Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 4 October 2024 [1]

Case C-181/23

European Commission
v

Republic of Malta

(Failure of a Member State to fulfil obligations under Article 20 TFEU and Article 4(3) TEU – Investor citizenship scheme – Naturalisation of third-country nationals in exchange for pre-determined payments or investments – Absence of a genuine link between applicants for naturalisation and a Member State)

Scope of the action

1. This action under Article 258 TFEU arises out of the adoption and operation of the Maltese Citizenship by Naturalisation for Exceptional Services by Direct Investment scheme (2020) (the '2020 citizenship scheme'). [2] The European Commission seeks a declaration that, by establishing and operating the 2020 citizenship scheme, that offers naturalisation, in exchange for pre-determined payments or investments, to persons notwithstanding the absence of a genuine link between them and the Republic of Malta, that Member State has failed to fulfil its obligations under Article 20 TFEU and Article 4(3) TEU.

2. The Republic of Malta claims that the Commission's action is unfounded, in law and in fact. EU law does not govern the conditions whereby persons may acquire the nationality of a Member State, unless those conditions are such as to put at risk, in a general and systematic manner, the European Union's values and objectives. Neither public international law [3] nor EU law require that a person have a 'prior genuine link' with a State prior to his or her naturalisation. The Republic of Malta also alleges that the Commission has oversimplified the 2020 citizenship scheme in an attempt to 'drive' the Court into making an erroneous assessment of the facts.

1 Original language: English.

2 The 2020 citizenship scheme consists of the 2020 Citizenship Act and the 2020 Regulations, described in points 5 to 7 of the present Opinion.

3 Hereinafter 'international law'.

Legal context – Maltese law

The Maltese Citizenship Act

3. The Maltese Citizenship Act regulates the acquisition, deprivation and renunciation of Maltese citizenship.[4] Article 10 thereof lays down the conditions for ordinary naturalisation. Pursuant to Article 10(1), an applicant may be granted a certificate of naturalisation as a citizen of Malta if he or she satisfies the Minister[5] of the following conditions:

'(a) that he has resided in Malta throughout the period of twelve months immediately preceding the date of application; and

(b) that, during the six years immediately preceding the said period of twelve months, he has resided in Malta for periods amounting in the aggregate to not less than four years; and

(c) that he has an adequate knowledge of the Maltese or the English language; and

(d) that he is of good character; and

(e) that he would be a suitable citizen of Malta.'

4. Pursuant to Article 10(1), second subparagraph, of the Maltese Citizenship Act, if the Minister so thinks fit in the special circumstances of any particular case, he or she may allow periods of residence earlier than seven years before the date of application to be reckoned in computing the aggregate mentioned in paragraph (b). The 1989 Citizenship Regulations (as amended) lay down detailed rules for applications for naturalisation based on Article 10(1) of the Maltese Citizenship Act.[6]

[4] Maltese Citizenship Act (Chap. 188), ACT XXX of 1965, as amended by Acts: II of 1970, XXXI of 1972, LVIII of 1974, XXXI of 1975, IX of 1977, XIII of 1983, XXIV of 1989, IV of 2000 and X of 2007; and Legal Notice 410 of 2007 and Act XV of 2013, Acts XXIV and XXVI of 2017 and Acts XV and XXXVIII of 2020.

[5] Article 2(1) of the Maltese Citizenship Act provides that '"the Minister" is 'the Minister for the time being responsible for matters relating to Maltese citizenship and, to the extent of the authority given, includes any person authorised by such Minister to act on his behalf'.

[6] Subsidiary Legislation (S.L.) 188.01 Citizenship Regulations of 1 August, 1989 (Legal Notice 106 of 1989, as amended by Legal Notices 16 of 1993, 232 of 1997, 26 of 2000, 188 and 410 of 2007, 17 and 63 of 2014; Act XIII of 2015, Legal Notice 336 of 2017 and 214 of 2019 and 443 of 2020).

The Maltese Citizenship (Amendment No 2) Act, 2020

5. On 28 July 2020, the Republic of Malta adopted the Maltese Citizenship (Amendment No 2) Act, 2020 (the '2020 Citizenship Act').[7] Article 3 of that act replaced Article 10(9) of the Maltese Citizenship Act by the following text:

'Notwithstanding the provisions of this or any other Act, the Minister may grant a certificate of naturalisation as a citizen of Malta to an alien or stateless person, who has rendered exceptional services to the Republic of Malta or to humanity, or whose naturalisation is of exceptional interest to the Republic of Malta, and who satisfies the requirements prescribed under this Act. For the purposes of this sub-article, "exceptional" means manifestly superior, and refers primarily to contributions by scientists, researchers, athletes, sports people, artists, cultural performers, investors and entrepreneurs: Provided that the Minister shall also grant a certificate of naturalisation to an eligible dependent of an alien or a stateless person who has rendered exceptional services to the Republic of Malta through investment: Provided further that such person makes an application in such manner as may be prescribed and upon taking the oath of allegiance in Malta.'

6. On 20 November 2020, the Republic of Malta adopted[8] the Granting of citizenship for Exceptional Services Regulations, 2020 (the '2020 Regulations').[9] Part III and Part IV of the 2020 Regulations contain detailed rules governing the processing of applications for naturalisation for exceptional services by merit and 'by Direct Investment in the economic and social development in the Republic of Malta'.[10] Foreign investors[11] may apply to be naturalised under the second category where they fulfil or undertake to fulfil the following conditions:

a) contribute either EUR 600 000 or EUR 750 000 to the Maltese Government, EUR 10 000 of which is to be paid as a non-refundable deposit together with the submission of the residence applications or the eligibility form, the balance falling due after the application for naturalisation has been approved;

b) acquire and hold residential immovable property in Malta with a minimum value of EUR 700 000, or take a lease of a residential immovable property in Malta for a minimum of 5 years at a minimum annual rent of EUR 16 000;

7 Act No XXXVIII of 2020, published on 31 July 2020. On 15 November 2013, the Republic of Malta adopted Act No XV of 2013 amending the Maltese Citizenship Act (Chap. 188 (15 November 2013)) (the '2013 Citizenship Act'). In parallel to the procedure laid down in Article 10(1) of the Maltese Citizenship Act, the 2013 Citizenship Act established an accelerated route to naturalisation by means of participation in an 'individual investor programme' governed by separate conditions and procedures. The Individual Investor Programme of the Republic of Malta Regulations, 2014 (Subsidiary Legislation 188.03 of the Laws of Malta), enacted under Legal Notice 47 of 2014 and published in the Government Gazette of Malta on 4 February 2014 (the '2014 Regulations') were repealed on 20 November 2020 by Legal Notice 437 of 2020. A limit of 1 800 successful applicants (excluding dependents) applies to the scheme adopted pursuant to the 2013 Citizenship Act and the 2014 Regulations ('the 2014 citizenship scheme'). Notwithstanding the similarities between the 2014 and 2020 citizenship schemes and the numerous references in the pleadings to both, the present infringement action is limited to the 2020 citizenship scheme.

8 In accordance with Article 10(9) of the Maltese Citizenship Act, as amended by the 2020 Citizenship Act.

9 Subsidiary Legislation 188.06 of the Laws of Malta. The 2020 Regulations were enacted under Legal Notice 437 of 2020.

10 Whilst the 2020 Regulations repealed the 2014 Regulations, Regulation 31(1), second subparagraph, of the 2020 Regulations retains the 2014 Regulations in force until the maximum number of 1 800 applications permitted under the latter has been reached.

