INSIGHT

# The If and the How: Losing the EU Citizenship, but with Due Regard to the Due Process of (EU) Law

Francesco Luigi Gatta*

ABSTRACT: The judgment in *Stadt Duisburg,* concerning the loss of German (and, thus, EU) citizenship in the context of naturalization proceedings, adds a new chapter to the "judicial saga" of loss of a Member State's citizenship and compatibility of its national measures with EU law. This *Insight* focuses on such a case-law of the Court of Justice ("ECJ" or "the Court"), which reflects the compromise between the "untouchable" State sovereign competence in nationality matters and the gradual consolidation of a "procedural armour" assisting the loss of the EU citizenship and the rights attached thereto. Building on this assumption, the *Insight* retraces and examines the main principles of EU citizenship law elaborated by the Court via its case-law, inaugurated with its 2010 leading case *Rottmann*, and complemented with the latest additions of the 2024 judgment in *Stadt Duisburg*. The main idea emerging from this jurisprudence is that, essentially, the competence to establish criteria for the loss of nationality is, and remains, firmly in the Member States' hands. Its exercise, though, is increasingly made contingent on the respect of basic, legal principles of EU procedural law, *i.e.*, proportionality, effectiveness and due process of law. In other words, the ECJ does not intervene on the substantial side of the Member States' competence (the *"if"*), but rather on the procedural one (the "*how*"), thereby influencing its concrete exercise.

KEYWORDS: EU citizenship – art. 20 TFEU – *de jure* loss of nationality – proportionality – effectiveness – due process guarantees.

## I. The citizenship of the Union: an evolving, slippery ground

The citizenship of the EU is arguably one of the most relevant achievements of the European integration process, which boosted the objective of creating "an ever closer union among the peoples of Europe".[1] But who are actually "the peoples of Europe"?

* Research Fellow, University of Tuscia, francesco.gatta@unitus.it

[1] Art. 1 TEU. According to the Eurobarometer, 87 per cent of the Europeans agree that they feel they are citizens of the EU, 89 per cent agree that it benefits them personally, 83 per cent that it benefits the European economy (Flash Eurobarometer 528, European Commission, December 2023, Citizenship and democracy).


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The "fundamental status" of nationals of the Member States, to recall the ECJ's formula, has triggered controversies over integration, dual citizenship and naturalization processes.[2] Unsurprisingly, because it intersects a typical bulwark of State sovereignty and, at the same time, marks the legal capacity to accede to European rights and freedoms. More generally, it often triggers sensitive, identitarian issues.

The 2015 "refugee crisis", for example, led to Germany's organized reception of over 1 million asylum seekers: a destabilizing initiative, or a step in the process of creating an ever closer union among *the peoples of Europe*, as per art. 1 TEU? Is a resettled, integrated and naturalized Syrian refugee less German than how Italian Mr. Micheletti was? Or than third-country nationals "Europeanized" via the "golden passport" schemes of Malta and Cyprus?[3] Brexit led to an unprecedented loss *en masse* of the fundamental status of the Union.[4] Are Brits less European than Abramovich, an EU citizen subject to restrictive measures following Russia's occupation of Ukraine?[5] Are citizens of Bulgaria, Romania

[2] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458 para. 31. The literature on EU citizenship and its legal-constitutional features is very vast. Among others, see D Kochenov (ed), *EU Citizenship and Federalism* (Cambridge University Press 2017); C O'Brien, *Unity in Adversity* (Hart 2018); F Jacobs, 'Citizenship of the European Union: A Legal Analysis' (2004) ELJ; K Lenaerts, 'Civis Europaeus Sum: From the Cross-Border Link to the Status of Citizen of the Union, Constitutionalising the EU Judicial System', in P Cardonnel, A Rosas, N Wahl (eds), *Constitutionalising the EU Judicial System*. *Essays in Honour of Pernilla Lindh* (Hart 2012) 213; J Shaw, 'The Political Representation of Europe's Citizens. Development' (2008) EuConst 162; E Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) CMLRev 13; M Szpunar and E Blas López, 'Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment', in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 110; D Thym (ed), *Questioning EU Citizenship* (Hart 2017); D Thym and M Zoetewij Turhan (eds), *Degrees of Free Movement and Citizenship* (Brill Nijhoff 2015).

