this thesis will propose therefore has to include a step when the sincere cooperation of the Member State enacting a particular CBI scheme is examined.

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<sup>151</sup> Treaty on European Union (n 145) Art. 2.

## 5 Test for compliance of CBI schemes with EU law

The aim of this chapter is to design a test which the Court might use to assess whether any particular CBI scheme enacted by a Member State is compliant with EU law. The conclusion reached in *Commission v Malta* is limited to the facts of the case given that it is a result of infringement proceedings against a Member State pursuant to Art. 258 TFEU. Therefore, given the sensitive nature of citizenship, the test should be very narrow in scope in the sense that it should outlaw only those CBI schemes that are purely transactional, i.e. citizenship is granted for a predetermined payment with no other significant obligations imposed, be it, for example, residency requirements, language and cultural assessments or comprehensive security background checks. If there is, however, reasonable doubt as to the transactional nature of the scheme, it should pass the test and not infringe EU law.

The test is to be used on CBI schemes only. Therefore, the preliminary question the Court has to answer is whether the examined naturalisation procedure is indeed a CBI scheme. If it is not, then it falls outside the scope of the test. It is important to note that not every pecuniary charge connected with obtaining citizenship, such as an administrative fee, counts as an investment requirement. The sum of money required should be sufficiently large as to either explicitly or de facto constitute an investment into a Member State.

### 5.1 Steps of the test

Relying on the conclusions reached in the previous chapter, the test consists of the following steps:

- (i.) Existence of bond between the applicant and the Member State;
- (ii.) Sincere cooperation of the Member State; and
- (iii.) Member State does not enable systematic abuse of rights.

The steps are to be taken in this order and should the examined scheme fail at any step, the remaining step(s) are not necessary and the scheme is to be deemed unlawful under EU law.

#### 5.1.1 *Existence of bond between the applicant and the Member State*

The first step of the test looks at the existence and extent of bond between the applicant and the Member State required to obtain citizenship under the CBI scheme. Since applicants can have various degrees of links to the Member State, only the weakest acceptable link that leads to citizenship is relevant. Subjective elements of such a link (sense of belonging, allegiance, or intent to keep living in the country) are not suitable criteria since they are difficult to determine

and vary greatly between applicants. A criterion that would objectively measure such a bond is therefore needed. Relying on Carens<sup>152</sup>, this step uses residence and passage of time to determine what degree of bond Member State requires of the applicants.

It is unfeasible (and undesirable) to set an EU-wide minimum period of residence required to prove the bond. It will be up to the Member States to determine what length of residence they consider appropriate. If no period of residence is required (like in the 2013 Maltese version), the scheme fails the test automatically. The assessment gets difficult from this point. It is not unreasonable to suggest that a very short residency is not enough to develop ties to a state and points towards the conclusion that such a requirement was put into law merely to formally satisfy this step of the test. Moreover, as seen in Malta, a Member State can have a reasonably long residence requirement on paper but if it is not enforced in practice, then it can hardly be taken as proof of existence of a bond.

As for very short residence requirement, certain guidance can be found in Art. 16(1) of the CRD which states that the right of permanent residence should be granted to EU citizens after five years of continuous legal residence.<sup>153</sup> Further, paragraph 3 of the same article states that the period should not be affected by absences not exceeding a total of six months in a given year with exceptions such as military service.<sup>154</sup> A new secure residence is then established which is no longer dependent on economic activity or self-sufficiency.<sup>155</sup> While the article states the maximum period Member States can require, it can be inferred that a relationship which allows for such a secure residence is developed in a matter of years. Therefore, residence requirements in a matter of months or even days can be seen as too short, although assessment of any given CBI scheme has to be done on a case-by-case basis and it is always necessary to strictly observe the principle of proportionality and to take into account all other relevant attributes of the scheme, especially those that might mitigate an apparently short residency requirement.