11 Applications may include 'dependent' members of an applicant's family with, inter alia, the proviso that an additional payment of EUR 50 000 is made in respect of each of them. See Regulation 16(3) of the 2020 Regulations and paragraph 1(b) of the First Schedule to those regulations.

c) donate a minimum of EUR 10 000 to a registered philanthropic, cultural, sport, scientific, animal welfare or artistic non-governmental organisation or society, or one otherwise approved by the authorities;

d) have been a resident in Malta for a period of 36 months (where the payment amounts to EUR 600 000) which period may be reduced to a minimum of 12 months subject to making an exceptional direct investment, namely, a payment of not less than EUR 750 000;

e) having passed an eligibility assessment by the authorities and being authorised to submit an application for naturalisation in accordance with Regulation 10 of the 2020 Regulations.

7. Pursuant to Regulation 19 of the 2020 Regulations, the 'number of certificates by Maltese Citizenship by Naturalisation for Exceptional Services by Direct Investment granted, excluding dependants, shall not exceed four hundred (400) per annum, and in any case the total accumulated amount of successful applicants excluding dependants shall not exceed one thousand five hundred (1 500)'.

The pre-litigation procedure

8. On 20 October 2020, the Commission issued a letter of formal notice to the Republic of Malta. It expressed concerns that the Individual Investor Programme adopted under the Maltese Citizenship Act, as amended by the 2013 Citizenship Act and the 2014 Regulations, was incompatible with EU citizenship established by Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU. On 9 June 2021, the Commission addressed an additional letter of formal notice to the Republic of Malta in which it observed that since the revised legislative framework of the 2020 citizenship scheme did not alter its transactional nature it thereby infringed Article 20 TFEU and Article 4(3) TEU.

9. The Republic of Malta replied to that letter on 6 August 2021. It disagreed with the Commission's assessment. It submitted, inter alia, that the Commission's position was incompatible with the principle of conferral in so far as it encroached on a domain within the sovereignty of the Member States.

10. On 2 March 2022, the Republic of Malta suspended its investor citizenship scheme for Russian and Belarusian nationals until further notice.

11. On 6 April 2022, the Commission sent a reasoned opinion to the Republic of Malta. The Commission reiterated and developed the arguments that it had set out in its letter of formal notice and additional letter of formal notice. In its reply, the Republic of Malta disagreed with the Commission's assessment and maintained that its investor citizenship legislative framework complied in full with EU law.

The procedure before the Court

12. By application lodged on 22 March 2023, the Commission brought the present action before the Court under Article 258 TFEU seeking a declaration that:

'by establishing and operating an institutionalised programme, such as the Maltese Citizenship by Naturalisation for Exceptional Services by Direct Investment based on Article 10(9) of the Maltese

Citizenship Act as amended by the Maltese Citizenship (Amendment No 2) Act, 2020, and the Granting of citizenship for Exceptional Services Regulations, 2020, that offers naturalisation in the absence of a genuine link of the applicants with the country, in exchange for pre-determined payments or investments, the Republic of Malta has failed to fulfil its obligations under Article 20 TFEU and Article 4(3) TEU.'

13. The Commission also requests that the Republic of Malta be ordered to pay the costs.

14. In its defence, lodged on 27 June 2023, the Republic of Malta contends that the Court should dismiss the present action and order the Commission to pay the costs.

15. After a further exchange of pleadings, on 17 June 2024 a hearing took place at which the Commission and the Republic of Malta presented oral argument and answered questions from the Court.

Legal analysis

Arguments of the parties

16. The Commission's action consists of a single complaint, which it divides into three steps.

17. First, the Commission observes that while the Member States are competent to make rules governing the acquisition of their nationality, EU law constrains the exercise of that competence.[12] The concept of mutual trust underpins EU citizenship. Respect for that mutual trust prohibits Member States from adopting citizenship rules that undermine the essence, value and integrity of EU citizenship. EU citizenship is destined to be the fundamental status of nationals of the Member States.[13] EU law imposes far-reaching obligations on Member States as regards their treatment of EU citizens who seek to rely on the rights EU citizenship confers upon them. Since the conferral of Member State nationality automatically results in the acquisition of EU citizenship and the enjoyment of the rights attached thereto, the conditions under which it may be conferred have such a direct impact on other Member States and on the European Union that they are no longer the exclusive concern of that Member State. Member States must therefore have due regard to EU law, in particular to the principle of sincere cooperation in Article 4(3) TEU and the integrity of the status of EU citizenship created by Article 20 TFEU, when they confer their nationality on third country nationals.

18. Second, the Commission emphasises that while the European Union is founded on the integration of European States that share a common set of aspirations and values, that entails bringing together the peoples of each of those Member States. EU citizenship thus implies both the strengthening of ties between Member State nationals and the European Union 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 European Union. The nature of EU citizenship, which includes the rights to move to and reside in the territory of another Member

[12] Judgments of 7 July 1992, *Micheletti and Others* (C-369/90, EU:C:1992:295, paragraph 10) (the '*Micheletti* judgment'); of 20 February 2001, *Kaur* (C-192/99, EU:C:2001:106, paragraph 19) (the '*Kaur* judgment'); of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 37) (the '*Zhu and Chen* judgment'); of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104, paragraphs 39, 41 and 45) (the '*Rottmann* judgment') and of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189, paragraph 30) (the '*Tjebbes* judgment').

[13] Judgment of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 82).

State, to be treated equally to nationals of that Member State, and to vote and stand as a candidate in the municipal elections of host Member States and in elections to the European Parliament, reinforces this interpretation. EU citizenship and the rights derived therefrom thus express solidarity and mutual trust between Member States. The automatic and unconditional extension of certain rights to nationals of all Member States is consistent with the principle of mutual trust and is based upon a shared understanding: that 'nationality is the expression of a genuine link between [a State] and its nationals'. [14] 'The special relationship of solidarity and good faith between [the State] and its nationals and also the reciprocity of rights and duties … form the bedrock of the bond of nationality'. [15]

19. Where a Member State establishes and operates an investor citizenship scheme that facilitates the systematic grant of its nationality to persons in exchange for pre-determined payments whilst not requiring the existence of any genuine link between that State and those individuals, it compromises and undermines both the essence and the integrity of EU citizenship and the mutual trust that underpins it. Such an investor citizenship scheme is thus incompatible with the concept of EU citizenship provided for in Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU. It follows that the establishment and the operation of such schemes, even if perceived as in the (purely financial) interests of a Member State, is detrimental to the European Union's objectives.

20. Third, the 2020 citizenship scheme meets the criteria of an unlawful investor citizenship scheme as described in the second step since it permits the systematic grant of nationality in exchange for the payment of substantial pre-determined sums without requiring applicants to demonstrate a genuine link with the Republic of Malta. Article 10(1)(a) of the Maltese Citizenship Act, which regulates 'ordinary' naturalisation, provides that an applicant must be able to demonstrate that he or she has 'resided in Malta throughout [a] period of twelve months' immediately prior to submitting an application. Pursuant to Article 10(1)(b) thereof, such a person must establish periods of residence 'amounting in the aggregate to not less than four years' in a period of six years. Qualitatively different provisions apply to applicants under the 2020 citizenship scheme. The Commission submits, in particular, that the latter scheme contains insufficient safeguards to ensure that the residence obligation is more than a purely fictitious requirement or that there is any genuine link between the Republic of Malta and applicants for Maltese nationality thereunder.

