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"To be or not to be an EU citizen?" Who qualifies as an EU citizen in the case law of the CJEU?

Abstract

The question of who is to be regarded as a citizen of the Union and, as such, who may exercise the rights conferred by EU citizenship is an important one and, despite its apparent simplicity, is often difficult to answer. Since EU citizenship is a status derived from Member State nationality, it seems reasonable to assume that anyone who can claim EU citizenship must necessarily be considered a national of a Member State and, conversely, that any national of a Member State is free to claim all or part of EU citizenship rights to which he or she is entitled. In practice, the question of the existence of EU citizenship status is often less clear-cut, as the case law of the European Court of Justice (hereinafter referred to as CJEU) has shown: both in cases of multiple nationalities and in cases of statelessness, there may be specific circumstances that are also decisive for the assessment of the existence of EU citizenship. This paper examines these "border areas" of EU citizenship, drawing on the case law of the CJEU.

Keywords: EU citizenship, multiple nationalities, statelessness, investor citizenship programmes

I. Introduction

Nationality, in the international legal sense, is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties".[1] Citizenship is a legal relationship between an individual and the State, based on reciprocity, involving rights and duties and implying a relationship of trust and proximity between the State and its citizens.[2] According to the Advisory Opinion of the Permanent Court of International Justice on the *Nationality Decrees issued in Tunis and Morocco,* the question of

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1 ICJ, *Nottebohm (Liechtenstein v. Guatemala),* 6 April 1955, ICJ Reports 1955. 23.

2 See e.g.: Szabó M., A többes állampolgárság – Új nemzetközi és uniós perspektívák felé?, (2013) (1–2) *Állam- és Jogtudomány,* 126. Several authors also cites the finding of the International Court of Justice; see e.g.: Sonnevend P., Állampolgárság, idegenjog, in Kende T., Nagy B., Sonnevend P. and

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nationality is essentially a matter for the domestic jurisdiction of States.[3] The European Convention on Nationality, promulgated in Hungary by Act III of 2002, states in the same spirit that "Each State shall determine under its own law who are its nationals".[4] Accordingly, in public international law, the question of granting nationality is essentially a matter of States' domestic affairs, and other States are obliged to accept the nationality rules of individual States "in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised concerning nationality".[5] This also means that the instruments of public international law have very little influence on the nationality practices of individual States.[6]

In legal terms, ideally, a natural person has one (and only one) nationality recognised by all other States, and, at the same time, all natural persons have a nationality (recognised by all other States).[7] However, there may be situations in which a natural person has the nationality of several States simultaneously (multiple nationality) or, on the contrary, has no nationality at all (statelessness). It is also possible that an individual has a nationality but, for some reason (typically persecution),[8] is unable or unwilling to seek the protection of the State of nationality.[9]

The Maastricht Treaty established the institution of EU citizenship.[10] According to Article 20(1) TFEU, "Every person holding the nationality of a Member State shall

Valki L. (szerk.), *Nemzetközi jog,* (Complex, Budapest, 2014) 513.; Ganczer M., *Állampolgárság és államutódlás,* (Dialóg Campus, Budapest–Pécs, 2013) 43.

3 PCIJ, *Nationality Decrees Issued in Tunis and Morocco (French Zone) on 8 November 1921,* 7 February 1923, 72.

4 See Article 3(1) of the Convention.

5 See Article 3(2) of the Convention.

6 Szabó M., A tagállami állampolgárság és az uniós polgárság viszonya: félúton vagy tévúton?, in Gyeney L. and Szabó M. (szerk.), *Az uniós polgárság jelene és jövője: úton az egységes európai állampolgárság felé?,* (Orac, Budapest, 2023) 17–33.

7 For a long time, jurisprudence (and practice) considered multiple nationality (or statelessness) to be something of an 'anomaly'. In today's globalised world, multiple nationality is increasingly accepted and there are fewer and fewer legal problems when a natural person holds the nationality of several States at the same time.

8 See e.g. Article 1(A)(2) of the 1951 Geneva Convention relating to the Status of Refugees. For an analysis of the concept, see e.g.: *Kézikönyv a menekült státusz meghatározására szolgáló eljárásról és az azzal kapcsolatos követelményekről a menekültek helyzetéről szóló 1951. évi Egyezmény és az 1967. évi Jegyzőkönyv alapján,* (Az Egyesült Nemzetek Menekültügyi Főbiztosának Hivatala, Genf, 1992) 8–18.

9 For completeness, it should be noted that in some cases the question of citizenship may also be linked to the question of recognition of citizenship. On this point, see e.g.: Ganczer M., Az állampolgárság más államok általi elismerése és az effektivitás elve, (2012) (1) *Állam- és Jogtudomány,* 29–62.