As for unenforced standard length residency requirement, it is unreasonable to require an applicant to reside in a Member State for the whole prescribed period. Inspiration for a balanced solution can again be found in the CRD – residency is unenforced if an applicant can spend more time out of the Member State they wish to become a citizen of than in it (exceptions listed

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<sup>152</sup> Joseph H Carens (n 129).

<sup>153</sup> Directive 2004/38/EC (n 143) Art. 16(1).

<sup>154</sup> *ibid* Art. 16(3).

<sup>155</sup> Elspeth Guild, Steve Peers and Jonathan Tomkin, 'Right of Permanent Residence', *The EU Citizenship Directive: A Commentary* (Oxford University Press 2019) p. 197.

in the CRD would apply here as well). The possibility of having to satisfy shorter residency in exchange for greater investment (as was the case in Malta<sup>156</sup>) is also a sign of effectively unenforced residency requirement. Enforcing a residency requirement in practice must in any case be conducted with utmost care for and attention to the privacy of the applicants. The rule should be not to *a priori* monitor all applicants at all times but rather to raise concerns only in cases where total inactivity is detected e.g. lack of interaction with the tax administration or other state bodies or no evidence of dependent children being enrolled in an educational institution. Again, proportionality needs to be observed and the conclusion of a lack of enforcement must be reached only in exceptional circumstances and supported by strong evidence.

Keeping in mind the narrow scope of the test, the Court should therefore at this stage deem unlawful those CBI schemes that have no residency requirements at all. Of those that do have residency requirements in place, only the schemes with extremely short residency period during which no kind of meaningful bond could possibly be established or systematically unenforced standard length residency period should be deemed unlawful.

#### 5.1.2 *Sincere cooperation of the Member State*

The second step of the test looks at the intentions of the Member State behind enacting its CBI scheme. Its purpose is to outlaw those schemes that have as their primary aim to use the link between national citizenship and EU citizenship for financial profit. In the case of Malta, the lack of sincere cooperation was seen by the Court, among other things, in marketing its scheme through authorised private third party agents as a way to obtain EU citizenship; applications may have been submitted only through those agents.<sup>157</sup> The text on the agents' website quoted in *Commission v Malta* advertised that the scheme offered:

*'right to reside, study and work in any of the 27 countries of the European Union as well as citizenship of an EU country for the entire family of the applicant, including financially dependent and unmarried children under 29 years old, as well as parents over 55 years old'*<sup>158</sup>

The main metric of this step is therefore how the scheme is presented to the potential applicants. Whether it is indeed meant as a genuine alternative to ordinary naturalisation procedure with

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<sup>156</sup> *Commission v Malta* (n 1) para. 109.

<sup>157</sup> *ibid* para. 119.

<sup>158</sup> *ibid*.

EU citizenship being only a collateral benefit or whether EU citizenship is the dominant factor in the marketing of the scheme used to attract investors. This does not mean that there cannot be any mention of EU citizenship at all in the presentation of the scheme. The marketing of the scheme just cannot result in a situation when the primary motivation of the applicants would be obtaining EU citizenship rather than the citizenship of the Member State.

It is unlikely that a Member State would advertise a CBI scheme as a way to obtain EU benefits in such a way that it could be seen as advertised by the state itself (e.g. on an official government website or in the legislation's preamble). It is more likely that such an advertisement would be done by third parties who process the applications and collect fees. To preserve state sovereignty, a conclusion that a particular marketing campaign conducted by third parties can be attributed to the Member State can be reached only if its agents are authorised by that Member State and interested persons can apply for the scheme only through those agents. A possibility of a disguised authorisation in the form of indirect support by for example specific subsidies or tax breaks not available to other undertakings should be taken into account. Although, as with unenforced residence requirements, conclusion about a disguised authorisation must be reached only in exceptional circumstances and supported by strong evidence.

Therefore, in this step, those schemes that are advertised either by the Member State itself or through authorised third party agents primarily as a way to obtain rights under EU citizenship should be deemed unlawful. Conversely, when a scheme is advertised primarily as a way to obtain national citizenship or marketing activities primarily focused on EU citizenship by third parties cannot be attributed to the Member State, such a scheme should pass this step of the test.