21. In accordance with Article 16(1)(a) of the 2020 Regulations, the main applicant, and his or her dependants aged eighteen and above, must provide proof of residence in Malta for a period of 36 months. Article 16(1)(a), read in conjunction with the First Schedule of the 2020 Regulations, provides that, upon payment of EUR 750 000 (i.e. an additional EUR 150 000), that residence period may be reduced to a minimum of 12 months. The 2020 Regulations do not define 'resident' or 'residence'. They prescribe no equivalent requirement that such residence takes place 'throughout' the period specified. Since there are no rules which require regular physical presence over a significant period of time that could be interrupted by travelling or short stays abroad, the 2020 Regulations contain no rules on absences susceptible to break any periods of residence. The Commission thus submits that Regulation 16(1)(a) of the 2020 Regulations merely requires legal residence, as distinct from a physical presence, in Malta.

[14] *Tjebbes* judgment, paragraph 35.

[15] *Rottmann* judgment, paragraph 51, and *Tjebbes* judgment, paragraph 33. See also judgment of 17 December 1980, *Commission* v *Belgium* (149/79, EU:C:1980:297, paragraph 10), and *Liechtenstein v Guatemala*, Preliminary Objection (Second phase). See also judgment of the International Court of Justice ('the ICJ') of 6th April 1955, [1955] ICJ Rep 4, 20 (the '*Nottebohm* judgment').

22. The Commission also rejects the Republic of Malta's claim that it has the right to grant citizenship by reference to 'prospective links' by way of future integration and contribution to that Member State. Such a 'buy now – develop a link later' approach is incompatible with EU law. The Commission recalls that the benefits of EU citizenship, including freedom of movement, take effect from the moment that status is acquired. There is no guarantee that a Maltese citizen naturalised under the 2020 citizenship scheme will remain in, and forge links with, the Republic of Malta. He or she could choose to move to another Member State or even maintain his or her centre of life in a third country while exploiting the rights of EU citizenship without forging bonds with any Member State. Promotional material published by agents authorised to promote the scheme advertise the possibility that a naturalised citizen might take up residence in another Member State or in a Schengen associated State as one of the benefits of obtaining Maltese nationality.

23. In its reply, the Commission rejects the assertion that the present action challenges an entire national legislative framework for the naturalisation of persons. The Commission does not purport to prescribe how Member States are to determine 'who are their nationals'. The present action is limited to a specific investor citizenship scheme that, by commoditising EU citizenship, undermines the integrity of that status in a manner that amounts to a particularly serious breach of EU law.

24. The Commission bases its claim on EU law, the particular requirements that flow from the status of EU citizenship and the duty of sincere cooperation that requires Member States to refrain from action that may jeopardise the attainment of the European Union's objectives. While the Republic of Malta disagrees that the *Nottebohm* judgment supports the proposition that international law requires a genuine link as a condition for the acquisition of nationality, that judgment is, and remains, a widely cited authority on the entitlement of States to refuse to recognise nationality granted by another State. In accordance with the *Micheletti* judgment, Member States may not refuse to recognise the nationality of a Member State citizen. The automatic nature of that recognition in the EU legal order furnishes a legal basis for a common shared conception of nationality that entails the existence of a genuine link between a Member State and its nationals.

25. The Commission submits that the legal framework of the 2020 citizenship scheme shows that the due-diligence process carried out with respect to applicants is to assess their security or reputational risk and the extent of their wealth. It does not seek to ascertain the existence of a genuine link between an applicant and the Republic of Malta. The existence of this verification process and the Minister's[16] discretion to refuse to grant a certificate of naturalisation do not alter the scheme's transactional character. The Republic of Malta does not contest that, in order to come within the 2020 citizenship scheme, actual physical presence in Malta is required on two occasions only: to provide biometric data in order to obtain a residence permit and to swear the oath of allegiance. The 'legal residence' that the scheme requires is therefore incapable of creating a genuine link between the Republic of Malta and an applicant for citizenship.

26. The Republic of Malta first observes that, since ancient times, States have sought to attract wealth and prosperity by encouraging an influx of high-net-worth individuals through the grant of citizenship or its equivalent. The power to attribute nationality lies at the very core of national sovereignty. It is attached closely to the conception and the development of a Member State's national identity that Article 4(2) TEU requires the European Union to protect. The Republic of

[16] As defined in Article 2(1) of the Maltese Citizenship Act.

Malta acknowledges that the existence of a 'prior genuine link' is a legitimate basis upon which States may decide to recognize an individual's ties with their political community. It is, nonetheless, a matter for the democratic institutions of each Member State to choose that option by way of political and sovereign decisions, often based on considerations of fairness and moral justice. A Member State thus enjoys a broad discretion in deciding what links are sufficient to justify inviting an individual to become a member of its body politic. The Treaties and their travaux préparatoires do not oblige Member States to require a person to have a 'prior genuine link' with a Member State prior to his or her naturalisation. The Republic of Malta also contends that that requirement does not exist under international law, and that the *Nottebohm* judgment, upon which the Commission relies, has been the subject of extensive and well-justified criticism.

27. For these reasons, the Republic of Malta submits that only where a Member State's naturalisation policy gives rise, in a general and a systematic way, to a serious breach of EU values and objectives as defined in the Treaties and in legislation, can that policy plausibly constitute a violation of those rules and values. That is not the case here. The Commission's action is unprecedented. It seeks to prevent a Member State from implementing policy choices that it has legitimately made in a field of national competence as recognised by Article 9 TEU and Article 20(1) TFEU. The action also contests the legality of an entire national legislative framework governing naturalisation of persons. The Republic of Malta further submits that the expansive interpretation of Article 20 TFEU and Article 4(3) TEU for which the Commission contends will have an immediate impact on the legislative frameworks governing nationality in all Member States, particularly those in which naturalisation is granted on a discretionary basis. Reporting obligations will inevitably ensue, leading to the Commission, as the guardian of the Treaties, reviewing Member States' naturalisation policies, laws and practices in the light of EU law. That development will encourage Member States to question and, ultimately, to challenge the law and practice of other Member States in this field. Such scrutiny may be justified only where it is clearly demonstrated, by appropriate evidence, that a Member State's rules constitute, in a general and systematic way, a genuine risk to EU values and objectives.

28. The Republic of Malta further contends that the Commission's single plea oversimplifies the Court's case-law by seeking to equate the withdrawal of nationality with its acquisition. The withdrawal of Member State nationality from an individual deprives that person of EU citizenship and the body of rights attached thereto. As a matter of EU law, Member State action that may result in the *de iure* or *de facto* deprivation of the rights and duties attached to EU citizenship must be subject to careful and strict surveillance. In contrast, the acquisition of nationality expands, rather than diminishes, the range of a person's rights and duties. The acquisition of nationality therefore falls to be reviewed by reference to a different standard. The Commission's failure to grasp this fundamental difference has led it to advocate an interpretation of the Treaties that would lead to a disproportionate outreach of EU scrutiny over a field of national competence that is closely linked to the sovereign prerogatives of the Member States.