10 On the international and EU legal nature of EU citizenship, see e.g.: Á. Mohay and D. Muhvic, The legal nature of EU citizenship: Perspectives from international and EU law, in T. Drinóczi, M. Zupan, Zs. Ercsey and M. Vinkovic (eds), *Contemporary legal challenges: EU – Hungary – Croatia,* (Pécs and Osijek, 2012) 155–175. For a comprehensive analysis, see: Gyeney L., Európai uniós polgárság,

be a citizen of the Union".[11] The wording of the Maastricht Treaty implies that EU citizenship is not an institution in its own right but a derivative status conferred on persons holding the nationality of a Member State, notwithstanding the fact that EU citizenship otherwise includes partly separate rights (e.g., the right to petition) and partly complementary rights (e.g., the extension of the right to consular protection) to Member State nationality. However, since the institution of EU citizenship is directly linked to Member State nationality, CJEU case law on EU citizenship necessarily affects the framework of nationality laws of the Member States.

II. The invocability of existing nationality – The Micheletti Doctrine and the case law beyond

Under Article 3(2) of the European Convention on Nationality, while each State has the right to determine who its nationals are, "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 concerning nationality". The CJEU takes the same approach, adding that EU Member States must also consider EU law when defining their nationality policies.[12]

In *Micheletti,* the CJEU ultimately had to decide, on the basis of the above, whether the authorities of a Member State (namely Spain) could choose to examine the application for a permanent residence permit of an Italian-Argentine dual national (Mario Vicente Micheletti) who had previously lived in Argentina by taking only the nationality of the applicant's habitual residence into account (in this case, Argentina). This was particularly important in Micheletti's case. As an Italian national, he would have been entitled to a permanent residence permit, but as an Argentine national, his application could have been legally rejected by the Spanish authorities. Based on the (recognised) principle of effectiveness in public international law, it is well established that, in the case of multiple nationalities, the nationality to be considered effective is with which the person concerned has a genuine connection (mainly because of habitual residence).[13]

in Jakab A., Könczöl M., Menyhárd A. and Sulyok G. (szerk.), *Internetes jogtudományi enciklopédia (IJOTEN),* (2020).

[11] For a comprehensive analysis, see: Szalayné Sándor E., Az uniós polgárság: Az EUM-Szerződés 20–25. cikkéhez fűzött kommentár, in Osztovits A. (szerk.), *Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata,* (Complex, Budapest, 2011) 1010–1043.

[12] Case C-369/90, *Micheletti,* Judgment of 7 July 1992, ECLI:EU:C:1992:295, 10. See e.g.: Szalayné Sándor E., *A személyek jogállása az uniós jogrendben,* (Nemzeti Közszolgálati Egyetem, Budapest, 2014) 39.

[13] For details, see e.g. Ganczer, *Állampolgárság és államutódlás,* 72.

The principle of effectiveness does not mean, however, that the host State does not recognise the other (ineffective) nationality of the person concerned but merely indicates that certain rights and obligations linked to nationality (e.g., in the context of diplomatic protection) only apply concerning one of the States of nationality (and thus ultimately to only one of the nationalities).

By requiring Member States in *Micheletti* to consider EU law in addition to public international law when making certain decisions on nationality (and ultimately EU citizenship), the CJEU has essentially established that the principle of effectiveness cannot result in a Member State's national being deprived of the exercise of his or her EU citizenship rights.

This approach is justified because 'ineffective' nationality is also an existing citizenship that can be 'revived' if necessary. Indeed, by wishing to exercise one of the rights of EU citizenship, an EU citizen ultimately 'revives' their nationality. In another approach, *Micheletti* also implies that EU Member States cannot call into question the nationality of another Member State in accordance with the rules of public international law.

For completeness, the CJEU decided *Micheletti* before the institution of EU citizenship was established. However, its conclusions are still relevant in the context of EU citizenship. The Micheletti doctrine applies to all situations where a person with multiple nationalities of a Member State and a third country would like to exercise EU citizenship rights. The fact that an EU citizen also holds the nationality of a third country should not affect their rights as an EU citizen. It is also true that tensions can quickly arise when people who were originally third-country nationals and who have acquired nationality through generous naturalisation rules move to a Member State other than their own when they settle in the EU. An example is the case of Moldovan-Romanian dual nationals who, having acquired Romanian nationality, have chosen Italy as their place of residence in large numbers as EU citizens, a natural consequence of the institution of EU citizenship.

If the issue of multiple nationality arises in an intra-EU context, the transnational nature of EU citizenship could, in principle, render the issue beyond debate. In such a case, the nationality of the Member State itself is decisive. The question of which Member State the person concerned is a national is only of secondary importance. This approach is attractive in theory. However, practice in the Member States varies considerably. While most Member States recognise the institution of multiple nationalities, others continue to require renunciation of their former nationality as part of the naturalisation process. There are also cases where acquiring another nationality can lead to the loss of the original citizenship. An example of the latter is the 2010 amendment to the Slovak Nationality Act, which has dire consequences for Hungarians in *Felvidék* (the historical Upper Hungary, now part of Slovakia) according

to which a person who voluntarily applies for and obtains another nationality based on an express declaration of will loses Slovak nationality at the same time.

