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The opinion of AG Collins in Case C- 181/23 Commission v Malta

Citation for published version:
Coutts, S 2024, 'On mutual recognition and the possibilities of a ‘Single European Polity’: The opinion of AG Collins in Case C- 181/23 Commission v Malta', *European Papers*, vol. 9, no. 2, pp. 818-829. https://doi.org/10.15166/2499-8249/785

Digital Object Identifier (DOI):
10.15166/2499-8249/785

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Publisher's PDF, also known as Version of record

Published In:
European Papers

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Download date: 30. Apr. 2025

INSIGHT

On Mutual Recognition and the Possibilities of a "Single European Polity": The Opinion of AG Collins in Case C-181/23 *Commission v Malta*

Stephen Coutts*

Abstract: The Advocate General's Opinion in Commission in *Commission v Malta* is a useful opinion. Not because it is correct but because it highlights the central issue at stake in the case: the question of mutual recognition and its implications. The automatic mutual recognition of Member State nationality found in *Micheletti* has the logical consequence that some requirements on the form of Member State nationality may flow from Union law. However, while the constitutional logic implies some role for Union law in this field, there are scant legal materials to support this contention. Finally, the concept of mutual recognition, elevated to the political and constitutional level, gives some insight into how a "single polity" of Union citizens may be possible.

Keywords: Union citizenship – investment citizenship – art. 20 TFEU – single polity – *Commission v Malta* – mutual recognition.

I. Introduction

The Opinion of AG Collins in *Commission v Malta*[1] is useful in the way an Opinion of an Advocate General should be. Not because the result is necessarily correct, although as a statement of the law as it currently stands, it is perfectly valid. Nor because the analysis is particularly thorough; much of the Opinion is taken up describing the arguments of the parties and the reasoning amounts to a "concise"[2] 21 paragraphs. Nonetheless, in its treatment of the Commission's arguments in particular, the Opinion helps to clarify what is really at stake in this case, how it connects to constitutional structure of the Union and the manner in which it may, or may not, advance the development of the Union as a polity. It is a useful Opinion to think with and against.

* Lecturer in EU Law, University of Edinburgh, scoutts@ed.ac.uk.

[1] Case C-181/23 *Commission v Malta* (Opinion of AG Collins) ECLI:EU:C:2024:849.

[2] M van den Brink, Concise, Clear and Convincing: the Opinion of AG Collins in *Commission v Malta* (Citizenship for Sale) (2024) (9 October 2024) Verfassungsblog verfassungsblog.de.

www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/785
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To the eyes of some EU lawyers, this case should never have reached the Court or even the Commission.[3] Union institutions have begun to take an interest in national citizenship investment practices for some time, with the Parliament passing a resolution[4] and the Commission issuing a Report on the issue.[5] The political interest for the Union is evident: acquiring national citizenship automatically grants Union citizenship and the rights associated with it, including free movement rights throughout the Union. The Commission also raised security, tax-evasion and money-laundering concerns.[6] Discussions were held with Malta and Cyprus on their citizenship-investor schemes with infringement actions opened. The action against Cyprus was dropped after amendments to the Cypriot law. The action against Malta was maintained, even after some amendments to its scheme.[7]

The difficulty for the Commission is the absence of an obvious legal basis for the action in the field of citizenship acquisition. Nationality is an area of Member State sovereignty and a reserved competence. Union citizenship is derived from Member State nationality, not the inverse. This is reflected quite clearly in the Treaties, especially art. 20 TFEU, and in a Declaration to the Treaty of Maastricht.[8] While reserved competences must be exercised in conformity with the Treaties,[9] the scope of the Treaties quite simply does not cover this issue. Finally, the fact that individual decisions withdrawing nationality falls within the scope of the Treaties is not relevant.[10] These involves an entirely different set of legal relations and crucially pre-existing Union law rights held by an individual. Moreover, this reflects the broader structure of the EU as a political community. It is a community of peoples, each of which are sovereign to determine their collective membership of the Union. There is little evidence for a putative "supranational" political community existing autonomously from these national political communities, which are in any event given clear priority, as is event in *EP v Préfet du Gers*.[11]

What the Opinion does is bring to the fore the issue of mutual recognition, both as a legal concept and as a political process.[12] It is here that the nub of the case lies. There are

[3] *Ibid.*

[4] European Parliament Resolution P7_TA(2014)0038 of 16 January 2014 on EU citizenship for sale.