### *5.1.3 Member State does not enable systematic abuse of rights*

The third and final step of the test ensures that CBI schemes with effective residency requirements enacted in accordance with the principle of sincere cooperation do not allow the applicants to systematically obtain EU citizenship in exchange for a predetermined payment. In his opinion in *Rottman*, AG Maduro proposes that *'the principle of sincere cooperation [...] could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalisation of nationals of non-member States.'*<sup>159</sup>

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<sup>159</sup> 'Opinion of Advocate General Maduro in Case C-135/08 Rottmann, 30 September 2009, ECLI:EU:C:2009:588.' para. 30.

The purpose of the step is therefore to check for systematic abuse of rights i.e. to act as a safety valve against such a potential unjustified mass naturalisation of nationals of non-member States. For a scheme to be deemed unlawful, the Commission has to prove that the mass naturalisation in question is (i) happening in unreasonably large numbers, (ii) is unjustified and (iii) the Member State is either actively participating in or not making a reasonable effort to stop the situation. The difference from the previous two steps is that this step does not look at how the scheme is designed and intended but how it is used by the applicants despite the sincere cooperation of the Member State when enacting the scheme.

As for the unreasonably large number criterion, there has to be a sudden significant increase in applicants for the scheme. This applies especially in cases that suggest some form of organisation of the applicants either between themselves or by a third party. An increase in applications is to be deemed sudden and significant if the relative year on year change in the number of applicants exceeds 25 % (as opposed to the EU average of 6.1 % between 2022 and 2023).<sup>160</sup> To prevent abuse of the threshold, in cases where it is proven that the Member State is complicit, increases that are indicative of being very close to the threshold to circumvent it (e.g. an increase of 24.5 %) should be deemed significant as well. The threshold is set intentionally high to reflect the increased burden of the third step on state sovereignty.

Regarding the second criterion, the mass naturalisation is unjustified when there is no common characteristic that applies to all the applicants and which warrants such a process. An example of a justified mass naturalisation would be previous systematic deprivation of citizenship of political opponents by a totalitarian regime.<sup>161</sup> An example of an unjustified mass naturalisation would be if a Member State was flooded by requests for naturalisation under the direction of a third country and those applicants would not qualify as asylum seekers under international law.

Lastly, the Member State cannot be complicit in the unjustified mass naturalisation (in that case the step is failed automatically) and at the same time has to make reasonable efforts to stop it. This is the most sensitive part of the test because at this point, the Member State has ensured effective residency requirements, acted in accordance with the principle of sincere cooperation when enacting the scheme and is not knowingly abetting large numbers of applicants to abuse

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<sup>160</sup> Eurostat, 'Figure 2: Acquisitions of Citizenship, Relative Change, 2022-2023 in Acquisition of Citizenship Statistics - Main Trends in the Acquisition of Citizenship' (2023) <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Acquisition\\_of\\_citizenship\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Acquisition_of_citizenship_statistics)> accessed 11 October 2025.

<sup>161</sup> See Act No. 186/2013 Sb. on the Acquisition and Loss of Citizenship and amending certain other laws (Act on the Citizenship of the Czech Republic) Section 31.

EU law. Only a grave negligence bordering on intent (e.g. intentional disregard for the situation or unwillingness to do anything about it) can result in the scheme being deemed unlawful. It suffices that the Member State is actively trying to find and implement a solution which has the potential to mitigate the situation. As with previous steps, proportionality needs to be observed. If at least some effective steps are being taken (i.e. the number of applicants actually decreases towards the levels before the sudden significant increase), even if the solution is yet being discussed in the national parliament (in this case the measure must have the potential to lead to an actual decrease in the number of applicants), the scheme should pass the test.

Therefore, in this step, those schemes that are allowing for an unjustified mass naturalisation of third country nationals and such a process is either directed by the Member State or the Member State is not making reasonable efforts to stop it should be deemed unlawful.