[3] See JHH Weiler, 'Citizenship for Sale (Commission v Malta): Who of the Two is Selling European Values?' (14 April 2024) Verfassungsblog verfassungsblog.de, where the Author provocatorily wonders whether an infringement proceeding should have been launched against Germany, as done in the case of Malta. See also the different position expressed in M Chamon, 'A Rejoinder to Citizenship for Sale (Commission v Malta): Some Remarks and Counterarguments' (15 April 2024) Verfassungsblog verfassungsblog.de. On the programmes of "citizenship by investment", see S Kudryashova, 'The Sale of Conditional EU Citizenship: The Cyprus Investment Programme Under the Lens of EU Law' (2018) European Papers www.europeanpapers.eu 1265; A Scherrer and E Thirion, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) Schemes in the EU' (2018) European Parliamentary Research Service www.europarl.europa.eu.

[4] To navigate the post-Brexit case-law, including on issues relating to the EU citizenship, see S Peers, 'Litigating Brexit: A Guide to the Case Law', EU Law Analysis eulawanalysis.blogspot.com.

[5] Case T-313/22 *Abramovich v Council* ECLI:EU:T:2023:830. On this matter, see D Kochenov, 'Sanctions for Abramovich, but Schröder Goes Scot-Free: Linking Sanctions, Citizenship, the Rule of Law and the Values of the European Union' (11 March 2022) Verfassungsblog verfassungsblog.de; N Moran, 'Judicial scrutiny and EU Sanctions against individuals: Expanded listing criteria, limited safeguards and scrutiny' (20 December 2022) VerfassungsBlog verfassungsblog.de; M Mota Delgado, 'Can EU citizens like Roman Abramovich be sanctioned?' (9 March 2022) EUIdeas euideas.eui.eu.

and Cyprus less European than others, when it comes to USA visa policy *vis-à-vis* EU citizens?[6]

These controversial cases exemplify the intricate issues surrounding the substance of the EU citizenship, such as its (in?) dependence as legal status or the relevance of residence and territoriality. This *Insight* does not focus on that, but looks at the procedural side of the matter, by examining the actionable "toolkit" of guarantees in case of loss of the EU citizenship. This has been developed through the ECJ's case-law, whose latest addition is the 2024 judgment in *Stadt Duisburg*, concerning the *de jure* loss of German-EU citizenship in the context of naturalization proceedings and (re)acquisition of Turkish nationality.[7]

As it will be seen, the Court confirms its balancing exercise between State sovereignty and attention to and protection of rights stemming from the EU citizenship. While it refrains from intervening on the domestic legislative choices on loss of nationality, it conditions their implementation from a procedural perspective. Put differently, the Court does not intervene on the "*if*", but on the "*how*": Member States remain capable of revoking nationality in the light of certain purposes (which are considered as legitimate), but must observe EU procedural law and the principles of proportionality, effectiveness and due process.

## II. The case-law concerning the loss of the EU citizenship

Dealing with citizenship is not an easy task. The ECJ has been stepping on thin ice, in an attempt to strike a balance between sovereign prerogatives of Member States and the rights of the European citizens (and their family members). Complex principles come into play, intersecting international law and domestic legislation, often involving delicate, extra-legal implications. The Court, thus, has proceeded with caution, promoting an incremental approach, rather than sudden changes.[8] When it comes to the loss of the EU citizenship, in particular, it has progressively equipped the EU citizen with a "procedural armor" based upon the principles of proportionality and effectiveness.[9]

The Court's choice to pursue the procedural pathway has been read in different manners. While some have considered the hesitation to dwell on the substance of the EU citizenship understandable, others have criticized it as equivalent to surrendering itself to States' sovereign claims, as well as inconsistent with international (human rights) law

[6] Case C-137/21 *Parliament v Commission (Exemption de visa pour les ressortissants des États-Unis)* ECLI:EU:C:2023:625. On this matter, see J Bornemann, 'The Price of Transatlantic Friendship: Visa-Reciprocity and EU Citizenship at the CJEU' (12 September 2023) Verfassungsblog verfassungsblog.de.

[7] Joined Cases C-684/22 to C-686/22, *Stadt Duisburg (Perte de la nationalité allemande)* ECLI:EU:C:2024:345.

[8] K Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach' (2015) International Comparative Jurisprudence 1.