[5] Report COM(2019) 12 final from the Commission of 23 January 2019, *Investor Citizenship and Residence Schemes in the European Union*.

[6] *Ibid.* 10-18.

[7] J Lepoutre, 'Romantic Times? Nationality and European Citizenship' (2024) Nordic Journal of Social Law 55

[8] Declaration on nationality of a Member State [1992].

[9] See L Boucon, 'EU Law and Retained Powers of Member State' in L Azoulai (ed), *The Question of Competences in the EU* (Hart 2014) 168.

[10] See Case C-135/08 *Janko Rottmann v Freistaat Bayern* ECLI:EU:C:2010:104 and subsequent jurisprudence. See J Lepoutre, 'Romantic Times? Nationality and European Citizenship' cit.

[11] Case C-673/20 *EP v Préfet du Gers (No 1)* ECLI:EU:C:2022:449.

[12] LD Spieker, 'Dismissing the Genuine Link by Disregarding Constitutional Principles' (9 October 2024) Verfassungsblog verfassungsblog.de mentions the argument based on mutual recognition amongst other constitutional arguments.

strong arguments in favour of grounding some common criteria for Member State and hence Union citizenship acquisition on the requirements of mutual trust which are necessary for an automatic system of mutual recognition. This in turn implies a certain commonality or sharing of a conception of citizenship amongst the Member States. However, there is a gap between the constitutional logic of mutual recognition and the legal materials. The Court is therefore faced with a constitutional choice: the constitutional logic of Union citizenship pushes in the direction of some common criteria of membership which the legal materials do not support. Choosing to impose these criteria, with the implication of a common understanding of membership of a common political community, would represent not just a "seminal" case, developing the Union legal order. It would also be an overtly judge-led development with all the attendant constitutional questions.

II. Facts and Context

Member State citizenship investment schemes, programmes by which citizenship can be acquired for an investment or payment of funds, sometimes with, sometimes without other conditions, have been on the radar of the European institutions for some time.[13] Malta, Cyprus and Bulgaria in particular have been in the sights of the European Parliament and European Commission with actions opened against all three.[14] After discussions and amendments, an action against Cyprus was discontinued. As it stands at the time of the infringement action, Maltese citizenship could be obtained by a payment of €600,000 or €750,000 to Malta, alongside other investment criteria, and a residence requirement of 36 and 12 months respectively.[15] However, it appears that residence need not mean physical presence but rather legal residence, leading the Commission to maintain its infringement action.

III. Opinion of AG Collins

The Opinion of the Advocate General is brief and to a considerable extent is devoted to laying out the arguments of the parties. The AG reconstructs the Commission's argument, founded on art. 20 TFEU and art. 4(3) TEU, as consisting of three steps. Firstly, that Union citizenship is based on mutual trust which requires Member States to refrain from taking any actions which might undermine the integrity of Union citizenship. This means that Member States must require a genuine link between them and their nationals. Secondly, investor citizenship schemes, in the absence of other ties to the Member State in

[13] EP Resolution P7_TA(2014)0038 cit. and Commission Report COM(2019) 12 final cit.

[14] J Lepoutre, 'Romantic Times? Nationality and European Citizenship' cit. 63ff.