29. The Republic of Malta submits that the Commission's portrayal of the 2020 citizenship scheme as an 'automatic and unconditional' access route to Maltese nationality, providing for the 'systematic granting of nationality in exchange for pre-determined payments', in the 'purely budgetary interests' of the Republic of Malta, is an oversimplification without any foundation in law or in fact. Whilst an initial investment triggers access to the scheme, it does not operate in an 'automatic and unconditional' manner, but rather places significant weight on the impact of each application on 'security, reputation, systemic effects, compliance and other criteria'. A rate of refusal of approximately one third of all admissible applications is sufficient proof of the absence of any automaticity. Neither is the grant of nationality a direct consequence of a financial

transaction since applicants must give long-term commitments and remain subject to prolonged review procedures after naturalisation. The Republic of Malta therefore asserts that the 2020 citizenship scheme is a legitimate, robust, professionally run and effective naturalisation scheme, the operation of which does not undermine the EU's objectives. The 2020 citizenship scheme is transparent, carefully monitored and has a direct and positive impact on Maltese society. The Republic of Malta rejects the Commission's characterisation of the scheme as a 'buy now – develop a link later' approach. Successful applicants reflect a variety of links with the Maltese community, consisting in prior, present, and prospective bonds that evolve over time.

30. In its rejoinder, the Republic of Malta claims that, were the Court to uphold the Commission's plea, it would be required to repeal an entire body of legislation and statutory instruments, not limited to a single provision or a specific set of rules on nationality. By challenging a Member State's entire legal framework governing access to nationality, the Commission invites the Court to act as an 'indirect legislator', exercising a veto over national legislation adopted in a domain that is reserved to the Member States. The broader the scope of the review afforded in a field of exclusive national competence, the higher the risk that its exercise will exceed the European Union's competence in a particularly sensitive field. For that reason, the Republic of Malta submits that only a significant breach of the European Union's values and/or objectives could justify any intervention by the Court. Finally, and contrary to the Commission's assertions, the Republic of Malta emphasises that the European Union is a political community, and not a 'single polity'.

Assessment

Admissibility

31. While the Republic of Malta does not explicitly object to the admissibility of the present action, it refers to differences between the arguments the Commission raised during the pre-litigation phase of the procedure and those it now seeks to rely upon. The Republic of Malta claims that a number of the Commission's arguments in the reply differ from those in the application. It also objects to the Commission tendering the 'Passport papers' [17] in evidence, since they relate to the operation of the 2014, not the 2020, citizenship scheme at issue in these proceedings.

32. The Court may consider of its own motion whether the conditions laid down in Article 258 TFEU for an action for failure to fulfil obligations to be brought are satisfied. [18] Since the issue of the admissibility of the action was raised at the hearing and the Commission had an opportunity to reply to a question from the Court thereon it is appropriate that the Court examine that issue. In accordance with settled case-law, the subject matter of an action under Article 258 TFEU for failure to fulfil obligations is determined by the Commission's reasoned opinion. That document must contain a cogent and detailed exposition of the reasons that led the Commission to conclude that the Member State to which it is addressed has failed to fulfil an obligation under the Treaty. An ensuing infringement action must be based upon the same grounds and pleas as set out in the reasoned opinion, and the Court cannot examine a ground of complaint that does not

[17] See 'Passport papers' published by the Daphne Caruana Galizia Foundation. https://www.daphne.foundation/passport-papers/2021/04/round-up.

[18] Judgment of 5 April 2017, *Commission* v *Bulgaria* (C-488/15, EU:C:2017:267, paragraph 50).

appear therein.[19] The present action is narrower in scope than the complaint in the reasoned opinion of 6 April 2022, since the latter took aim at both the 2014 and the 2020 citizenship schemes. Subject to that caveat – which does not give rise to concern[20] – the action is based on the same grounds and pleas as those in the reasoned opinion. Both the reasoned opinion and the application identify a breach of Article 20 TFEU and Article 4(3) TEU by reason of legislation the Republic of Malta introduced that offers naturalisation to persons in exchange for pre-determined payments or investments without requiring the existence of a genuine link between that Member State and those individuals.

33. As for the alleged differences between the application and the reply, it is settled case-law that a party may not alter the subject matter of the case during the course of proceedings, and that the merits of the action must be examined solely in the light of the claims in the application.[21] The Commission is nevertheless entitled to respond to arguments that the Republic of Malta raised in its defence, provided – as in this case – the scope of the proceedings is unaltered.

34. I therefore advise the Court that both the present action and the arguments raised in the reply are admissible.

35. As regards the admission into evidence of the so-called 'Passport papers', the Commission does not dispute that they concern the operation of the 2014 citizenship scheme which is irrelevant *ratio materiae* to the present action. Contrary to what the Commission appears to contend, the contents of those papers may not, therefore, be relied upon in any way to reach conclusions as to the legality of the 2020 citizenship scheme.

Substance

– *Preliminary remarks*

36. In this action, the Commission seeks a declaration that, by enacting and operating Article 10(9) of the 2020 Citizenship Act and the 2020 Regulations, the Republic of Malta failed to fulfil its obligations under Article 20(1) TFEU and Article 4(3) TEU. Should the Court grant that order, the Republic of Malta will be required to take the necessary measures to comply with the Court's judgment.[22] It follows that, contrary to the Republic of Malta's submissions, these

[19] Judgment of 24 June 2004, *Commission* v *Netherlands* (C-350/02, EU:C:2004:389, paragraph 20). The purpose of the pre-litigation procedure is to give the Member State concerned the opportunity to comply with its obligations under EU law or to present its defence against the Commission's complaints effectively. The proper conduct of that procedure is essential to protect the rights of that Member State and to ensure that the subject matter of the contentious procedure is clearly defined. The pre-litigation procedure thus pursues three objectives: to allow a Member State to put an end to any infringement, to enable it to exercise its rights of defence and to define the subject matter of the dispute with a view to bringing an action before the Court (judgment of 16 September 2015, *Commission* v *Slovakia*, C-433/13, EU:C:2015:602, paragraphs 39 and 49).

[20] The requirement that the subject matter of proceedings under Article 258 TFEU is circumscribed by the pre-litigation procedure for which it provides does not require that in every action the operative part of the reasoned opinion and the form of order sought in the application are identical, provided that the subject matter of the latter is neither extended nor altered but is limited (judgment of 14 March 2006, *Commission* v *France*, C-177/04, EU:C:2006:173, paragraph 37).

[21] Judgment of 11 November 2010, *Commission* v *Portugal* (C-543/08, EU:C:2010:669, paragraph 20). See also Article 21 of the Statute of the Court of Justice of the European Union and Article 120(c) of its Rules of Procedure.

[22] See Article 260(1) TFEU.

proceedings do not impugn the legality of that Member State's entire legislative framework on naturalisation.[23] Nor is the Commission's action an effort by that institution, with the Court's direct or indirect assistance, to legislate in the field of EU citizenship.

37. The Republic of Malta accepts that a Member State that adopted a naturalisation policy that excluded individuals of a specific race or ethnic origin would be in breach, inter alia, of Article 20 TFEU, read in the light of Article 2 TEU. Since the Commission does not claim that the 2020 citizenship scheme operates in a discriminatory manner on grounds of race, ethnic origin or otherwise, that submission need not detain the Court further.[24] The Republic of Malta also submits that it has made considerable efforts and invested significant resources to operate a multi-tiered due-diligence process in order to ensure that the 2020 citizenship scheme complies with and enforces, inter alia, EU legislation on anti-money laundering, corruption and terrorism. Since the Commission's action is not based on any failure by the Republic of Malta to comply with that, or indeed any, EU legislation, that submission is also moot.