[9] For Kochenov the Court's case-law represents "a procedural discussion" (D Kochenov, 'The Tjebbes Fail' European Papers (European Forum Insight of 25 April 2019) www.europeanpapers.eu 321).

and EU law itself.[10] The approach to multiple nationalities, furthermore, by upholding some Member States' desirability of mono-nationality, would be contrary to the very physiological phenomenon of European circulation and integration.[11]

### II.1. Case-law overview: characterization and main features

The case-law on the loss of EU citizenship, inaugurated with *Rottmann,* is over a decade old.[12] It has been nurtured through requests for preliminary rulings from courts of Central-Northern Europe (Germany, Austria, the Netherlands, Denmark), raising sensitive legal-political issues, as is evident from some procedural features. First, the cases have almost always involved the Grand Chamber, *i.e.*, one of the Court's highest judicial formations.[13] Second, various governments have intervened with observations: not a surprise, as States are willing to keep a jealous eye on their prerogatives over citizenship. The most active are Estonia, the Netherlands and Germany: all countries that have typically had issues relating to citizenship.[14]

The case-law concerns a complex, multi-level legal framework. Referring courts seek guidance as to the interpretation of EU primary Law, *i.e.*, the EC (in the pre-Lisbon case *Rottmann*), the TFEU and the Charter. Some provisions are recurrent: art. 20 TFEU, interpreted as stand-alone, as well as "in conjunction with" or "in the light of" arts 7 (respect

[10] K Swider, 'Legitimizing Precarity of EU Citizenship: Tjebbes' (2020) CMLRev 1163; D Kochenov, 'Double Nationality in the EU: An Argument for Tolerance' (2011) ELJ 323; D Kochenov, D de Groot, 'Curing the Symptoms but not the Disease: CJEU's Myopic Advances in the Field of EU Citizenship in JY' (20 January 2022) Verfassungsblog verfassungsblog.de.

[11] D de Groot, 'Free Movement of Dual EU Citizens', in N Cambien, D Kochenov and E Muir (eds), *European Citizenship under Stress. Social Justice, Brexit and Other Challenges* (Brill Nijhoff, 2020) 67.

[12] Case C-135/08, *Rottmann* ECLI:EU:C:2010:104. For analyses and comments, see G Davies, 'The Entirely Conventional Supremacy of Union Citizenship and Rights', in J Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (EUI Working Papers RSCAS 2011/62) 5; HU Jessurun d'Oliveira, GR de Groot and A Seling, 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, *Janko Rottman v. Freistaat Bayern*. *Case Note 1* Decoupling Nationality and Union Citizenship? *Case Note 2* The Consequences of the *Rottmann* Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters' (2011) EuConst 138; D Kochenov, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of 2 March 2010 (Grand Chamber), Not Yet Reported' (2010) CMLRev 1831.

[13] The Court sits in a Grand Chamber in particularly complex or important cases, while it sits as a full Court where the Court considers that a case is of exceptional importance. See art. 60 (1) (2) Rules of Procedure of the Court of Justice

[14] In the case of Estonia, for example, the citizenship policy complicates the country's relationship with its Russian-speaking minority and the Russian neighbor. On this matter, see DJ Trimbach, 'Nationality is Ethnicity: Estonia's Problematic Citizenship Policy' (7 March 2017) Baltic Bulletin www.fpri.org. Southern-European Member States tend to intervene less in this type of controversies, except for Greece, which intervened a couple of times in the case-law under consideration.

for family life) and 24(2) (best interest of the child) of the Charter.[15] In *Wiener Landesregierung*, art. 21 TFEU, concerning freedom of movement and residence, came into play as well, but the Grand Chamber, although declaring it applicable, then solved the case based solely on art. 20 TFEU.[16] This choice, it has been suggested, might point to the intention to prioritize the possession of the status of EU citizen over the actual exercise of the rights stemming therefrom.[17]

At domestic level, legislations on nationality are questioned, including relevant reforms adopted over times. As it will be seen, in *Stadt Duisburg,* the applicants in the main proceedings one day found out that, by operation of law and following a reform of the law on nationality, they were no longer Germans, after years, if not decades, since their naturalisation. The "legal puzzle" is completed by some relevant international treaties adopted within organizations such as the United Nations (1961 UN Convention on the reduction of Statelessness) and the Council of Europe (1997 European Convention on Nationality).[18]

Factually, the case-law addresses the loss of EU citizenship in two scenarios: *de facto,* as a consequence of the personal, unlawful conduct of the applicants;[19] *de jure*, by operation of law.[20] Art. 20 TFEU covers both actual and former European citizens "caught in a no-man's land between two member state nationalities",[21] with the consequence of either becoming stateless persons or losing the dual (EU-third country) citizenship and ending up as a non-European.