## **5.2 Standard of proof**

The individual steps of the test have been designed to protect the integrity of EU citizenship while preserving Member State's sovereignty as much as possible. For a scheme to fail the test, its transactional nature has to be so dominant as to be capable of calling into question mutual trust between Member States. The test is therefore meant to outlaw only the most dangerous and purely transactional CBI schemes that threaten the attainment of the AFSJ. Any reasonable doubt that arises in any step of the test should be resolved in favour of the Member State. Should the Court, despite the narrow scope of the test, conclude that a CBI scheme is indeed not compliant with EU law, it should limit the temporal effects of its judgment so that it only has *ex nunc* effects to preserve legal certainty and legitimate expectation of the successful applicants.

## **5.3 Procedural role of the Commission and other Member States**

It is the role of the Commission as the guardian of the Treaties to make sure Member States follow EU law.<sup>162</sup> If it suspects that a Member State has enacted an illegal CBI scheme, it can launch infringement procedure against it enshrined in Art. 258 TFEU. However, the Commission should first attempt to resolve the dispute in informal negotiation and try to persuade the Member State to either repeal the scheme or amend it to bring it in line with EU law. If these negotiations fail, the Commission shall begin the formal procedure by allowing the Member State to submit its observations. Then it shall send firstly a letter of formal notice where it delimits the subject matter and then, if the scheme is still in place, a reasoned opinion

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<sup>162</sup> Treaty on European Union (n 145) Art. 17(1).

giving a more detailed assessment.<sup>163</sup> If the Member State does not comply within the time limit set in the reasoned opinion, the Commission can bring the matter before the Court.<sup>164</sup> Given the high standard of proof and sensitivity of the area of citizenship acquisition, the Commission should make sure that the scheme is so dangerous to the EU legal order that the action for failure to fulfil obligation is warranted before bringing the matter before the Court. Conversely, if there is any doubt in the Commission's mind if the threat of the scheme is sufficiently grave, it should not bring the matter before the Court.

If a Member State suspects that another Member State operates an illegal CBI scheme, it should notify the Commission pursuant to the principle of sincere cooperation.<sup>165</sup> Should the Commission bring the matter before the Court, a Member State can then intervene in the proceedings by submitting its statement.<sup>166</sup>

#### **5.4 Diagram of the test**

The test designed in this chapter involves a lot of decision points. For the sake of clarity and better orientation, a diagram of the test is included on the next page – ‘Diagram of the test’.