[15] For more detail on the factual context see H Van Eijken, 'Nationality for Sale: different fruits in one basket?' (28 October 2024) EU Law Live eulawlive.com.

question, result in the granting of citizenship in the absence of a genuine link. Finally, and thirdly, that the Maltese scheme constitutes such an investor citizenship scheme.[16]

In his analysis, the AG focuses on the first of these steps. He notes that it is for the Commission to identify the relevant EU law obligation which is being infringed,[17] here a requirement under EU law that Member States ensure a genuine link between them and their nationals. The starting point of his analysis is that nationality law is a Member State competence, that the Member States have not decided to pool.[18] This competence in turn reflects a "sovereign" prerogative of the states.[19] There is nothing in EU law which requires a "genuine link". While *Tjebbes*[20] permits Member States to require a genuine link between them and their nationals, it does not oblige Member States to ensure such a link.[21] *Nottebohm*,[22] an international law case allowing a state to refuse to recognise a grant of nationality by another state in the absence of a genuine link, does not create any requirement on states to ensure such a genuine link in neither international nor EU law.[23] Finally, the automatic mutual recognition between Member States on issues of nationality established by *Micheletti*[24] is authority not for a requirement of a genuine link but indicates "respect for the sovereignty of each Member State" in the field of nationality law.[25]

IV. Preliminary Remarks

One issue which is prominent by its absence is the question of scope. Scope is the dog that does not bark in this Opinion. At first glance, this issue should not be before the Court of Justice. It should not fall within the scope of the Treaties. Indeed, this is the objection most EU lawyers would make upon hearing of such a case. And yet, the question of scope is not discussed directly. This is striking. It appears uncontroversial that the matter may fall within the scope of Union law. The Advocate General does not discuss it explicitly. Moreover, Malta accepts that nationality acquisition may violate Union law, and cites a practice which may violate art. 2 values (such as discrimination on the grounds of race) as an example. What may have once been the major argument is conceded. This is no doubt true and an intelligent concession from the point of view of Malta's litigation strategy. However, it does demonstrate increasing acknowledgement of the "totalisation"

[16] *Commission v Malta* (Opinion of AG Collins) cit. paras 17-24.

[17] *Ibid.* para 38.

[18] *Ibid.* para 44.

[19] *Ibid.* para 45.

[20] Case C-221/17 *MG Tjebbes and Others v Minister van Buitenlandse Zaken* EU:C:2019:189.

[21] *Commission v Malta* (Opinion of AG Collins) cit. para 55.

[22] International Court of Justice judgment of 6 April 1955 *Nottebohm (Liechtenstein v Guatemala)*.

[23] *Commission v Malta* (Opinion of AG Collins) cit. para 56.

[24] Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* EU:C:1992:295.

[25] *Commission v Malta* (Opinion of AG Collins) cit. para 57.

of EU law[26] and the totalising effect of art. 2 TEU in particular. We seem to think in terms of scope to a decreasing extent.

If AG Collins does not address the issue of scope directly, he does raise a related issue, that of competence or even sovereignty. As noted by Spieker,[27] the AG invokes the language of competence and sovereignty at various points in the Opinion. The Declaration attached to the Treaty of Maastricht is cited, noting that "the question of 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".[28] This is read as reflecting "the view of the Member States that their respective conceptions of nationality touch on the very essence of their sovereignty and national identity, which they do not intend to pool".[29] The duty of mutual recognition in the field of national law implies "respect for the sovereignty of each Member State – not a means to undermine the exclusive competences that the Member States enjoy in this domain".[30] To hold otherwise would "constitute a wholly unlawful erosion of Member States' competence in a highly sensitive field".[31] It is wrong to say that the AG falls into "the competence trap".[32] He acknowledges that theoretically there may be some obligation under Union law. He simply finds that the Commission has not identified any such obligation. Nonetheless, this understanding of Member States "exclusive competence"[33] which reflects a "sovereign prerogative"[34] which the "Member States have not decided to pool"[35] clearly indicates the underlying conception of the constitutional balance between the Member States and the Union in the field of nationality law which informs the AG and his Opinion.

V. Mutual Recognition and its Requirements

As noted, the AG accepts that the fact that nationality is a Member State competence is not dispositive of the case. The fact that it is a Member State competence is certainly relevant for his findings, for the Opinion is built around the premise that, nationality law being a Member State competence, the Commission must point to some obligation under Union law which would constrain that competence. The Commission points to mutual

[26] L Azoulai, 'The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) European Journal of Legal Studies178.