### II.2. Legal principles of EU citizenship law established by the Court

The Court has stated some basic, legal principles applicable to situations of loss of the EU citizenship. The first is the (re)affirmation of the *States' competence over the conditions for the acquisition and loss of nationality*. It goes back to the 1992 landmark judgment in *Micheletti,*

[15] On the relationships between the EU citizenship rights, as enshrined in the TFEU, and the fundamental rights protected in the Charter, see K Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU', (2019) German Law Journal 779; H van Eijken, 'Connecting the Dots Backwards, What Did *Ruiz Zambrano* Mean for EU Citizenship and Fundamental Rights in EU Law?' (2021) European Journal of Migration and Law 48.

[16] Case C-118/20 *Wiener Landesregierung (Révocation d'une assurance de naturalisation)* ECLI:EU:C:2022:34.

[17] K Hyltén-Cavallius, 'Stateless Union Citizens in a Nationality Conundrum: EU Law Safeguarding Against Broken Promises' (2022) EuConst 564-565.

[18] The judgment in *Rottmann* also includes the Universal Declaration of Human Rights (which, under art. 15, states that "everyone has the right to a nationality"). Curiously, the reference to such a relevant – although of soft law nature – international instrument "disappears" in the following judgments.

[19] *Rottmann* cit.; *Wiener Landesregierung* cit.

[20] Case C-221/17 *Tjebbes* ECLI:EU:C:2019:189; Case C-689/21 *Udlændinge- og Integrationsministeriet (Perte de la nationalité danoise)* ECLI:EU:C:2023:626; *Stadt Duisburg* cit.

[21] K Hyltén-Cavallius, 'Stateless Union Citizens in a Nationality Conundrum: EU Law Safeguarding Against Broken Promises' cit. 566.

and it has been systematically reiterated ever since.[22] The principle is presented as uncontested, corroborated by the "authority" of both international law and of an "established"[23] or "settled"[24] case-law. The key point lies not so much in the States being vested with such a competence, but rather in the ways in which it is concretely exercised (when and because EU citizenship is involved). States are and remain the legitimate holders of these sovereign prerogatives. The Court has never contended this assumption, but has clarified that States' power must be used with the proverbial "due regard" to Community/EU law.[25]

The second principle concerns the *crucial importance of EU citizenship*, which is "intended to be the fundamental status" of Europeans.[26] It matters not only symbolically, from a political or ideological point of view, but also in concrete terms, as it enshrines the rights (as well as the duties)[27] provided for under EU primary law. The EU citizenship is both a vehicle for integration and an indispensable tool that enables, to use the Court's own words, "the normal development of [...] family and professional life from the point of view of EU law".[28]

The third principle is that of the *applicability of EU law* to situations of loss of the EU citizenship. It is precisely because national measures involving the loss of the EU citizenship provoke the deprivation of the whole "package" of European rights that EU law steps in. A domestic decision impairing the nationality of a Member State, upon which the EU citizenship rests, is naturally "attracted" into the sphere of applicability of EU law, "by reason of its nature and its consequences".[29] This is logical: the ECJ would have not intervened if Ms *Tjebbes* had lost her Canadian nationality, instead of the Dutch one, or the applicant in *Udlændinge- og Integrationsministeriet* had been deprived of her nationality of the USA, instead of that of Denmark. What triggers the applicability of EU law is the loss of the EU citizenship *per se*, the key point being the *effects* of such an event, not its cause (which may be the personal conduct of the individual as in *Rottmann*, or some criteria, abstractly and generally established under domestic law, as in *Tjebbes*).

The fourth, consequential principle is that, given the applicability of EU law, domestic measures revoking the Member State's nationality are subject to *judicial scrutiny* in the light of principles and guarantees stemming from the Union's legal order. It is not the *if*

[22] Case C-369/90 *Micheletti* ECLI:EU:C:1992:295 para. 10. See, as additional examples, Case C-179/98 *Mesbah* ECLI:EU:C:1999:549 para. 29; Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639 para. 37.