38. In proceedings under Article 258 TFEU for failure to fulfil obligations, the Commission must prove that a Member State has not fulfilled an obligation binding upon it under EU law and may not rely upon any presumption in order to do so.[25]

39. Settled case-law prescribes that the principle of sincere cooperation laid down in Article 4(3) TEU requires Member States to take all measures necessary to guarantee the application and the effectiveness of EU law. A failure to fulfil the general obligation of sincere cooperation under Article 4(3) TEU exists only in so far as that failure consists of conduct distinct from an infringement of a specific obligation owed by that Member State.[26]

40. The present action seeks a declaration that, by establishing and operating the 2020 citizenship scheme that offers naturalisation to persons who do not have a genuine link with the Republic of Malta, in exchange for pre-determined payments or investments, that Member State has failed to fulfil its obligations under Article 20(1) TFEU and Article 4(3) TEU. As confirmed at the hearing, the Commission's allegation that the 2020 citizenship scheme operates so as to impose obligations and duties upon other Member States in breach of Article 4(3) TEU arises from, and follows as a consequence of, its allegation that the Republic of Malta is in breach of Article 20 TFEU. Without proof of a breach of the Treaty provisions governing citizenship there is, therefore, no basis, in law or in fact, for the claim that the Republic of Malta is in breach of the duty of loyal co-operation. As the case-law affirms, the alleged breach of Article 4(3) TEU refers to conduct that is not distinct from an infringement of a specific obligation based upon Article 20 TFEU. I therefore advise the Court that, in these proceedings, it is not called upon to examine the allegation that the Republic of Malta failed to comply with Article 4(3) TEU separately from that advanced under Article 20 TFEU.

[23] In Article 258 TFEU proceedings it is exclusively a matter for the Commission, when it considers that a Member State has failed to fulfil its obligations, to assess whether it is appropriate to act against that State, to identify the provisions it claims that State has infringed, and to choose when it will initiate those proceedings (judgment of 3 March 2016, *Commission* v *Malta*, C-12/14, EU:C:2016:135, paragraph 24).

[24] The Republic of Malta claims that the 2020 citizenship scheme applies objective and transparent criteria. Article 5(1) of the European Convention on Nationality, adopted under the aegis of the Council of Europe, which entered into force on 1 March 2000 (the 'European Convention on Nationality'), states that '[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin'.

[25] See, to that effect, judgment of 26 April 2005, *Commission* v *Ireland* (C-494/01, EU:C:2005:250, paragraph 41 and the case-law cited).

[26] Judgment of 17 December 2020, *Commission* v *Slovenia (ECB archives)* (C-316/19, EU:C:2020:1030, paragraphs 119 and 121 and the case-law cited).

– *The requirement of a 'genuine link' under EU and international nationality law*

41. It is evident from the parties' written and oral submissions that there is no dispute between them as to the content of the 2020 citizenship scheme and the manner in which it operates. The Republic of Malta does not, in particular, contest that it offers naturalisation to persons in exchange for pre-determined payments, subject to their meeting certain requirements.[27] At the hearing, the Republic of Malta confirmed that, in exchange for payment of a specific financial contribution, a single year's legal residence in that Member State suffices for the purposes of naturalisation. The Commission confirmed in its oral submissions that its single complaint is based upon the existence of a requirement under EU law – and, to a lesser extent, under international law – that, in order to preserve the integrity of EU citizenship, there must be a 'genuine link' between a Member State and its nationals. In the course of those submissions, the Commission also affirmed that the success of its action turns on the validity of that premiss.

42. Article 20(1) TFEU establishes EU citizenship. In accordance with Article 9 TEU and Article 20(1) TFEU, every person holding the nationality of a Member State shall be a citizen of the European Union. Article 9 TEU also provides that EU citizenship is additional to and does not replace national citizenship. The status of EU citizenship is inseparably linked to, and entirely dependent upon, the possession of the nationality of a Member State. The acquisition of Member State nationality results in the automatic and unconditional acquisition of EU citizenship. The loss of Member State nationality has the consequence that the person concerned automatically loses his or her status as an EU citizen.[28] Member State nationality is a *sine qua non* or an 'essential condition' for being an EU citizen.

43. Since the *Grzelczyk* judgment,[29] the Court has repeatedly confirmed that EU citizenship is 'destined to be the fundamental status of nationals of the Member States'.[30] In practice this means that EU citizenship confers an array of rights on those who possess it. These include the right to move and reside freely within the territory of the Member States[31] and the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence under the same conditions as nationals of that State.[32] Every EU citizen may also rely on the prohibition of discrimination on grounds of nationality in Article 18

[27] See point 29 of the present Opinion.

[28] Judgment of 9 June 2022, *Préfet du Gers and Institut national de la statistique et des études économiques* (C-673/20, EU:C:2022:449, paragraphs 46 to 48 and 57) ('the *Préfet du Gers* judgment'). Paragraph 48 thereof states that 'by Article 9 TEU and Article 20 TFEU, the authors of the Treaties thus established an inseparable and exclusive link between possession of the nationality of a Member State and not only the acquisition, but also the retention, of the status of citizen of the Union.' Following the United Kingdom's sovereign decision to withdraw from the European Union on the basis of Article 50(1) TEU, the Treaties ceased to apply to the United Kingdom from the entry into force on 1 February 2020 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7). From that date, nationals of the United Kingdom no longer hold the nationality of a Member State and are no longer EU citizens. See the *Préfet du Gers* judgment, paragraph 91.

[29] Judgment of 20 September 2001, *Grzelczyk* (C-184/99, EU:C:2001:458, paragraph 31). See also judgments of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 82) and of 15 July 2021, The Department for Communities in Northern Ireland (C-709/20, EU:C:2021:602, paragraph 62). In Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraph 172) the Court stated that 'the pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the *raison d'être* of the EU itself'.

[30] See also the *Tjebbes* judgment, paragraph 31 and the *Préfet du Gers* judgment, paragraph 49 and the case-law cited.

[31] Article 20(2)(a) TFEU and Article 21 TFEU. The rights Article 21(1) TFEU confers on EU citizens are intended, amongst other things, to promote their gradual integration in the society of the host Member State (judgment of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 56).

[32] Subject to the conditions and limits defined by the Treaties and by the measures adopted thereunder: Article 20(2)(b) TFEU and Article 22 TFEU. See also Articles 40 and 41 of the Charter of Fundamental Rights of the European Union ('the Charter').

TFEU in all situations that fall within the scope *ratione materiae* of EU law.[33] The fundamental status of EU citizenship and the corresponding obligations and duties that it imposes on Member States do not exempt the exercise of those rights from being made subject to certain conditions.[34]

44. Because the enjoyment of EU citizenship is entirely dependent upon the existence of Member State nationality, it is settled case-law that it is for each Member State, acting within its exclusive competence[35] and having due regard to international law,[36] to lay down the conditions under which its nationality may be acquired and lost.[37] As I indicated in my Opinion in *Préfet du Gers*,[38] the Member States could have decided to pool their competences and to confer on the European Union the power to determine who may become an EU citizen. They have chosen not to do so.

