



## Statement by the Investment Migration Council concerning the European Commission's case against Malta

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Geneva, 9<sup>th</sup> November 2022

On the 29<sup>th</sup> September 2022 the European Commission, in an expected move, brought Malta before the Court of Justice of the European Union (JCEU) citing alleged violations of the principle of sincere cooperation (Article 4(3) TEU) and the principles underlying EU citizenship (Article 20 TFEU) in the context of offering Maltese citizenship for investment.

The Commission opined, most importantly, that these violations resulted from the fact that these newly-naturalized Maltese citizens - who obtained this nationality and by extension the citizenship of the European Union, which is granted by derivation to all the 'nationals of the Member States' (Article 9 TEU), as a result of investing a 'pre-determined amount' - acquired this citizenship without a 'genuine link' to the respective Member State. The case thus builds on an earlier reasoned opinion and two letters of formal notice from the Commission, numerous public pronouncements by Commissioners, as well as European Parliament Resolutions and Reports. These two institutions have thus created an atmosphere of condemnation, in the face of silence from the European Council and [astonishment](#) of leading European scholars (among many others, see also [here](#)).

Basic legal analysis of this action demonstrates beyond any reasonable doubt that the case in question is a clear example of abuse of power by the European Commission, acting in the absence of competence; based on flawed legal reasoning; and potentially capable of undermining the core principles of the internal market - the heart of the Union acquis which the Commission is supposed to safeguard. In essence, the Commission claims that it should have a say in the legal framing of the peoples of the Member States, thus directly contradicting the principle of conferral. EU law is clear that the competences not conferred on the Union remain with the Member States (Article 4(1) TEU). Once the Commission acquires a right to decide what it means to be a Maltese - a competence not conferred on the Union - the Pandora's box is open, as the same trick can be used to inform France about who is French and who is not, and Ireland on who is Irish, in accordance to the Commission and without regard to the lawful operation of Maltese, French and Irish legislation. The very starting point of approaching the matter through the prism of 'genuine links' - an approach expressly outlawed by the Court of Justice in *Micheletti* - points towards the crumbling checks and balances in the Commission as an Institution: the law means little, as the case makes clear, in the face of abusive political pressure, as it is also shown in the Report commissioned by the Investment Migration Council on the matter.



## Competence

No competence to legislate on matters of the conferral of the nationalities of the Member States has been conferred on the Union, as Union citizenship, although ‘autonomous’ as per AG Poiares Maduro in *Rottmann*, remains derivative from the nationalities of the Member States by law (Articles 9 TEU and 20 TFEU). Article 9 TEU, moreover, following the Danish declaration on this matter appended to the Treaty of Maastricht, clarifies that ‘Citizenship of the Union shall be additional to and not replace national citizenship’. In this context the inability of the Union to rule on the matter of Member State nationalities is abundantly clear: ‘Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States’ (Article 5(2) TEU, see also Article 4(1) TEU). The Court of Justice has been clear about the Member States’ freedom to shape their own nationality law (*Rottmann*, *Tjebbes*, *JY*), which includes the conferral (*JY*) and withdrawal (*Tjebbes*, *Rottmann*) of nationalities. Crucially, in the absence of Union legislative competence, the Member States are required to frame and implement national law on nationality with ‘due regard’ to EU law (*Micheletti*).

In practice this means that the exercise of national competence cannot undermine the achievement of the objectives of integration (Article 2 TEU) and/or undermine the values of the Union, as expressed in Article 2 TEU. The protection of fundamental rights and fundamental freedoms, including the freedom of movement, is thus to be taken into account in the context of Member States’ actions in the nationality field (*Rottmann*), which in practice means that the Member States are required to apply proportionality assessment in cases where the continued enjoyment of EU citizenship and the rights connected with it is in danger (*Rottmann*, *Tjebbes*, *Ruis Zambrano*), and they have to ensure that EU citizenship is not lost, however briefly, in the context of switches between Member States’ nationalities (*JY*). The Member States are prohibited from questioning each-others’ nationalities (*Micheletti*).

The Court has been clear that while the competence in nationality matters remains with the Member States, the Union is still able to intervene to protect the continued possession of EU citizenship by individuals as well as their enjoyment of EU citizenship rights (*Tjebbes*, *Rottmann*, *JY*). Those who have never been EU citizens do not enjoy such protection (*Kaur*). The Commission’s intervention, seeking to push a Member State to curtail the rights of own citizens rather than seeking to safeguard such rights to the fullest extent is thus a violation of EU law as it stands: its very starting logic is repugnant to the rationale of the Treaties.