[23] In this latter respect, see *Rottmann* cit. para. 39.

[24] *Udlændinge- og Integrationsministeriet* cit. para. 28.

[25] "It is necessary to distinguish the existence of that exclusive power of the Member States *from its exercise* with due regard to the EU legal order" (joined cases C-684/22 to 686/22 *Stadt Duisburg* ECLI:EU:C:2023:999, opinion of AG Szpunar, para. 33).

[26] See, among many others, *Grzelczyk* cit. para. 31; *Rottmann* cit. para. 43; *Tjebbes* cit. para. 31.

[27] On this matter, see D Kochenov, 'EU Citizenship without Duties' (2014) ELJ 482.

[28] *Wiener Landesregierung* cit. para. 59.

[29] *Ibid.* para. 30.

of the Member States' competence, it is the *how*: that is, the way in which national authorities make concretely use of it, which must comply with EU law.[30]

The mentioned principles have been enriched with a number of additional corollaries, pertaining to the way in which the Member State's competence to revoke its nationality must be exercised in practice: a relevant legal-procedural toolbox, which deserves particular attention and is examined more in details in the following paragraphs.

## III. The proportionality test and its effectiveness

Member States' exclusive competence to withdraw nationality is amenable to judicial review carried out in the light of the principle of proportionality, which entails a balancing exercise in terms of checking the reasonable relation of proportionality between the means employed and the aim pursued.[31] In this respect, the Court has not questioned the legitimacy of the aims of the domestic measures leading the loss of the nationality. In *Rottmann,* the Grand Chamber qualified the decision to withdraw the German nationality as corresponding to "a reason relating to the public interest", intended "to protect the special relationship of solidarity and good faith between it [the Member State] and its nationals".[32] In *Tjebbes,* the legitimate aim was identified in the need to preserve nationality as "the expression of genuine link between it [the Member State] and its nationals".[33] This assumption was confirmed also in *Udlændinge- og Integrationsministeriet*.[34] Further, in *Wiener Landesregierung* and *Stadt Duisburg,* a legitimate objective was found in the undesirability of the consequences of having multiple nationalities.[35]

Once the legitimacy of the rationale behind the withdrawal of the nationality is ascertained, the proportionality test kicks in, being aimed at checking whether the concerned

[30] Significantly, the Court has affirmed this in cases where the loss of nationality represented a "sanction" of the citizen's unlawful conduct (see, *Rottman* cit. paras 51 ff.; *Wiener Landesregierung* cit. paras 57 ff.).

[31] For reflections on the principle of proportionality, see W Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) CYELS 439; T Tridimas, 'The Principle of Proportionality', in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018). For the application of the principle in the context of the ECHR and the ECtHR's case-law, see S Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) ICON 468.

[32] *Rottmann* cit. para. 51.

[33] *Tjebbes* cit. para. 35.

[34] The aim is specifically identified in the need to "prevent Danish nationality being handed down from generation to generation to persons established abroad who have no knowledge of or link with the Kingdom of Denmark" (*Udlændinge- og Integrationsministeriet* cit. para. 34). For a discussion on the "genuine link", see J Y Carlier and E Frasca, 'Libre circulation des personnes dans l'Union européenne. Chroniques' (2024) Journal de droit européen 193. For further analyses and comments on the judgment, see J B Farcy, 'Arrêt Udloendinge og Integrationsministeriet: la perte automatique de la nationalité d'un État membre pour défaut de lien effectif remise en cause par le principe de la proportionnalité' (2023) Journal de Droit Européen 453; J Heymann, 'Perte de nationalité d'un État membre et citoyenneté de l'Union: effectivité vs effectivité!' (2023) Revue des affaires européennes 793.

[35] See, respectively, *Wiener Landesregierung* cit. paras 54-55 and *Stadt Duisburg* cit. paras 39-40.

measure was proportionate to the legitimate aim pursued. As to the object, the test pertains to the *consequences* stemming from the loss of the EU citizenship. From the subjective perspective, it entails a dual scope of application: the repercussions must be assessed with regard to the person concerned *and* the members of their family, if relevant. The Court clarified this already in *Rottmann* and has maintained this criterion ever since.[36] Such a "bifurcation" in the personal measurability of proportionality also explains why, after *Rottmann,* relevant provisions of the Charter, such as art. 7 (respect for private and family life) and art. 24 (best interests of the child), start to appear as part of the pertinent legal context brought to the attention of and examined by the Court.