[27] LD Spieker, 'Dismissing the Genuine Link by Disregarding Constitutional Principles' cit.

[28] Declaration on nationality of a Member State [1992].

[29] *Commission v Malta* (Opinion of AG Collins) cit. para 45.

[30] *Ibid.* para 57.

[31] *Ibid.*.

[32] LD Spieker , 'Dismissing the Genuine Link by Disregarding Constitutional Principles' cit.

[33] *Commission v Malta* (Opinion of AG Collins) cit. paras 44 and 57.

[34] *Ibid.* para 28.

[35] *Ibid.* para 44.

recognition and mutual trust. And it is the treatment of this argument that the Opinion is most revealing.

For the AG, the fact that automatic mutual recognition exists in the area of nationality law means that Member States have retained an "exclusive competence" in this area and that they remain free from constraints. "The system of mandatory mutual recognition that [*Micheletti*[36] and *Chen*[37]] contemplate has the corollary that Member States are not required to have a shared conception of what constitutes nationality and that their rules for its grant can diverge".[38] "There is [...] no logical basis for the contention that because Member States are obliged to recognise nationality granted by other Member States, their nationality laws must contain a particular rule....A duty under EU law to recognise nationality granted by other Member States is a mutual recognition of, and respect for, the sovereignty of each Member State – not a means to undermine the exclusive competences that the Member States enjoy in this domain".[39]

This is a misreading of the nature of mutual recognition and its requirements, especially its relationship to harmonisation and shared systems of concepts, legal values and enforcement mechanisms. It is simply not true to say that there is "no [...] logical basis"[40] for developing common criteria in a system based on automatic mutual recognition. There is a perfectly logical basis, namely the need to secure mutual trust which in turn is facilitated by common standards, amongst other requirements. Mutual recognition and the related principle of mutual trust operate in various fields of Union law.[41] Mutual recognition is supposedly facilitated by the existence of mutual trust between the Member States and this mutual trust is rooted in some legal provisions. It has been elevated to a constitutional level[42] and is part of the "structured network of principles, rules and mutually interdependent legal binding the European Union and its Member States reciprocally as well as binding its Member States to each other".[43] Mutual recognition does not exist in the absence of requirements and operates normally on the basis of some equivalence between the legal systems and rules concerned. Mutual recognition regimes range from conditional to unconditional and automatic to non-automatic.[44] A general rule is that the greater degree of automaticity, the greater need there is for underlying common standards to ensure the required equivalence and hence mutual trust. The features of any particular mutual recognition regime will be particular to the regime in

[36] *Micheletti* cit.
[37] Case C-200/02 *Zhu and Chen* EU:C:2004:639.
[38] *Commission v Malta* (Opinion of AG Collins) cit. para 48.
[39] *Ibid.* para 57.
[40] *Ibid.* para 57.
[41] See C Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013).
[42] Opinion 2/13 *Accession to the European Convention on Human Rights* EU:C:2014:2454.
[43] Case C-621/18 *Wightman and Others* EU:C:2018:999 para 45.
[44] C Janssens, *The Principle of Mutual Recognition in EU Law* cit.

question: the sensitivity of the field, the required degree of trust, the presence of underlying equivalence that can be presumed etc. In some regimes, the European Arrest Warrant Framework Decision in particular,[45] the balance between mutual recognition, mutual trust and common standards (and their enforcement) has been problematic and has caused difficulties in both implementation[46] and operation.[47] Nonetheless, mutual recognition normally rests on trust which in turn does imply some expectation of commonality at some level. This can be implicit, as in the case of the 32 areas of crime for which the requirement of double criminality has been abolished in the EAW FD and indeed in all other mutual recognition instruments in the field of criminal law,[48] or explicit, where flanking harmonisation measures, such as procedural rights, are adopted.[49] The traditional and somewhat naïve view that mutual recognition would constitute a more Member State competence or sovereignty friendly means of integration compared to harmonisation[50] must be nuanced. Aside from the compromise of sovereignty necessary in the "extra-territoriality" inherent in mutual recognition (the recognition of standards or acts of other Member States on one's territory), mutual recognition cannot operate in a vacuum but requires a surrounding structure of common standards and mechanisms of enforcement which underpin mutual trust and make mutual recognition acceptable. That is the paradox of mutual recognition: a technique of integration which promises to be "sovereignty respecting" ultimately requires compromises of sovereignty and acceptance of some commonality.[51]