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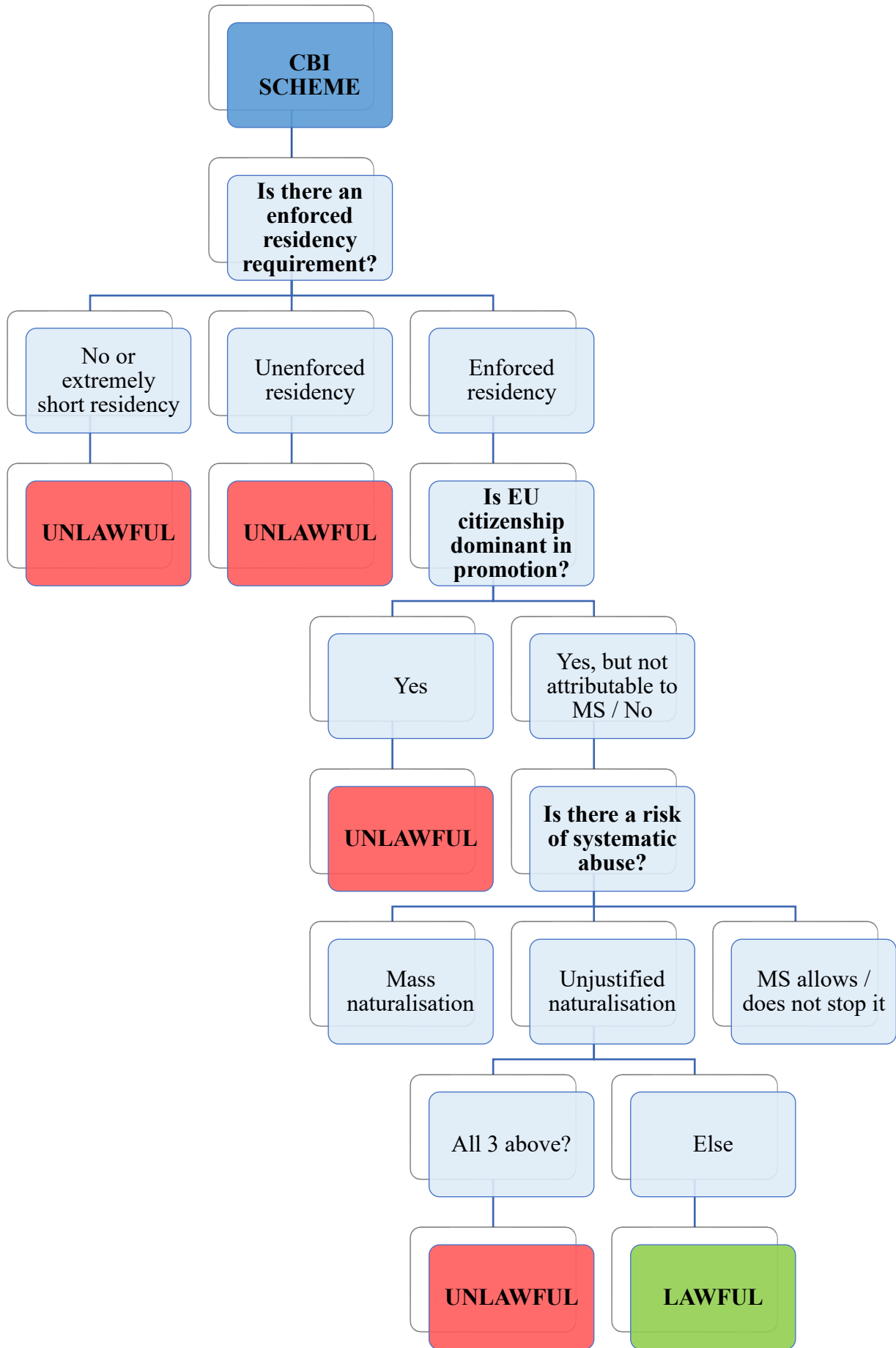
<sup>163</sup> Bernhard Schima, ‘Article 258 TFEU’ in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: a commentary* (Oxford University Press 2019) p. 1779.

<sup>164</sup> Treaty on the Functioning of the European Union (n 3) Art. 258.

<sup>165</sup> Treaty on European Union (n 145) Art. 4(3).

<sup>166</sup> ‘Rules of Procedure of the Court of Justice, OJ L 265, 29.9.2012, CELEX:32012Q0929(01)’ Art. 129 et seq.

# DIAGRAM OF THE TEST



## Conclusion

The aim of this thesis was to critically examine the judgment of the Court in *Commission v Malta*, its implications for the division of competences between the EU and the Member States and to develop a test for compliance of CBI schemes with EU law. Since the area of citizenship belongs to the competence of Member States (albeit with limitations developed by case law) and this was the first time the Court dealt with a case concerning acquisition of nationality, great attention had to be paid to the principle of proportionality. Any limitation to the Member States' right to determine who their nationals are had to be proposed in a manner that affected sovereignty to the least possible extent while still achieving the goal of preserving the integrity of EU citizenship.

The design of the now repealed Maltese CBI scheme was used to illustrate the functioning of such schemes. Particular attention was given to the residency requirement – the fact that it was introduced only after the intervention of the Commission, allegations that it is not sufficiently enforced and that it could be reduced from three years to one year merely for an additional investment. But since the judgment is a result of an action for failure to fulfil obligations pursuant to Art. 258 TFEU, the verdict is closely tied to the facts of the case. Should Malta reintroduce the scheme with altered parameters or another Member State comes up with their own, the Commission would have to initiate new proceedings. It was therefore useful to try and propose a test of compliance with EU law that could apply to any CBI scheme.