Building on this, the case-law has developed a list of factors or criteria that permeate the prism of proportionality. They may be summarized as follows.

### III.1. Individual examination

A first, crucial component of the proportionality test is the accessibility of an *individual examination* of the consequences of the loss of the EU citizenship for the person concerned. While in *Rottmann* the Court established *what* is the object of the proportionality test (the consequences of the loss of the status), in *Tjebbes* it clarified *how* such a test must be done, that is, via an individual examination. This makes sense: the former case already implied an individualisation of the matter, given Mr *Rottmann*'s personal conduct, which was at the basis of an *ad hoc,* targeted withdrawal decision of the nationality; in *Tjebbes,* on the contrary, the loss of nationality materialized *ex lege*, due to an abstract, general provision, which provided for a legal automatism. The Court, thus, introduces the guarantee of an individual examination precisely in the framework of a general, indiscriminate, normative mechanism, which, only in this way, can be considered as consistent with the principle of proportionality.[37]

As further procedural guarantees, the Court clarifies that the individual examination shall be accessible "at any time" and before the "competent national authorities and courts", thereby opening the door to both administrative and judicial reviews.[38] Moreover, it highlights that such a scrutiny must concern the consequences of the loss of EU citizenship, which "cannot be hypothetical or merely a possibility".[39]

[36] *Rottman* cit. para. 56, where the Court clarifies that such an assessment is "necessary" due to "the importance which primary law attaches to the status of citizen of the Union".

[37] For the Court, "the loss of the nationality of a Member State by operation of law would be inconsistent with the principle of proportionality if the relevant national rules did not permit at any time an individual examination of the consequences of that loss for the persons concerned from the point of view of EU law" (*Tjebbes* cit. para. 41).

[38] *Ibid.* paras 41-42.

[39] *Ibid*. para. 44. In terms of wording, in the initial rulings the Court generally refers to the consequences of the loss of the EU citizenship. In later judgments, it highlights the importance of the examination of "the

The ECJ reiterated the principles developed in *Tjebbes* in *Udlændinge- og Integrationsministeriet*, *i.e.*, another case of automatic loss of EU citizenship by operation of law. Here, the Grand Chamber pointed out that EU law does not impose specific rules as to the way in which the individual examination shall be carried out. According to the principle of procedural autonomy, indeed, Member States are free to establish their own national procedural rules to govern the exercise of EU law.[40] However, those rules must not make it in practice impossible or excessively difficult to have access to such a right to an individual examination of the consequences of the loss of the EU citizenship. Proportionality, thus, is assisted by effectiveness.[41]

### III.2. Effective possibility to recover the nationality *ex tunc*

The right of access to an individual examination in the context of a loss of EU citizenship arising by operation of law entails the possibility, if appropriate, to recover (or retain) the nationality of the concerned Member State *ex tunc* (thereby restoring the citizenship of the Union).[42] Since the proportionality test shall be accessible "at any time", competent national authorities must be in a position to examine the consequences of the loss of the EU citizenship, "as an ancillary issue", also in the context of other, related proceedings, such as when examining an application for a travel document or any other documents pertaining to the nationality.[43] As a matter of fact, some of the requests for a preliminary ruling concerning the loss of EU citizenship have arisen precisely as an "incidental" matter in the framework of this kind of proceedings, like the submission of passport applications to embassies or consulates of a Member State (*Tjebbes*), or the application for a travel document for the applicant's son (*Stadt Duisburg*).[44]

### III.3. Consistency with the Charter and additional criteria for the proportionality test

The Court has also defined elements to be borne in mind by national authorities when carrying out the individual examination. As a first requirement, the loss of EU citizenship must be consistent with the fundamental rights guaranteed by the Charter.[45] Starting from *Tjebbes*, provisions of the Charter appear as relevant parameters of interpretation (the reference for a preliminary ruling in *Rottmann* was received at the Court in April 2008,

serious consequences" (cf. *Udlændinge- og Integrationsministeriet* cit. para. 48; *Stadt Duisburg* cit. para. 56) and of the "significant consequences" of the loss of the status (*Wiener Landesregierung* cit. para 73).