45. Declaration No 2 on nationality of a Member State, annexed to the final act of the Treaty on European Union,[39] also reflects the extent of Member State prerogatives in this domain. As we have seen, the acquisition of Member State nationality automatically results in the acquisition of EU citizenship, which all other Member States are bound, as a matter of EU law, to recognise. Declaration No 2 makes it clear 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 …' Declaration No 2 thereby reflects 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.

[33] Article 18 TFEU is intended to apply independently only to situations governed by EU law with respect to which the TFEU does not contain specific rules on non-discrimination (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraphs 63 and 65 and the case-law cited).

[34] Article 6(1) of 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77), provides that 'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.' By contrast, pursuant to Articles 7 and 16 of Directive 2004/38, an EU citizen's right of residence in another Member State for a period of longer than three months but less than five years is subject to additional conditions. For example, Article 7(1)(b) of Directive 2004/38 provides that non-active EU citizens must 'have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence …'. See judgment of 15 July 2021, *The Department for Communities in Northern Ireland* (C-709/20, EU:C:2021:602, paragraphs 75 to 79).

[35] There is no EU legislation on either the acquisition or the loss of EU citizenship. The Republic of Malta observed at the hearing that such legislation could be introduced on the basis of Article 352 TFEU.

[36] In both its written and oral submissions, the Commission asserts that it does not rely on international law in these proceedings. That statement is somewhat inconsistent with its reliance on the *Nottebohm* judgment to support its case. EU law in any event requires Member States to respect international law when they lay down rules on the acquisition and revocation of nationality: see the *Tjebbes* judgment, paragraph 30. It follows that, in the absence of conflict, EU law standards in this sphere are informed by, and must respect, international law. See, however, Opinion of Advocate General Poiares Maduro in *Kadi* v *Council and Commission* (C-402/05 P, EU:C:2008:11, point 24), where he states that 'the relationship between international law and the [EU] legal order is governed by the [EU] legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the [European Union]'.

[37] Judgment of 18 January 2022, *Wiener Landesregierung (Revocation of an assurance of naturalisation)* (C-118/20, EU:C:2022:34, paragraph 37 and the case-law cited) ('the *Wiener Landesregierung* judgment'). See, by analogy, the *Kaur* judgment, paragraph 25. The Court clarified that a Member State's unilateral declaration prior to its accession to the European Community (EC) to delimit the scope *ratione personae* of EC provisions, and thus the nationals of that Member State who would benefit from those provisions, did not deprive nationals of that Member State of the benefit of those rights, as they had never enjoyed them.

[38] Opinion of Advocate General Collins in *Préfet du Gers and Institut national de la statistique et des études économiques* (C-673/20, EU:C:2022:129, point 22).

[39] OJ 1992 C 191, p. 98 ('Declaration No 2'), attached to the 1992 Maastricht Treaty which established EU citizenship. Declaration No 2 intended to clarify the ambit *ratione personae* of EU law provisions that referred to the concept of 'national' and is therefore to be taken into consideration when determining the ambit *ratione personae* of the TEU (judgment of 5 September 2023, *Udlændinge- og Integrationsministeriet (Loss of Danish nationality)*, C-689/21, EU:C:2023:626, paragraph 27).

46. The Treaties contain numerous references to the peoples of Europe, to the Union's peoples, the peoples of the Member States and the European peoples. EU citizens are, moreover, constituent actors of the European Union in a single polity,[40] evidenced, in particular, by the right to vote and to stand as candidates in elections to the European Parliament.[41] This does not, in any way, detract from the fact that the Member States have decided that it is for them alone to determine who is entitled to be one of their nationals and, as a consequence, who is an EU citizen. The 'single polity' that results from the creation of EU citizenship therefore does not impose obligations on the Member States with regard to the terms and conditions upon which they confer nationality.

47. In a spirit of mutual respect and trust, Member States have unconditionally agreed to abide by the decisions of other Member States as to whether an individual possesses the nationality of a Member State and, therefore, EU citizenship, irrespective of the particular relationship between that person and that Member State. Article 9 TEU, Article 20(1) TFEU and Declaration No 2 do not permit the EU institutions, or other Member States, to introduce any conditions for the recognition of the nationality of another Member State.

48. In the *Micheletti* judgment,[42] the Court held that, with a view to the exercise of the fundamental freedoms provided for in the EC Treaty, it is impermissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing any additional condition for the recognition of that nationality.[43] While that judgment predates the establishment of EU citizenship, the Court restated that principle, inter alia, in the *Zhu and Chen* judgment,[44] in the context of EU citizenship.[45] It follows that the European Union, its institutions and its Member States must, in principle, abide by all other Member State rules on the conditions for the acquisition and the loss of nationality. The system of mandatory mutual recognition that this case-law contemplates 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.

49. Although EU law does not lay down the conditions for the acquisition and the loss of nationality of a Member State,[46] and they must abide each other's rules for that purpose, it has been held that the application of those rules must not breach EU law in situations that come within the latter's scope.[47] The exercise of a Member State's sovereign prerogative to grant or to withdraw citizenship is not unlimited and both EU and international law may, in principle,

[40] That 'single polity' is limited by the provisions of the Treaties and is therefore not to be equated to that of a State.

[41] Article 20(2)(b) TFEU. See also Articles 9 to 11 TEU on democratic principles, which refer extensively to EU citizens.

[42] Paragraph 10.

[43] In his Opinion in *Micheletti and Others* (C-369/90, EU:C:1992:47, points 3 and 4), Advocate General Tesauro stated that the acquisition and loss of nationality is exclusively a matter for each State. The possession of the nationality of a Member State, irrespective as to how it was acquired, is the only prerequisite that an individual must satisfy in order to exercise the right of establishment, and no other factor or criterion may be taken into consideration.

[44] Paragraph 39. See also judgment of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 28). In the *Zhu and Chen* judgment, paragraph 39, the Court does not refer to a restriction imposed by legislation but states in broad terms that a Member State may not restrict the effects of the grant of the nationality of another Member State by imposing additional conditions for the latter's recognition.

[45] Articles 17 and 18 EC (now Articles 20 and 21 TFEU).

[46] The principle of conferral governs the attribution of competences to the European Union: Article 4(1) and Article 5(1) and (2) TEU. Competences not conferred on the European Union remain with the Member States. The European Union cannot arrogate competences in domains reserved exclusively to the Member States.