However, such national legislation cannot be subject to the EU legal principles limiting the institutional and procedural autonomy of Member States, in particular the principle of effective judicial review, since 'Union citizenship' of the EU citizen is not affected.[14] Nationality of a Member State is, of course, of 'high value' from the point of view of Union citizenship and the rights attached to it. Therefore, it is legitimate to demand that Member States not allow the almost unlimited acquisition of their nationality, mainly when it serves exclusively economic ends and, above all, the interests of the natural person acquiring nationality. This is why the European Commission (and, shortly, the CJEU) is trying to crack down on the purchase of nationality (and hence EU citizenship) with money. The international legal basis for this action can be traced back to the *Nottebohm* judgment of the International Court of Justice, in which the ICJ stressed the 'genuineness' of the link between state and national in the context of providing diplomatic protection. At the same time, it is questionable, at least in public international law, to what extent a relationship based essentially on economic considerations can be considered genuine. Marcel Szabó cites the example of the naturalisation of elite athletes, which primarily benefits the State that grants nationality.[15] In contrast, the elite athletes who obtain nationality primarily receive financial (and competitive) opportunities. The concept of nationality for investment (or for money),[16] on the other hand, is based on the opposite approach: in this case, the real beneficiary of nationality is the national, while the benefits for the State are only indirect and budgetary.[17] In the EU, particularly in the case of Malta and Cyprus, establishing investor programmes granting nationality (especially for Russian nationals) became so popular that the European Commission has already decided to launch infringement proceedings in 2020.[18]

[14] The above requirements and legal consequences are difficult to interpret from the point of view of EU law, particularly regarding the fundamental nature of EU citizenship and the principle of equal treatment. They are, in any case, incompatible with the Treaty's objective of closer unity between the peoples of Europe.

[15] Szabó, A tagállami állampolgárság és az uniós polgárság viszonya: félúton vagy tévúton?, 23–24.

[16] For more details, see e.g.: Horváthy B., Befektetői állampolgársági programok és az uniós polgárság intézménye, in Ganczer M. and Knapp L. (szerk.), *Az uniós polgárság elmélete és gyakorlata,* (Gondolat, Budapest, 2022) 61–80; Schiffner I., The Golden Passport – avagy a befektetési programmal elérhető állampolgárság aktuális kérdései az Európai Unióban. (2021) (4) *Forum: Acta Juridica et Politica,* 257–274.

[17] See e.g.: J. Dzankic, To Sell or Not to Sell. The Ethics of Ius Pecuniae, in J. Dzankic (ed.), *The Global Market for Investor Citizenship,* (Palgrave Macmillan, 2019) 57–89. DOI: https://doi.org/10.1007/978-3-030-17632-7_3

[18] INFR(2020)2300 Cyprus investor citizenship scheme; INFR(2020)2301 Malta investor citizenship scheme. It is interesting to note that the two-month deadline for Member States to respond has long since passed, but even though there is no indication that the Commission has launched proceedings in

Concerning similar nationality programmes based on economic considerations, the CJEU must consider two aspects at the same time: on the one hand, Member States are, in principle, free to decide on nationality issues and, on the other hand, this freedom must not lead to the EU's interests being harmed. However, since the 'economic relationship' between the State and the national is not traditionally called into question in the case of the naturalisation of elite athletes, it would be difficult, at least objectively, to justify not accepting a relationship of an economic nature. This is why the Commission has only alleged that the nationality rules of the two Member States breach the principle of loyalty in its infringement proceedings against Malta and Cyprus.

Legal guidance for the Commission in this regard is provided by Advocate General Maduro's opinion in *Rottmann,* which argues that it would be contrary to EU law if a Member State, without consulting the Commission and the other Member States, were to carry out "an unjustified mass naturalisation of nationals of non-member States".[19]

It is also interesting to note that if, in the future, the CJEU were to follow the ICJ's *Nottebohm* judgment automatically, it could even conclude that nationals who acquired such status under investor programmes are not entitled to certain rights enjoyed by EU citizens. However, such an approach is, at best theoretical: while the ICJ's *Nottebohm* case focused on an exceptional legal instrument (i.e., the granting of diplomatic protection), which allows for thorough control of the conditions for granting diplomatic protection, the concept of the internal market implies that EU citizens should be free to exercise their rights with a minimum of control. It can be seen from the above cases that the CJEU, in its jurisprudence, considers the existence of nationality 'acquired for the purpose intended' as an absolute or even factual question that can be invoked in all cases, regardless of the principle of effectiveness under international law. While undoubtedly unconventional, this approach is highly desirable for the effective and uniform application *(effet utile)* of EU law and citizenship throughout the EU.

However, the situation is different concerning nationality 'acquired by abuse', which is already fundamentally at odds with EU law (or at least its spirit). Although the CJEU has not yet ruled on this point, it seems logical to include in the category of nationality "acquired in the interest of the State" those cases where nationality can be granted on the basis of an individual assessment of the relationship between the State and the individual (rather than on a mass basis).