[40] Case C-33/76 *Rewe-Zentralfinanz and Rewe-Zentral* ECLI:EU:C:1976:188 para 5.

[41] *Udlændinge- og Integrationsministeriet* cit. para. 41.

[42] *Tjebbes* cit. para. 42; *Udlændinge- og Integrationsministeriet* cit. para. 40.

[43] *Tjebbes* cit. para. 42.

[44] See the factual part relating to "the dispute in the main proceedings and the question referred for a preliminary ruling", respectively, *Tjebbes* cit. paras 13-16; *Stadt Duisburg* cit. paras 11-12.

[45] *Tjebbes* cit. para. 45.

*i.e.*, before the entry into force of the Lisbon treaty and the Charter becoming legally-binding). These include, namely, art. 7, concerning the right to respect for private and family life, considered alone or in conjunction with art. 24(2), which imposes the obligation to take into consideration the best interests of the child.

Besides compliance with the Charter, the "checklist" encompasses a non-exhaustive number of factors that are "likely to be relevant" for the national, competent authorities.[46] They must be assessed, on a case-by-case basis, in the light of the purpose of verifying whether the loss of the citizenship (dis)proportionately affects the "normal development of [...] family and professional life from the point of view of EU law".[47] These essentially pertain to limitations to the freedom to move and reside freely within the territory of the Member States.[48] In *Tjebbes*, the Court also mentions to the risk for safety relating to the impossibility to enjoy consular protection under art. 20(2)(c) TFEU in the territory of the third State where the (former) EU citizen resides.[49] While in *Wiener Landesregierung,* the Grand Chamber generally refers to the deprivation of the "opportunity to enjoy all the rights conferred by that status [that of EU citizen]".[50] When minors are involved, additional and more specific criteria come into play, being linked with the obligation to meet the child's best interests as enshrined in art. 24 of the Charter.[51]

More precise criteria for the proportionality test have been elaborated in *Rottmann* and *Wiener Landesregierung, i.e.*, the cases relating to the loss of EU citizenship due to an unlawful, individual conduct. In *Rottmann*, the Grand Chamber indicated three factors upon which domestic authorities would have to establish whether the loss of nationality is justified: *i)* the gravity of the offence committed; *ii)* the lapse of time between the naturalisation decision and the withdrawal decision; *iii)* the possibility to recover the original nationality.[52] It then left to the domestic authorities the task to apply these criteria and "measure" whether the loss of the EU citizenship was to be considered as a proportionate decision.

In *Wiener Landesregierung,* the Court went a step further.[53] Here, the unlawful conduct of a woman (who had relinquished her original Estonian nationality in order to gain the

[46] *Ibid*. para. 46.

[47] *Tjebbes* cit. para. 44. According to the Advocate General Szpunar, "these considerations are essential for the judicial review carried out in the light of EU law, and the examination of the proportionality [...] must be carried out comprehensively and scrupulously by the competent authorities and the national courts" (Case C-689/21 *Udlændinge- og Integrationsministeriet* ECLI:EU:C:2023:53, opinion of AG Szpunar, para. 46).

[48] The relevant "limitations" refferred to by the Court are clarified and exemplified as follows: "limitations [...] including [...] particular difficulties in continuing to travel [...] in order to retain genuine and regular links with members of his or her family, to pursue his or her professional activity or to undertake the necessary steps to pursue that activity" (*Tjebbes* cit. para. 46).

[49] *Tjebbes* cit. para. 46.

[50] *Wiener Landesregierung* cit. para. 48.

[51] *Tjebbes* cit. para. 47.

[52] *Rottmann* cit. para. 56.

[53] For an analysis, see K Hyltén-Cavallius, 'Stateless Union Citizens in a Nationality Conundrum: EU Law Safeguarding Against Broken Promises' cit.; I Gambardella, 'JY v Wiener Landesregierung: Adding Another