[47] The *Rottmann* judgment, paragraphs 39 and 41 and the *Tjebbes* judgment, paragraph 30 apply this general proposition of EU law.

constrain its exercise.[48] Contrary to the Republic of Malta's submissions, all breaches of EU law, howsoever framed, may be the subject matter of an action pursuant to Article 258 TFEU for failure to fulfil an obligation. Recourse to that procedure is not reserved to the prosecution of what might be described as serious breaches.[49]

50. Aside from the present action, I am unaware of any case to date where the Court examined a Member State's rules on the acquisition of nationality in the light of EU law and, in particular, by reference to EU citizenship. That EU law is incapable of conferring a right on a person to become a Member State national appears to explain that state of affairs. In the *Micheletti* judgment the Court did not review the Italian rules on naturalisation in the light of EU law but rather the compatibility with EU law of Spanish rules that purported to restrict the effect of Italian law in Spain. In the *Zhu and Chen* judgment,[50] the Court examined the question of the abuse of law or the misuse of rights in the context of the acquisition of EU citizenship.[51] The Court rejected the United Kingdom Government's claim that a national of a third country should be prevented from relying on EU law – in particular on the right of EU citizens to move and reside freely within the territories of the Member States – where that person had arranged matters in such a way as to ensure that their child acquired the nationality of a Member State and thus EU citizenship and the rights derived therefrom. In rejecting that government's claim, the Court emphasised that none of the parties that had submitted observations in the case questioned either the legality of, or the fact that, the child in question had acquired the nationality of a Member State.[52]

51. The Court has confirmed that individuals must comply with the general principle of law according to which EU law cannot be relied on for abusive or fraudulent ends.[53] The legality of the grant or the acquisition of EU citizenship may thus, in principle, be examined in the light of that concept. The present action alleges a failure by the Republic of Malta to fulfil its obligations under Article 20 TFEU. It does not assert that that Member State abused the law or misused rights afforded to it. The possible application of that doctrine does not, accordingly, arise for consideration in these proceedings.

52. The Court's case-law is more abundant on the issue of the withdrawal or the loss of EU citizenship. While the competence to grant nationality is reserved to the Member States and EU citizenship is contingent on the exercise of that competence, recourse to the prerogative to

[48] See judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'* (C-490/20, EU:C:2021:1008, paragraph 38 and the case-law cited), where the Court stated that 'it is for each Member State, having due regard to international law, to lay down the conditions for acquisition and loss of nationality, and that in situations covered by EU law, the national rules concerned must have due regard to the latter'.

[49] Article 258 TFEU enables the Commission to institute proceedings for failure to fulfil obligations when it is of the view that a Member State has failed to fulfil an obligation under EU law, without requiring it to draw distinctions by reference to the nature and the gravity of the alleged infringement. Judgment of 27 November 1990, *Commission* v *Italy* (C-209/88, EU:C:1990:423, paragraph 14). See, by analogy, judgment of 18 October 2007, *Commission* v *Denmark* (C-19/05, EU:C:2007:606, paragraph 35).

[50] *Zhu and Chen* judgment, paragraphs 34 to 40.

[51] See, by analogy, Sloane, R.D., *Breaking the Genuine Link. The Contemporary International Legal Regulation of Nationality*, Harvard International Law Review, Vol. 50, No 1. The author considers that the *Nottebohm* judgment may be properly read as a narrow decision in which the ICJ invoked the general principle of abuse of law in order to prevent Mr Nottebohm from evading the consequences of the law of war.

[52] Proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by EU law, the purpose of those rules has not been achieved and, second, a subjective element consisting in an intention to obtain an advantage from EU rules by artificially creating the conditions laid down for obtaining it. Judgment of 26 February 2019, *T Danmark and Y Denmark* (C-116/16 and C-117/16, EU:C:2019:135, paragraphs 70 and 97 and the case-law cited) ('the *T Danmark* judgment').

[53] *T Danmark* judgment, paragraphs 70 to 71 and the case-law cited. The concept of abuse of EU law or the misuse of rights may, in principle, apply to the actions of individuals and of Member States, provided that the requisite EU competence and necessary proofs are established.

withdraw national, and thus EU, citizenship is subject to a number of identifiable constraints. An important feature of this case-law is that it engages the exercise of Member States' sovereign prerogatives vis-à-vis their own nationals and not nationals of other Member States or of third countries. Arising from concerns that the withdrawal of national citizenship, which results in the loss of EU citizenship, may render individuals stateless and deprive them of rights granted under the Treaties and the Charter, EU law guarantees a minimum standard of legal protection to persons who find themselves in such circumstances. This results in a situation where an exact parallel cannot be drawn between the grant and the withdrawal of Member State nationality, with the consequence that EU law makes different demands of the Member States under each of these headings. For these reasons, I agree with the Republic of Malta's submission that one cannot equate a withdrawal of a Member State's nationality with its acquisition.

53. This is illustrated in the *Rottmann* judgment [54], where the Court held that, notwithstanding the fact that the conditions for the acquisition and loss of nationality fall within the competence of Member States, EU law applies in circumstances where an individual may lose his or her EU citizenship and the rights attaching thereto. Where the exercise by Member States of their powers in this domain affects rights that EU law confers and protects, it may be the subject of judicial review by reference to those rights. A Member State may withdraw its nationality from an individual where it was acquired by deception, notwithstanding that the person concerned thereby loses EU citizenship and may become stateless, [55] provided the principle of proportionality is observed. [56] The application of that principle may require that the person concerned be afforded a reasonable period of time before the loss of his or her nationality to enable him or her to try to recover the nationality of another Member State. [57]

54. The Court also held, in the *Tjebbes* judgment, [58] that a Member State may legitimately consider nationality to be an expression of a genuine link with that Member State. A Member State may therefore prescribe that the absence, or the loss, of a genuine link between it and an individual entails the loss of his/her nationality provided that the principle of proportionality applies with regard to the consequences of that loss for the person concerned [59] from the viewpoint of EU law. According to the Court, the loss of Member State nationality by operation

[54] Paragraphs 41, 42, 48, 57 and 58.

[55] Article 15(2) of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, provides that 'no one shall be arbitrarily deprived of his nationality.' Article 8(2)(b) of the Convention on the Reduction of Statelessness, done at New York on 30 August 1961, which entered into force on 13 December 1975, provides that a person may be deprived of the nationality of a Contracting State where that nationality has been obtained by misrepresentation or fraud. Article 8(4) further provides that a Contracting State shall not exercise a power of deprivation permitted by Article 8(2)(b) except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body. In addition, Article 7(1) of the European Convention on Nationality states that 'a State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases: … (b) acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant.' See also Article 18(2)(a) thereof, which provides that '[i]n deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account in particular of: … (a) the genuine and effective link of the person concerned with the State …'.

[56] The Court held that a decision to withdraw nationality on grounds of deception may be justified in the public interest: *Rottmann* judgment, paragraph 51; *Tjebbes* judgment, paragraph 33; and *Wiener Landesregierung* judgment, paragraph 52).

[57] Which was a matter for the referring court to determine.

[58] Paragraphs 35, 40 and 41. The Court examined whether Article 20 TFEU precludes Member State legislation which provides that its nationality may be lost by operation of law. In the case of persons who are not also nationals of another Member State, that loss of EU citizenship occurs in the absence of an individual examination of the proportionality of that loss for the person concerned.