Finally, concerning multiple nationality, it is important to note that linking EU citizenship to nationality does not have the effect of extending the scope of the TFEU

the CJEU, of the two Member States, only Cyprus has suspended its investor programme, and Malta has explicitly defended its legality.

[19] See para. 30 of the Advocate General's Opinion.

to purely internal situations. For example, the CJEU ruled in *McCarthy* that a dual national (British and Irish) who has lived in the UK all her life, who has not been employed or self-employed, cannot rely on EU law to obtain residence for her third-country spouse.[20]

EU citizenship is not intended to extend the scope of the TFEU to internal situations that are in no way connected with the Union.[21] Thus, as a general rule,[22] a cross-border element – mainly in the form of movement – is always required to invoke the provisions of the TFEU relating to Union citizenship, regardless of whether it is a question of past or potential future movement. It is precisely because of the element of past movement that the CJEU has held that, unlike in *McCarthy,* there is a cross-border element in the case of a British-Spanish dual national who, having moved from Spain to the United Kingdom and acquired British nationality, thereby naturalisation, sought to rely on EU law.[23]

Similarly, we can distinguish from *McCarthy* the *Garcia Avello* judgment[24] of the CJEU, which arose in a case concerning the registration of children with dual Spanish-Belgian nationality and in which the future movement of the children represented the cross-border element. *Garcia Avello* essentially concerns some issues regarding the right to a name: Carlos Garcia Avello, a Spanish national, and his wife, Isabelle Weber, a Belgian national, lived in Belgium, where they had two children (Esmeralda and Diego), both of whom had dual Spanish and Belgian nationality. Under Belgian law, the Belgian registrar of births and marriages had entered the father's surname (Garcia Avello) on the children's birth certificates. Still, the couple wanted the children's surnames to be Garcia Weber (i.e., the father's first surname and the mother's first surname). The question (which the CJEU answered in the affirmative, as mentioned above) was whether children of Spanish-Belgian dual nationality living in Belgium could invoke Spanish law as their personal law against the Belgian authorities.

In its judgment, the CJEU, therefore, held that children might rely on the prohibition of discrimination based on nationality in order not to be discriminated

[20] Case C-434/09, *McCarthy,* Judgment of 5 May 2011, ECLI:EU:C:2011:277.

[21] Joined cases C-64/96 and C-65/96, *Uecker and Jacquet,* Judgment of 5 June 1997, ECLI:EU:C:1997:285.

[22] An exception to this is the recent case law of the CJEU, referred to above, according to which citizenship of the Union and the rights deriving from it can be invoked in an essentially purely national situation, provided certain circumstances apply. In *Zambrano,* the CJEU emphasised that an EU citizen has the right to reside in the territory of the EU, i.e., not in a particular Member State, irrespective of whether he or she has previously exercised freedom of movement. Case C-34/09, *Zambrano,* Judgment of 8 March 2011, ECLI:EU:C:2011:124. However, certain issues relating to EU citizenship are not only of great importance from a nationality perspective in the case law of the CJEU. See e.g.: L. Gyeney, EU Citizenship: the bumpy road away from a market-oriented approach. An analysis of the Rottmann, Zambrano, McCarthy and Dereci cases, (2012) (2) *Iustum Aequum Salutare,* 141–164.

[23] Case C-165/16, *Lounes,* Judgment of 14 November 2017, ECLI:EU:C:2017:862.

[24] Case C-148/02, *Garcia Avello,* Judgment of 2 October 2003, ECLI:EU:C:2003:539.

against as regards the rules governing their surname, which constitutes an obstacle to their freedom of movement by depriving them of the effects of documents issued based on a surname recognised in another Member State.[25] The difference in surnames can therefore cause serious inconvenience and both professional and private disadvantages for the persons concerned,[26] which in some cases are a matter for national courts to determine.[27] The above judgments (in addition to our difficulties in understanding some of the issues related to EU citizenship) also reflect the intercultural tensions that arise from different surname practices in different jurisdictions.[28]

III. Extension of EU citizenship to certain cases of statelessness – the *Rottmann* and *JY* cases

In the previous chapter, the cases where a person already had the nationality of a Member State were the subject of analysis and classification. The question was thus merely whether a national of a Member State could enjoy the rights of Union citizenship. However, given the inherent freedom of each Member State to determine certain aspects of its citizenship policy, there may be cases where a former national of a Member State (and thus an EU citizen) becomes stateless. A key case on the legal status of (former) EU citizens who become stateless is *Rottmann*.[29] According to the facts of the case, Janko Rottmann, originally an Austrian national, exercised his right to free movement and residence and settled in Germany. He applied for naturalisation, but during the procedure, he concealed the fact that he was the subject of criminal proceedings in Austria. Mr Rottmann acquired German nationality, which (under Austrian law) meant that he lost his Austrian nationality. When the suppressed criminal proceedings were subsequently brought to the attention of the German authorities, Mr Rottmann's German nationality was retroactively withdrawn as having been fraudulently acquired. However, the withdrawal of the German nationality was

[25] However, the CJEU's sharp distinction between *McCarthy* and *Garcia Avello* may be more convincing. In *McCarthy,* the CJEU held that the mere fact that McCarthy had Irish nationality in addition to her British nationality did not entail the application of measures by the Member States which impeded the exercise of her right to move and reside freely within their territory. According to the legal literature, even if the distinction is based on the effect of the different measures, the impossibility of living with a spouse is no less an obstacle than the requirement to hold documents in a different name.