[45] Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (EAW FD), as amended by Framework Decision 2009/299/JHA. For a recent comment, contextualising it within mutual recognition as a technique more broadly see M Bonelli and M Correia de Carvalho, 'No need to look, trust me! Mutual trust and distrust in the European arrest warrant system' (2024) Europen Law Open (early view).

[46] See for example the insertion of a human rights exception in the Irish implementing legislation in art. 37, European Arrest Warrant Act 2003 (as amended).

[47] For example, the discomfort national judges have concerning surrender in situations where the rule of law may be compromised in the issuing Member State. See Case C-216/18 PPU *Minister for Justice and Equality v LM* EU:C:2018:586. More recently see Joined Cases C-562/21 and C-563/21 *X and Y v Openbaar Ministerie* EU:C:2022:100.

[48] Art. 2(2), EAW Framework Decision. Note this is for crimes meeting a certain level of seriousness, determined by the sentence applied.

[49] For example, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with thrid persons and with consular authorities while deprived of liberty.

[50] Indeed, this was precisely the reasoning of the United Kingdom at the time mutual recognition was proposed as a means of judicial cooperation in criminal law matters.

[51] It is worth bearing in mind that it remains more respectful of Member State choices than harmonisation, particularly of a maximalist character.

VI. A Misreading of Nottebohm

It is at this stage that *Nottebohm* becomes relevant. Not because the concept of genuine link as it is developed in *Nottebohm* applies in a straightforward manner like some kind of direct legal transplant. That is not what *Nottebohm* implies. As pointed out by AG Collins and van den Brink,[52] *Nottebohm* is a judgment concerning recognition of nationality by one state granted by another. It does not proport to lay down criteria for that grant of nationality by the original Member State for the purposes of its own, internal legal system.[53] As noted by the AG "[i]t follows from the *Nottebohm* judgment that, at least in the ICJ's opinion, the rules for grant of nationality are a matter for individual states".[54]

However, this is a straw man argument. The Commission does not appear to be arguing that *Nottebohm* applies in some direct manner. Rather it is precisely because *Nottebohm* does *not* apply in intra-Member State relations that one can make an argument that some basis exists for obliging those Member States to require a genuine link. *Micheletti*[55] and *Chen*[56] become relevant. Not in the manner the AG believes, that is as authority for Member State "sovereignty" in the field, but as the basis of an argument that the automatic mutual recognition those judgments mandate requires some common criteria. As noted above, mutual recognition is based on equivalence or commonality. The greater the degree of automaticity and the less the possibility for refusing recognition of a decision of another state, the stronger the argument for some commonality to ensure equivalence and trust.

Mutual recognition and mutual trust are constitutional principles of the Union and concepts which increasingly runs through the fabric of Union law. Indeed, one can see its operation in the rule of law jurisprudence; an independent judicial system in a Member State is essential for other Member States to have trust that Union law (including its fundamental rights and due process) is applied properly and that decisions adopted in that Member State can be accepted. It operates across multiple fields of Union law and, while variable, the relationship between mutual recognition, mutual trust and equivalence is well understand. *Micheletti*, by establishing automatic and unconditional mutual recognition in the field of nationality law, is not just authority that nationality is a Member State competence. It also sets up a dynamic which calls for some equivalence or common standards at a Union level.

The problem for the Commission is the absence of concrete legal materials to which it can point to support this broader argument from constitutional principles and mutual

[52] M van den Brink, 'Concise, Clear and Convincing: the Opinion of AG Collins in Commission v Malta (Citizenship for Sale)' cit.