[59] And, if relevant, for the members of his or her family (judgment of 5 September 2023, *Udlændinge- og Integrationsministeriet (Loss of Danish nationality)*, C-689/21, EU:C:2023:626, paragraph 32). Loss of nationality must be consistent with the fundamental rights guaranteed by the Charter, in particular, the right to respect for family life in Article 7 thereof (*Tjebbes* judgment, paragraph 45; *Wiener Landesregierung* judgment, paragraph 61).

of law would be inconsistent with the principle of proportionality if the relevant national rules did not permit an individual examination of the consequences of that loss for the persons concerned. [60]

55. It follows that while a Member State, in accordance with its own nationality laws, may require proof of a genuine link, as defined in accordance therewith – or 'the special relationship of solidarity and good faith between it and its nationals' [61] – EU law does not define, much less require, the existence of such a link in order to acquire or to retain that nationality. [62] EU law countenances such a requirement under a Member State's national law only in the context of the withdrawal or revocation of nationality provided the principle of proportionality is respected and certain procedural guarantees are afforded to the person affected. [63]

56. On the requirement of a 'genuine link' as a matter of international law, it is true – as the Commission observes – that in the *Nottebohm* judgment, [64] the ICJ held that a State may refuse to recognise nationality granted by another State, in the absence of a genuine link or a connection between that individual and the nationality that he or she asserts. The ICJ ruling is limited to allowing States to withhold recognition of nationality granted in the absence of a genuine link between a person and the State of which she or he claims to be a national. It does not oblige States to require that such a link exists either between them and their own nationals or between other States and their nationals. [65] For the purposes of the present action, it is

[60] See the *Tjebbes* judgment, paragraph 41, and the *Wiener Landesregierung* judgment, paragraph 59. The Court considered that a Member State decision to revoke an assurance to grant nationality, which led to the permanent loss of EU citizenship for the person concerned, is incompatible with the principle of proportionality where the grounds for that decision were that that individual had committed administrative traffic offences punishable by pecuniary penalties (*Wiener Landesregierung* judgment, paragraph 74).

[61] Judgment of 25 April 2024, *Stadt Duisburg (Loss of German nationality)* (C-684/22 to C-686/22, EU:C:2024:345, paragraph 37 and the case-law cited).

[62] See, by analogy, Article 7(1) of the European Convention on Nationality whereby 'a State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases: … (e) lack of a genuine link between the State Party and a national habitually residing abroad'. The convention does not define that 'genuine link'. It follows, in my view, that Article 7(1)(e) of the European Convention on Nationality leaves it up to each State Party to decide what is a genuine link between it and its nationals.

[63] See judgment of 25 April 2024, *Stadt Duisburg (Loss of German nationality)* (C-684/22 to C-686/22, EU:C:2024:345, paragraphs 56 to 65 and the case-law cited). See, by contrast, the *Préfet de Gers* judgment, paragraph 62, where the Court held that the obligation to carry out an individual examination of the proportionality of the consequences of the loss of EU citizenship in situations that fall within the scope of EU law does not apply to loss of that status as the automatic result of a sovereign decision by a former Member State to withdraw from the European Union.

[64] Freidrich Nottebohm, a German national, was born in Germany in 1881. In 1905, he took up residence in Guatemala and opened a business. In 1939, immediately after the start of the Second World War, he applied to become a Liechtenstein national. Upon obtaining a Liechtenstein passport in December 1939, Mr Nottebohm had it visaed by the Consul General of Guatemala in Zurich. He returned to Guatemala at the beginning of 1940 to resume his business activities. In 1943, Mr Nottebohm was arrested by the Guatemalan authorities at the instance of the Government of the United States of America, handed over to the latter's armed forces and deported to the United States where he was interned without trial for two years and three months. The Guatemalan authorities commenced legal proceedings against Mr Nottebohm with a view to the expropriation, without compensation, of his properties. In December 1951, the Government of Liechtenstein instituted proceedings before the ICJ claiming restitution and compensation against the Government of Guatemala for its actions towards Mr Nottebohm's person and property. The Government of Guatemala contended that claim was inadmissible on the basis, inter alia, that the Principality of Liechtenstein had failed to prove that Mr Nottebohm, 'for whose protection it is acting', had properly acquired Liechtenstein nationality in accordance with the law of that State. The ICJ's judgment, which is limited to the question of admissibility, examines 'whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in … the proceedings instituted before the [ICJ]'.

[65] See, by analogy, Article 3(1) of the European Convention on Nationality of 6 November 1997, which provides that 'each State shall determine under its own law who are its nationals'. Article 3(2) thereof provides that 'this law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality.' See also Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws (adopted on 13 April 1930, entered into force on 1 July 1937) 179 LNTS 4137 (the 'Convention on Conflict of Nationality Laws'), the text of which is almost identical to Article 3(1) and (2) of the European Convention on Nationality. Article 2 of the Convention on Conflict of Nationality Laws provides that 'any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.' The references to international law in these conventions is somewhat circular. One might anticipate that such conventions might define or at least outline the minimum conditions that international law requires when a State grants nationality to a person. That these conventions have systematically shied away from establishing even minimum norms in this field to my mind demonstrates a clear intention to leave the definition of nationality and the conditions for its grant to the laws of individual States. It follows that, to date, international law has had but a marginal impact in this sphere.

important to point out that the ICJ did not define the concept of a 'genuine link' under international law, let alone require States to grant nationality by reference thereto. To the contrary: the ICJ held that 'it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality …'[66] It follows from the *Nottebohm* judgment that, at least in the ICJ's opinion, the rules for the grant of nationality are a matter for individual States.

57. There is no significant divergence between EU law and international law on the question as to whether a genuine link must exist between an individual and the State of which he or she is a national, since neither imposes such a requirement. The conditions for the grant of nationality are a matter of national law,[67] although some deference is paid to international rules against statelessness and respect may be afforded to the human and procedural rights of the individuals concerned. In the EU law context, Declaration No 2 and the *Micheletti* line of case-law prevent Member States from not recognising another Member State's grant of nationality, which the *Nottebohm* judgment appears to countenance.[68] There is also 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, let alone one that requires a 'genuine link' as a condition for possessing that nationality. 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 comptences that the Member States enjoy in this domain. To find otherwise would upset the carefully crafted balance between national and EU citizenship in the Treaties and constitute a wholly unlawful erosion of Member States' competence in a highly sensitive field which they have clearly decided to retain under their exclusive control.

58. It follows that, in my view, the Commission has failed to prove that, in order to lawfully grant national citizenship, Article 20 TFEU requires the existence of a 'genuine link' or a 'prior genuine link' between a Member State and an individual other than that which a Member State's domestic law may require. The Republic of Malta may have a case to answer as regards the second and third steps of the Commission's case: however a faithful application of the Commission's three-step approach persuades me that it is unnecessary for the Court to proceed beyond ruling on the first step. Absent proof of any other breach of EU law, I advise the Court to dismiss the present action.

Costs

59. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

60. In the present case, the Commission and the Republic of Malta applied, respectively, for the other party to the proceedings to be ordered to pay the costs.

[66] The ICJ continued by stating that '… it is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State'.

[67] There are no universally accepted rules for the acquisition of nationality under EU law or international law. This is the case even though States may often grant nationality based on (variants of) common norms or concepts such as *ius soli* or *ius sanguinis*. See, by analogy, Article 6(1)(a) of the European Convention on Nationality.

[68] In his Opinion in *Micheletti and Others* (C-369/90, EU:C:1992:47, point 5), Advocate General Tesauro stated that he did 'not believe that the case before the Court constitutes an appropriate setting in which to raise the problems relating to effective nationality, whose origin lies in a "romantic period" of international relations and, in particular, in the concept of diplomatic protection; still less … is the well-known (and, it is worth remembering, controversial) *Nottebohm* judgment of the [ICJ] of any relevance'.

61. Since the Republic of Malta has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

Conclusion

62. In the light of the foregoing considerations, I propose that the Court:

– dismiss the Commission's action;

– order the Commission to pay its costs and those of the Republic of Malta.