[26] Case C-353/06, *Grunkin and Paul,* Judgment of 14 October 2008, ECLI:EU:C:2008:559.

[27] Case C-391/09, *Runevic-Vardyn and Wardyn,* Judgment of 12 May 2011, ECLI:EU:C:2011:291.

[28] Király M., *Az Európai Unió gazdasági joga I.,* (ELTE Eötvös, Budapest, 2010) 87.

[29] Case C-135/08, *Rottmann,* Judgment of 2 March 2010, ECLI:EU:C:2010:104. For a detailed analysis of the case, see e.g. Gyeney, EU Citizenship: the bumpy road away from a market-oriented approach. An analysis of the Rottmann, Zambrano, McCarthy and Dereci cases, 141–164; Á. Mohay, The Rottmann case: new contributions to the links between EU citizenship and nationality, (2011) (2) *Jogesetek Magyarázata,* 50–58.

not accompanied by the 'revival' of Rottmann's former, Austrian nationality and Rottmann became a stateless person. In this case, the CJEU had to consider whether it is compatible with EU law to withdraw a nationality acquired by deception (fraud) if the result is that the person concerned becomes stateless and thus loses their EU citizenship. The CJEU first had to decide whether the case of Mr Rottmann, who was a stateless person at the time, fell within the scope of EU law, which the CJEU answered in the affirmative. According to the judgment, a situation in which the German authorities withdraw the German nationality acquired by naturalisation from a German national living in Germany falls within the scope of EU law "by reason of its nature and consequences" if, as a result of that decision, the person concerned also loses their status as an EU citizen.[30] The CJEU then had to consider two aspects (having established the relevance of the case to EU law). The first was that, following *Micheletti,* each Member State is free to decide on nationality matters within the limits of public international law (and EU law). This certainly includes the withdrawal of fraudulently acquired nationality. The second was that, by having his fraudulently acquired nationality withdrawn, Mr Rottmann not only lost his 'new' (German) nationality but also became stateless, which is a much more severe legal consequence than if he had 'only' had his newly acquired nationality withdrawn. Accordingly, the fact that the granting and withdrawal of nationality and the determination of the conditions for doing so are essentially matters for the Member States was not disputed in the CJEU's judgment.[31]

However, the CJEU also confirmed that Member States' powers are not unlimited: they must consider EU law when deciding whether to grant or withdraw nationality.[32] Thus, in the present case, although the withdrawal of Mr. Rottmann's German nationality may in itself be a matter of German domestic law, it is a matter of EU law that the legal consequences of the withdrawal of that nationality should not entail disproportionate legal consequences for Mr Rottmann. According to the CJEU, the latter aspect is a matter for the German court hearing the case: in the context of the proportionality of the deprivation of nationality, it must be examined whether, in the specific, individual case, *Rottmann* had sufficient time to regain Austrian nationality.[33]

In a sense, *JY* can be seen as a mirror image of *Rottmann*.[34] According to the facts of the case, JY, an Estonian national, applied for Austrian nationality and received a prior promise from the competent Austrian provincial government that he would be granted Austrian nationality if he could prove that he had lost his Estonian nationality

[30] See para. 42 of the Judgment.
[31] Ibid., para. 39.
[32] Ibid., para. 45.
[33] Ibid., para. 58.
[34] Case C-118/20, *JY,* Judgment of 18 January 2022, ECLI:EU:C:2022:34.

within two years. JY renounced his Estonian nationality on the basis of the promise, but Austria subsequently refused to grant him nationality because JY had committed several traffic offences (which were essentially fines and therefore not driving disqualifications) which, under Austrian law, precluded the Austrian authorities from granting him nationality.

As in *Rottmann,* the CJEU held that the case fell within the scope of EU law and that the Austrian court must therefore assess whether or not the legal consequence of not allowing the acquisition of Austrian nationality for offences punishable essentially by a fine, despite the Austrian government's prior declaration, was proportionate.[35] However, it is worth noting the Austrian government's argument that JY's situation is not covered by EU law because he is no longer an EU citizen. The CJEU rejected this argument on the basis of the principle of progressive integration, holding that an EU citizen who, by exercising his right to free movement, risks losing his EU citizenship by applying for nationality of another Member State, is, by definition, subject to EU law.[36]

The following conclusions can be drawn from the cases of *Rottmann* and *JY*. While it is clear from the ancillary nature of EU citizenship that only nationals of Member States can enjoy EU citizenship if the loss of nationality is not in accordance with EU law (in particular because of the disproportionate nature of the loss of nationality and thus of EU citizenship as a legal consequence), the legality of the Member State's action leading to the loss of nationality must be assessed on the basis of EU law. This also means that although the CJEU cannot override the derivative nature of Union citizenship and cannot guarantee the enjoyment of Union citizenship rights to persons who do not hold the nationality of any Member State at a given time if the loss of nationality is considered disproportionate, the national court must ultimately declare the act of the Member State that deprived the citizen of their nationality of being unlawful.