The argumentation of the Court as well as the AG was then summarised. Since the Court did not follow the AG's opinion, the purpose was to find out whose arguments are more persuasive and so could be used in the design of the test. AG Collins' reasoning centred around the conclusion that under EU law, there is no genuine link required between a Member State and its citizens. He reaches this conclusion by relying on the non-legally binding Declaration No. 2 and inferring that the Court's case law views genuine link only as a condition that Member States can require of their citizens in order to retain nationality and not as a positive obligation. Conversely, the Court grounded EU citizenship in solidarity as a fundamental value of the EU. It referred to earlier case law's definition of citizenship as a special relationship of solidarity and good faith and ruled that a Member State manifestly disregards such a relationship when it grants citizenship in exchange for a pre-determined payment. It therefore concluded that by implementing the scheme, Malta violated its obligations under Art. 4(3) TEU and Art. 20 TFEU.

Existing literature reacting to the Court's reasoning dealt with the nature of EU citizenship after the judgment, the Court's decision to ground citizenship in solidarity as a fundamental value of the EU, the genuine link requirement, and the practical implications of the judgment, most importantly its *ex tunc* effects. One side argues that citizenship is supposed to be just a legal status that does not require any form of bond between a citizen and the state they are a citizen of. It does not see the connection between solidarity and citizenship the Court makes and points out that there is no legal basis for making genuine link and obligation under EU law. The other side argues that citizenship is not only a set of rights and obligations but also a bond between the citizen and the state and that it is a requirement under EU law. The link between citizenship and fundamental values is understood as a basis for other Member States to refuse rights under EU citizenship to those people who acquire a passport through the scheme. As for the absence of temporal limitation, the literature points out the negative effect on legal certainty of those who obtained a passport through a scheme they thought was legal with some authors suggesting that the Court should have limited the scope of the decision so that it had only *ex nunc* effects.

The theoretical basis of the test was developed by accepting the premise that citizenship is a bond between the citizen and the State since the opposite would go against the very reason EU citizenship was established - building an ever closer union. On the discussion on temporal limitation, it took the view that the effects of a judgment outlawing a CBI scheme should have only *ex nunc* effects for the sake of legal certainty and legitimate expectation of the applicants. Further, it drew on two points not addressed by the judgment. Firstly, on the principle of prohibition of abuse of EU law by comparing CBI schemes to an arrangement already deemed abusive – marriages of convenience. Secondly, by recognising the obligation of Member States to act in sincere cooperation to the EU and its role as an enhanced duty of the public international law principle of good faith.

The test itself was then introduced consisting of the following steps: (i.) existence of bond between the applicant and the Member State, (ii.) sincere cooperation of the Member State and (iii.) Member State does not enable systematic abuse of rights. The steps are to be taken in this order and should the examined scheme fail at any step, the remaining step(s) are not necessary and the scheme is to be deemed unlawful under EU law. While the first two steps deal with the design of the scheme and the intentions of the Member State, the last step acts as a safety valve against mass unjustified naturalisation. The test is to be used on CBI schemes only.

The first step rules out those schemes that either have no residency requirement at all, have such a short residency requirement that no kind of meaningful bond can possibly be established or a standard length residency requirement is systematically unenforced. The second step rules out those schemes that are advertised either by the Member State itself or through authorised third party agents primarily as a way to obtain rights under EU citizenship. Finally, the third step rules out those schemes that allow for a mass (sudden significant increase) unjustified (no common characteristic which warrants such a process) naturalisation in which the Member State is either complicit or is not actively trying to find and implement a solution which has the potential to mitigate the situation.

Keeping the interference with Member States' sovereignty to a minimum, the test is meant to outlaw only the most dangerous CBI schemes threatening the attainment of the AFSJ and whose transactional nature is so dominant as to call into question mutual trust between Member States. For CBI schemes to be outlawed altogether under EU law, a consensus between Member States on an amendment to the Treaties would have to be reached.