[53] J Lepoutre, 'Nationalité et souveraineté', Université de Lille 2018).

[54] *Commission v Malta* (Opinion of AG Collins) cit. para 56.

[55] *Micheletti* cit.

[56] *Chen* cit.

recognition. As pointed out by van den Brink, the Commission's entire case rests on art. 20 TFEU and the principle of sincere cooperation found in art. 4(3) TEU. Art. 20 TFEU merely declares the status of Union citizenship and associates it with nationality. It is unclear precisely what role art. 4(3) TEU plays in the analysis of the Commission. As noted by the AG, it does not constitute a separate legal ground.[57] The argument appears to be that given Union citizenship is based on mutual recognition which in turn must be based on mutual trust, the granting of Union citizenship in circumstances such as the Maltese scheme undermines that mutual trust which in turn affects the "integrity" of Union citizenship. Put another way, given the derivative nature of the status, the integrity of Union citizenship rests on mutual trust between Member States in the area of nationality law. Anything which undermines that trust affects the integrity of Union citizenship and thus breaches the obligation of the Member States in art. 4(3) TEU to "refrain from any measure which could jeopardise the attainment of the Union's objectives",[58] the objective here presumably being the establishment and maintenance of Union citizenship in art. 20 TFEU.

That however requires much to be read into art. 4(3) TEU and art. 20 TFEU, much more than appears in the text of those provisions. Neither of these provisions speak of mutual recognition, mutual trust or the need for common criteria. The Commission is left to construct an argument from scant legal materials: an allusion to the "integrity of Union citizenship", a reference to "the mutual trust upon which the Union is built" and an invocation of sincere cooperation. And yet there is a constitutional logic to the Commission's argument founded on mutual recognition, mutual trust, sincere cooperation and to some extent the "ever closer union amongst the peoples of Europe". The Court is faced with constitutional implications of the status of Union citizenship as a status of mutual recognition which implies some common vision of citizenship but in the absence of concrete legal provisions on which to ground that same common vision. The Court has not shied away from developing Union citizenship on scant legal materials in previous cases, such as *Martinez Sala*[59] or *Zambrano*,[60] the latter of which also affected the federal balance between the Member States and the Union. Citizenship is a normatively loaded concept with constitutional implications. While the Member States may have intended to retain competence in nationality matters, they also created a status of citizenship of the Union. This, and the union of citizens it creates, should mean something. Union citizenship is an ever-maturing institution. We may have reached the point where the development of a nascent supranational law on the acquisition of Union citizenship is appropriate.

[57] *Commission v Malta* (Opinion of AG Collins) cit.
[58] Art. 4(3) TEU.
[59] Case C-85/96 *Maria Martinez Sala and Freistaat Bayern* EU:C:1998:217.
[60] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* EU:C:2011:124.

VII. A Single Polity

One extremely intriguing aspect of the pleadings and the Opinion is the invocation of a "single polity". Even the AG admits that "EU citizens are…constituent actors of the EU in a single polity".[61] The Commission moreover claims that "EU Citizenship (sic)…implies both the strengthening of ties between Member State nationals and the EU and the integration and deepening of solidarity between the different peoples of Europe, thereby coming together in a single polity as constituent actors of the EU".[62] What are we to make of this argument? If we accept the premise – that there exists a single European polity – what role does it play in the argument of the Commission? Is it that the existence of such a single supranational, perhaps federal, political community implies some overarching supranational authority to determine its conditions for membership and its boundaries? Is it an argument for self-determination of that supranational polity?

It is not clear what role this assertion makes in the argument for a requirement of a genuine link. However, some clue may be found in the notion that it is "the integration and deepening of solidarity between the different peoples of Europe, thereby coming together in a single polity". Asserting the existence of a single supranational polity composed of Union citizens which authorises the Union to determine conditions for the acquisition of Union citizenship, leading to a coming together of the political communities of the Member States, is to put the cart before the horse. It mistakes a top-down for a bottom-up process. It is the opening up of national political communities to each other through the vehicle of Union citizenship[63] and the blurring of boundaries (while maintaining those boundaries) that leads to some common supranational community. This is mutual recognition operating at the level of political recognition and status.[64] Mutual recognition of Member States of each others' nationals *qua* citizens. The justification for supranational criteria for membership and hence a second order, supranational, political community emerge from an inter-state process of mutual recognition of membership.