IV. Automatic loss of nationality (and EU citizenship) – the *Tjebbes* case

Withdrawal of nationality (and ultimately EU citizenship) can not only be made by individual decision but also at a general, legislative level, as the example of *Tjebbes* shows.[37] Independently of each other, four natural persons who had previously held

[35] Ibid., para. 74.

[36] On the case, see e.g.: Schiffner I., A Rottmann-ügy öröksége, avagy az uniós polgárság elvesztésének új kérdései a JY v. Wiener Landesregierung ügy alapján, (2021) (1) *Forum: Acta Juridica et Politica,* 93–111.

[37] Case C-221/17, *Tjebbes,* Judgment of 12 March 2019, ECLI:EU:C:2019:189. On the case, see e.g.: L. Gyeney, Challenges arising from the multi-level character of EU citizenship: The legal analysis of the

Dutch nationality and a Dutch passport but had been living outside the Netherlands let their passports expire and only applied for the renewal of their passports years later. However, the Dutch authorities found that all four applicants had automatically lost their nationality without further notification, as they were all multiple nationals (i.e., they could not become stateless after losing their Dutch nationality) and had lived outside the EU for more than ten years. This ten-year period would have been interrupted by the application for a new passport, but in the present case this ten-year-period had already passed without any result. The refusals were challenged by the persons concerned, and the Dutch court hearing the case asked the CJEU whether the Dutch rule, which automatically (and possibly without informing the former national) terminates Dutch nationality when certain conditions are met, without any form of assessment of the individual circumstances of the natural persons concerned, is compatible with EU law.

The CJEU (as in the previous cases) did not dispute that the Dutch legislation fully complied with the requirements of international law, in particular because the persons concerned did not become stateless.[38] However, for the loss of nationality (and thus EU citizenship), an additional requirement of EU law is that the act of a Member State resulting in the loss of EU citizenship must meet the proportionality requirement.[39] This can only be achieved if the legislation allows for assessing the individual circumstances of the persons concerned.[40] The approach of the CJEU in *Tjebbes* is essentially the same as in *Rottmann,* notwithstanding the fact that *Rottmann* was based on an individual decision of a public authority. In contrast, *Tjebbes* was based on domestic law. However, while, the authorities can easily carry out an examination of the individual circumstances of the (former) EU citizen concerned in the case of an individual administrative decision, in the case of a legislative provision of a general nature the above requirements can most likely be met only by national legislation. This is all the more true as there is no legal provision at EU level on the procedures for granting or refusing nationality that could be invoked by national authorities on the basis of the primacy of EU law, setting national law aside where appropriate.

Delvigne and Tjebbes cases, (2020) *Hungarian Yearbook of International Law and European Law,* 276–298. DOI: https://doi.org/10.5553/HYIEL/266627012020008001017

[38] See paras 34–37 of the Judgment.

[39] In their application, the plaintiffs in the main proceedings complained, among other things, that Dutch law prohibits the national courts from taking into account other circumstances which may justify the existence of a genuine link, such as knowledge of Dutch, the maintenance of family and/or emotional ties in that Member State and the exercise of the right to vote in Dutch elections.

[40] See para. 41 of the judgment. The CJEU mentions, for example, the possibility of restoring nationality with *ex tunc* effect. See para. 42 of the Judgment.

V. Loss of EU citizenship in the light of the international treaties governing Brexit

As well as posing severe economic and political challenges for the United Kingdom and, of course, for the Union itself, the UK's exit from the EU in 2020 has raised several other issues affecting the daily lives of citizens of the States concerned. Perhaps the most intriguing of these has been the question of whether UK nationals would lose their EU citizenship rights for good after Brexit and how the exit would affect the lives of many EU citizens who reside or wish to reside in the UK.[41]

Article 20 TFEU is very vague about EU citizenship, saying only that anyone who is a national of a Member State is an EU citizen. There are three ways of acquiring EU citizenship: by birth, by naturalisation (when a natural person from a third country acquires the nationality of an EU Member State), or by the accession of a new Member State to the EU. Brexit can be seen as the reverse of the latter, with the not insignificant difference that the loss of EU citizenship is not generally regulated by EU law. However, for the purposes of the legal concept of EU citizenship, it follows directly that EU citizenship requires the possession of the nationality of a Member State, which necessarily implies not only the possession of nationality but also the existence of EU membership. However, Brexit has had a strong impact not only on the EU citizenship status of UK citizens but also on the status of EU citizens residing in the UK. According to the European Commission's 2020 report, the Brexit referendum, which led to the UK leaving the EU, has affected the lives of around 3.7 million EU citizens living in the UK, in particular their rights to move, reside and vote.[42]