## List of abbreviations

<b>Art.</b>	Article
<b>AFSJ</b>	Area of Freedom Security and Justice
<b>AG</b>	Advocate General
<b>CBI</b>	Citizenship by Investment
<b>the Court</b>	Court of Justice of the European Union
<b>CRD</b>	Citizens' Rights Directive
<b>EU</b>	European Union
<b>ICJ</b>	International Court of Justice
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union

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## **Abstract**

This thesis deals with the phenomenon of citizenship by investment ('CBI') schemes in the European Union. Its aim is to critically examine the judgment of the Court of Justice of the European Union in Case C-181/23 *Commission v Malta*, its implications for the division of competences between the EU and the Member States and to develop a test for compliance of CBI schemes with EU law that would protect the integrity of EU citizenship while preserving Member States' sovereignty as much as possible.

The first chapter describes what CBI schemes are and illustrates their operation on the example of the Maltese scheme which was the subject of the judgment. Next, the thesis summarises the reasoning of both the Court and the Advocate General. Third chapter reviews existing literature reacting to the decision and outlines four main topics of discussion. Fourth chapter develops theoretical basis for the fifth chapter which designs a test of compliance of CBI schemes with EU law.

The test consists of the following steps: (i.) existence of bond between the applicant and the Member State, (ii.) sincere cooperation of the Member State and (iii.) Member State does not enable systematic abuse of rights. The steps are to be taken in this order and should the examined scheme fail at any step, the remaining step(s) are not necessary and the scheme is to be deemed unlawful under EU law. For a scheme to fail the test, its transactional nature has to be so dominant as to be capable of calling into question mutual trust between Member States.

The test is designed to outlaw only the most dangerous CBI schemes that threaten the attainment of the Area of Freedom Security and Justice. For CBI schemes to be outlawed altogether under EU law, a consensus between Member States on an amendment to the Treaties would have to be reached.

Keywords: EU citizenship, investment migration, fundamental values, sincere cooperation

Title: Combatting Investor Citizenship Schemes in the European Union

## Abstrakt

Tato práce se zabývá fenoménem systémů udílení občanství pro investory v Evropské unii. Jejím cílem je kriticky zhodnotit rozsudek Soudního dvora Evropské unie ve věci C-181/23 *Komise proti Maltě*, jeho důsledky pro rozdělení kompetencí mezi EU a členské státy a vyvinout test souladu těchto systémů s právem EU, který by ochránil integritu unijního občanství a zároveň co nejvíce zachoval suverenitu členských států.

První kapitola popisuje systémy udílení občanství pro investory a jejich fungování názorně ukazuje na příkladu maltského systému, který byl předmětem rozsudku. Práce dále shrnuje argumentaci Soudního dvora a generálního advokáta. Třetí kapitola je rešerší již existující literatury reagující na toto rozhodnutí a popisuje hlavní témata diskuze. Čtvrtá kapitola tvoří teoretická východiska pro pátou kapitolu, která vyvíjí test souladu systémů udílení občanství pro investory s právem EU.

Test se sestává z následujících kroků: (i.) existence vztahu mezi žadatelem a členským státem, (ii.) loajální spolupráce členského státu a (iii.) členský stát neumožňuje systematické zneužití práv. Tyto kroky je třeba provést v tomto pořadí a pokud zkoumaný systém nesplní jakýkoli krok testu, další krok(y) testu není nutné provádět a systém je považován za nezákonný podle práva EU. Aby systém v testu neuspěl, jeho transakční charakter musí být natolik dominantní aby byl schopen zpochybnit vzájemnou důvěru mezi členskými státy.

Test je navržen tak, aby prohlásil za nezákonné pouze ty nejvíce nebezpečné systémy, které ohrožují dosažení prostoru svobody, bezpečnosti a práva. Aby byly prohlášeny za nezákonné systémy udílení občanství pro investory obecně, členské státy by musely dosáhnout shody na změně Smluv (SEU a SFEU).

Klíčová slova: občanství EU, investiční migrace, základní hodnoty, loajální spolupráce

Název: Boj proti systémům udílení občanství pro investory v Evropské unii