## ‘Genuine Links’

An essential aspect of EU citizenship law consists of the full trust enjoyed by the Member States in citizenship matters vis-à-vis their peers as well as Union institutions, as long as the rights of individuals under EU law, including their procedural rights, remain safeguarded. The



Member States cannot question each-others' nationalities in seeking to deprive EU citizens of the enjoyment of their rights (Micheletti, also Zhu and Chen). EU law thus imposes an obligation to give full recognition to EU citizenship acquired via the nationalities of any Member State themselves acquired according to their legal requirements, be it by birth outside the territory (Zhu and Chen) or establishing remote ancestry ties without any linguistic knowledge or residence history in the state of nationality (Micheletti). Discrimination between EU citizens based on their mode of citizenship acquisition is strictly prohibited (Boukhalfa). Consequently, the 'genuine links' that the Commission is building its case upon are the genuine legal links of nationality existing between a Member State and an individual, which do not imply any requirements of additional connections between the said individual and the Member State in question, beyond the fact of existence of the legal link of nationality. Requiring any kind of history of residence or 'culture' ties on top of the citizenship link is a direct violation of the principle of non-discrimination on the grounds of nationality (Article 19 TFEU) and the principle of non-discrimination on the basis of a particular ground of citizenship acquisition (Boukhalfa). The Court of Justice in Micheletti expressly prohibited any reference to cultural/residential links between an EU citizen and his Member State, prompting Advocate General Tesauro to mock the arguments invoking connections with another Member State going beyond nationality brought by the Spanish government in that case. **The Commission's reference to 'genuine links' is a direct violation of EU law as it stands.**

### Sincere cooperation

The principle of sincere cooperation in Article 4(3) TEU covers both the sins of omission and the sins of commission and prohibits Member States from deploying national law adopted within their own sphere of regulatory competence in a way that could threaten the internal market and the achievement of the objectives of the Union. The Union offers its citizens an area of freedom, security and justice; ensures non-discrimination on the basis of nationality; provides free movement in the territory of all the Member States; and other rights found in Part II TFEU. To state that a newly-naturalised Maltese citizen is enabled to enjoy these rights in order to argue that the principle of sincere cooperation has been infringed - which the Commission is doing - is a logical impossibility: rather than an infringement, what we observe is that the law functions as designed. Malta creates Maltese citizens, who are then recognised as EU citizens and granted EU-level rights by default. Since the availability of rights to EU citizens, as well as Malta's ability to create them unquestionably flows from the law, as explained above, the breach that the Commission complains about is nowhere to be seen.

Moreover, given that the Court prohibited any kind of 'genuine links' approach in Micheletti, the argument alleging a breach of sincere cooperation is not merely flawed: it is put forward in an outright disregard of the law.

**The Treaties do not recognise the nationalist logic which the Commission presumes, as the Court has clarified on many occasions.**



Those who acquired a *ius soli* citizenship having never visited their Member State of nationality and thus enjoy zero ‘genuine links’ with it (Zhu and Chen) are granted equal rights to those who have never visited the Member State which issued their passport, having received nationality via ancestry in Latin America (Micheletti): these rights include benefitting from the full protection of EU law, including the express prohibition of any Member State from invoking a ‘genuine links’ argument to prevent these rights from operating. **The Commission is mounting an attack on the heart of the fundamental rights provided by EU law.**

The logic of the law explained above is not a frivolity. Allowing a check for ‘genuine links’ would turn the whole idea of non-discrimination on the basis of nationality into a fiction in a split second, it is precisely the reason why the Court in Micheletti prohibited Member States from going down this path. By suggesting the contrary, the Commission is mounting an attack on the heart of the fundamental rights provided by EU law, as well as the essence of the free movement of persons in the internal market. Given that the principle of sincere cooperation applies equally to the Member States and to the EU institutions, bringing Malta before the Court of Justice based on a gross perversion of the law is itself a clear violation of the duty of sincere cooperation by the Commission.

### **Dangerous abuse of power**

The underlying thinking informing this obscurantist unlawful pressure put on Malta is instructive in itself, as the Commission is attempting to set aside the law in order to attack only one mode of Member State nationality acquisition among many: while according to the Commission, paying for citizenship is not ok, ‘ancestral links’ emerge as always genuine according to this reasoning, no matter how remote the ‘ancestor’. In other words, the Commission uses the case of Malta to promote a citizenship ideal rooted in blood: fetishising both sexism (grandmothers usually count for little under this reading) and racism (only those with no ancestral connections have to ‘buy’ citizenship).

In summary, the Commission’s push to frame EU citizenship is in direct opposition with the founding values of the Union, including non-discrimination on the basis of nationality, democracy and the respect of the constitutional identity of the Member States.

This is something that the Court will not be able to uphold from whichever angle it may look at it.

The Investment Migration Council