After the end of the transition period, from 1 January 2021, the free movement of EU citizens in the UK ceased, which has been extremely sensitive for the masses of EU citizens then present in the UK, precisely because of the rights that come with EU citizenship. It is therefore not surprising (if only from a political and economic point of view) that the UK has given EU-27 citizens already living in the UK on 31 December 2020 the opportunity to register with the EU Settlement Scheme (EUSS) by 30 June 2021 at the latest. EU Citizens who had been resident in the UK continuously for at least five years could apply for 'settled status', while those who had been resident for less

[41] For more on the situation of EU citizens after Brexit, see e.g.: P. Mindus, *European citizenship after Brexit,* (Palgrave Macmillan, 2017) and É. Gellérné-Lukács, Á. Töttös and S. Illés, Free movement of people and the Brexit, (2009) 65 (4) *Hungarian Geographical Bulletin,* 421–432. DOI: https://doi.org/10.15201/hungeobull.65.4.9

[42] *EU Citizenship Report 2020,* https://mycitizenrights.eu/files/en/Citizen-Report-EN.pdf (Last accessed: 29.12.2023.) 5.

than five years could apply for 'pre-settled status' (which could be converted to 'settled status' after five years of continuous residence[43]).

The EU settlement scheme has been successful for many. The UK has granted 'status' to over six million EU citizens under the EU settlement scheme.[44] For completeness, however, it should be noted that the scheme's implementation is far from seamless. One of the main practical difficulties is that individuals have to apply explicitly for a change of status from pre-settled to settled status, failing which they may ultimately lose their right to reside legally in the UK.[45] Indeed, many of those with pre-settled status in the UK are unaware that they have to make a new application and, precisely because of the individual deadlines (as opposed to the previous general deadline), only find out afterward that their status has now been terminated.[46]

In light of the above, there is no doubt that Brexit, and in particular its protraction, has left deep scars on European integration, nor is there any doubt that restoring the free movement of persons between the UK and the EU in its previous form is not a realistic alternative, even if it means that the UK will also reduce the rights of its own nationals.[47] At the same time, of course, we must also recognise that the UK's emerging status already has a more or less well-established historical precedent, such as the relationship between the EU and Switzerland, where the parties have regulated the free movement of persons through bilateral treaties. However, if the (political) intention of the UK government is to take the UK out of the EU, it is questionable whether the political reality of an (international) legal solution that would restore some of the very benefits from which the UK has withdrawn is realistic.

Brexit has directly affected not only the right to move and reside (or work) but also the right to vote, as a significant number of EU-27 nationals were residents in the

[43] Settled status guarantees indefinite leave to remain (ILR) and the right to work in the UK. It also gives the holder the right to have treatment under the National Health Service (NHS), enrol in educational institutions, access various publicly-funded social benefits, and travel in and out of the UK without losing settled status, on the same terms as before. Finally, people with settled status can continue to benefit from family reunification (under the previous rules for EU citizens), and their children born in the UK will automatically acquire British nationality.

[44] According to some reports, EU-27 nationals who are in the UK but not yet settled were offered financial incentives to leave the country before the deadline for applying for settled status. See https://www.theguardian.com/politics/2021/jan/26/eu-citizens-offered-financial-incentives-to-leave-uk (Last accessed: 29.12.2023.).

[45] Under the EU Settlement Scheme, nationals who have been granted pre-settlement status must either apply for settled status or reapply for pre-settlement status before it expires. If they do not apply in time, they automatically lose their rights to access employment, housing, education, and benefits and may even be expelled.

[46] C. Barnard and F. Costello, *The EU Settlement Scheme – ongoing issues from the frontline,* https://ukandeu.ac.uk/the-eu-settlement-scheme-ongoing-issues-from-the-frontline/ (Last accessed: 29.12.2023.).

[47] A. Alemanno and D. Kochenov, Mitigating Brexit through Bilateral Free-Movement of Persons, *VerfassungsBlog,* 04.01.2021., https://verfassungsblog.de/mitigating-brexit-through-bilateral-free-movement-of-persons/ (Last accessed: 29.12.2023.).

UK before Brexit. At the time of the European Parliament elections, 4.5% of all registered voters in England and Wales and 3.2% of all registered voters in Scotland were non-British nationals with EU citizenship (and, of course, there were still British nationals with EU citizens living in the EU-27 Member States). Given that in Scotland and Wales, all residents can participate in local elections (i.e., have the right to vote) regardless of their nationality, the UK eventually decided that EU citizens would continue to have the right to vote in local elections in May 2021, but this was no longer a requirement of EU law but a decision by the UK legislature. At the same time, the UK government has concluded bilateral agreements with several EU-27 Member States (including Luxemburg, Poland, Portugal, and Spain) to ensure the participation of British nationals in local elections, and some interest groups, such as the '3 million' (referring to EU-27 citizens in the UK) and 'British in Europe'[48] (referring to EU-27 British citizens in the UK), are pushing even harder than before for bilateral agreements to ensure the broadest possible participation of citizens in local decision-making.