This is also visible from the kind of requirement the Commission is calling for, which in turn is reflected in the Court's jurisprudence on citizenship deprivation, namely, a "genuine link". But this genuine link is not a genuine link directly with the European Union. It is with the Member State of nationality. Similarly, the "special relationship of solidarity and good faith' which the Court of Justice consistently invokes in citizenship deprivation cases is a special relationship between [a Member State] and its nationals".[65] Neither the Court nor the Commission are in fact calling for concrete substantive criteria of membership to the Union, or even to a Member State, such as residence or descent. Rather the

[61] *Commission v Malta (Opinion of AG Collins)* cit.

[62] *Ibid.* para 18.

[63] See D Kostakopoulou, 'European Citizenship: Writing the Future' (2007) ELJ 623.

[64] See F Strumia, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU* (Martinus Nijhoff 2013).

[65] *Rottmann* cit. para 51 and *Tjebbes* cit. para 33.

Commission is claiming that while Member State nationality remains a competence of the Member States, that nationality must take a certain *form*: it must reflect a "genuine" link and not be merely transactional. It is a qualitative vision of citizenship as an intrinsically valuable and non-instrumental relationship. One should "genuinely" be a member of a national political community in order to be a Union citizenship. This is logical. It is on the basis of an inter-state agreement between the Member States that the status of Union citizenship arises. When the Member States agreed to extend citizenship-type rights to each other's nationals, they did so presumably on the basis that those nationals were "genuine" nationals. To be a European citizen is to be a member of national political community but that membership should have a particular (European) quality.

VIII. Conclusion

Commission v Malta has the potential to be seminal case of the Court of Justice of the European Union with significant implications for the laws of Member States and for our conceptualisation of the Union as a political community. On a practical level, if the Court decides to intervene in citizenship acquisition and develop criteria that the Member States must meet, it opens up many Member State practices to potential challenge. The "genuine link" criterion is problematic: there are many Member State practices in the area of citizenship acquisition which would not comply with a "genuine link" condition under any fair estimation. At the hearing, the issue of Spain's practice of offering citizenship to the descendents of sephardic jews expelled in 1492 was raised but the acquisition of citizenship by decent operated by many Member States, particularly those with a history of emigration would also be called into question. Similarly, Member State practice offering citizenship on the basis of ethnicity may be questioned. The challenge for the Court would be to craft a criterion sufficiently abstract to ensure Member States retain very wide discretion while capturing what the Court would consider to be problematic practices. The formula used in citizenship deprivation cases, which speaks of the "special relationship of solidarity and good faith" between nationals and Member States may form a basis for such a solution.

On a more conceptual level, acceptance of the Commission's arguments would imply the existence of a "single polity" at a European level. It would symbolise the development of a more supranational conception of Union citizenship, with common criteria of membership, but one which paradoxically emerges from a transnational or inter-state dynamic, namely mutual recognition of national citizenship. It is undeniable that there is an absence of explicit provisions in the Treaties for such a development. This is the great difficulty for the Commission and appears to be the clinching fact for the AG's quite orthodox approach. Those wary of judicial power and in particular the historic activism of the Court of Justice would, with good reasons, follow the AG. Nonetheless, there is a set of constitutional concepts and principles – mutual recognition, mutual trust, sincere cooperation and Union citizenship itself – which provide the basis for a further development

of Union citizenship. Furthermore, it is worth reflecting that we are in the space of constitutional interpretation, one in which teleological interpretations based on open-textured provisions are legitimate. Constitutions are living documents which necessarily evolve over time. At times, to better reflect and develop the constitutional order and concepts within it, a constitutional court must engage in interpretations which go beyond the literal text. It remains to be seen if the Court will do so in this case.