However, regarding EU citizens' right to consular protection, Brexit is more of a theoretical than a practical issue. In the case of the UK, it is difficult in principle to envisage the possibility of providing consular protection at the EU level. This is partly due to the development of the UK legal system and partly to the fact that all EU-27 Member States have a diplomatic mission in the UK. For British nationals, the Brexit disadvantage is also apparent, as the number of third countries where the UK would not have a diplomatic mission is negligible.

In the case of the right to complain to the European Ombudsman or the right to petition, the legal consequences are even less serious: these rights are available to EU citizens (regardless of their place of residence) and non-EU citizens living in the EU-27. Therefore, Brexit will only mean the loss of the right to complain to the European Ombudsman and the right to petition for UK citizens living in the UK.

All in all, therefore, it can be said that although Brexit has been very significant from an integration and political point of view, its impact on EU citizenship has been moderate overall, and the legal regime has significantly cushioned the natural legal consequences for EU citizens living in the UK and UK nationals living in the EU-27.[49]

[48] See: https://the3million.org.uk/ (Last accessed: 29.12.2023.); https://www.britishineurope.org/ (Last accessed: 29.12.2023.).

[49] Many Brits have applied for nationality of one of the EU-27 Member States, mainly to retain the rights of EU citizenship. For example, the father of the now-resigned British Prime Minister Boris Johnson applied for French nationality on 31 December 2020.

VI. Conclusions

In EU law, the concept of nationality is mainly taken as a matter of course, according to which the question of whether a person has the nationality of a Member State can only be answered by reference to the national law of the Member State concerned.[50] This approach has been partly confirmed by the CJEU itself, which has ruled that the conditions for acquiring and losing nationality are determined by each Member State, respecting EU law. In principle, therefore, it would be relatively easy to define the scope of EU citizens by looking at the nationality laws of the Member States.

While this is true for the 'rule of thumb' cases, in the case of exceptions and border areas, the question of the exercise of rights linked to EU citizenship can hardly be decided mechanically, given the fundamental differences in citizenship policies between Member States (mainly due to different legal systems and historical traditions). Thus, although Member States remain sovereign in deciding who their citizens are, from the point of view of the application of EU law, the rational limit to Member States' nationality policies is the effective enforcement of EU law (in this case, EU citizenship powers) *(effet utile)*. These limitations include the fact that the existence or non-existence of nationality is a question of fact (and not of law), which is essential for EU citizenship. No Member State can call into question another Member State's decision on nationality and thus, ultimately, the existence of nationality.

This is the case even though some Member States (notably Malta and Cyprus) operate extensive investor schemes that link national and, thus, EU citizenship, which could be used to devalue the institution of EU citizenship. The Commission has launched infringement proceedings against the Member States concerned precisely because the unitary nature of EU citizenship (and Member State nationality) does not allow the citizenship of the Union to be questioned once it has been granted.

A further element of the safety net is that each Member State's decision on nationality (and thus ultimately EU citizenship) is subject to the principle of proportionality, i.e., the loss of nationality can only be based on a consideration of the individual circumstances of the (former) EU citizen concerned, irrespective of whether the decision results in the person losing nationality and thus ultimately EU citizenship. However, while this individual discretion can always be exercised by the authorities in individual administrative decisions *(Rottmann),* in the case of *ipso iure* loss of nationality by legislation *(Tjebbes),* Member States are already obliged to legislate in order to comply fully with their obligations under EU law.

However, the case law of the CJEU also reveals a specific dichotomy in the case law on the acquisition of nationality (and thus EU citizenship): while the CJEU declares cases of acquisition of nationality to be contrary to EU law in extreme cases

[50] See Declaration No 2 annexed to the Maastricht Treaty.

only,[51] it seems to apply a stricter standard when judging cases of loss of EU citizenship. In a sense, the third element of the safety net is that, post-Brexit, both the UK (for EU-27 nationals remaining on its territory) and the EU (for UK nationals living in the EU-27) have ensured the continued exercise of the rights and obligations arising from acquired EU citizenship status through a series of legal provisions – in the case of the UK, not based on EU law, but rather on public international law and partly on UK domestic law. The combined significance of this legal context and jurisprudence is paramount: to assess the question of the exercise of certain rights deriving from EU citizenship, it is inevitable to examine first whether the natural person concerned is an EU citizen at all or (more permissibly) whether they can rely on certain rights and obligations deriving from EU citizenship.

[51] This could be the case, for example, of the two ongoing infringement procedures against Malta and Cyprus for their investor citizenship schemes.