Austrian citizenship) was regarded as a lack of "a positive attitude" by Austria, which considered that she could no longer be considered as deserving the Austrian nationality. The Court states that such a decision did not meet the threshold of the proportionality test in the light of the criteria elaborated in *Rottmann,* and especially the one of the gravity of the offences committed (which, in the specific case, consisted in a number of administrative offences relating to traffic and road safety). The Grand Chamber substantiates it in a number of further sub-elements: a) the notions of "public policy" and "public security", which, following the ECJ's own case-law, must be interpreted strictly (and do not cover infringements of the highway code and road safety); b) the type and entity of the sanctions imposed (low monetary fines, not leading to the withdrawal of the driving license); c) the type of offences (traffic offences, punishable by fines having a mere administrative nature). What is more, the Court applies such criteria by itself to the specific case, thereby stating the clear disproportionality of the Austrian measure impacting on the applicant's EU citizenship.[54]

## IV. Individual examination and due process rights: information and reasonable time

With the latest ruling in *Stadt Duisburg*, the Court has enriched the apparatus of guarantees applicable to the loss of EU citizenship, by relying on procedural rights encompassed within the broader principle of the due process of law.

The joined cases concern Turkish citizens who entered Germany in the '70s, '80s and '90s and have been resident there ever since, acquiring the German nationality by naturalization in 1999. As part of the process, they renounced to their original Turkish nationality, which was consequently withdrawn. According to the German legislation in force at that time, they could reacquire Turkish nationality – without losing the German nationality – by voluntarily applying to reacquire it as soon as it was withdrawn, which they did. However, several years later, they found out from the competent German authorities that they were no longer German citizens, by operation of law, in accordance with the legislation on nationality which had been reformed and had entered into force since 1 January 2000. The new version of the law, indeed, provided that a German national loses this nationality upon voluntary acquisition of a nationality of a third country, unless, before the acquisition of such a foreign nationality, the citizen applies for and obtains permission

Stone to the Case Law Built Up by the CJEU on Nationality and EU Citizenship' European Papers (European Forum Insight of 20 July 2022) www.europeanpapers.eu 399; D de Groot, 'CJEU asked to rule on acquisition of nationality in light of EU citizenship: The fundamental status on the horizon? (C-118/20 JY v Wiener Landesregierung)' (15 June 2020) EU Law Analysis eulawanalysis.blogspot.com; D Kochenov, D de Groot, 'Curing the Symptoms but not the Disease: CJEU's Myopic Advances in the Field of EU Citizenship in JY' (20 January 2022) Verfassungsblog verfassungsblog.de.

[54] The Court excludes that the citizen's conduct "represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or a threat to public security in the Republic of Austria" (*Wiener Landesregierung* cit. para. 70).

to retain the German nationality. Since the applicants had reacquired Turkish nationality after 1 January 2000 (entry into force of the amended legislative mechanism), and they had not applied for authorization to retain their German nationality before requiring that of Turkey, their loss of German/EU citizenship occurred automatically and, in particular, without having access to an individual examination of their case.

Aside from the applicants' Kafkaesque situation, the Court puts the focus on the erosion of due process guarantees. The German legislation is admissible under EU law, which does not prevent a Member State from providing for the loss of its nationality, for reasons of public interest and by operation of law, where its nationals voluntarily acquire the nationality of a third country, even if this entails the deprivation of the status of EU citizen. Once again, it is not the *if,* but the *how*.[55]

German law provided for an individual examination, but as a consequence of an application for a permit to retain German nationality. However, when the respective procedure is not initiated, the loss of German/EU citizenship occurs automatically and, most importantly, without access to an individual examination of the specific situation at hand: a legal-procedural lacuna, which causes friction with EU law. As established since the very first case of automatic loss of EU citizenship, *i.e. Tjebbes*, the loss of nationality by operation of law would be inconsistent with the principle of proportionality, if the domestic rules did not permit at any time an individual examination of the consequences of that loss for the person concerned, and their family, if relevant.[56] In *Stadt Duisburg* the Court confirms the inadmissibility of a pure legal automatism, which mechanically and blindly leads to the loss of the EU citizenship without an effective and genuine assessment of the situation of the person(s) concerned. The relevant, domestic procedure in question, thus, "must actually allow that individual examination of proportionality to take place".[57]

What the Court does next, building on a path already initiated in *Udlændinge- og Integrationsministeriet*, is the reinforcement of the right to access to an individual examination with two additional due process guarantees: the rights to be duly informed and to have a sufficient time limit for requesting such an examination. In this way, proportionality meets effectiveness, via due process. The right to have access to an individual examination, thus, evolves in the right to have *effective access* to an individual examination.[58]

Firstly, the Court, whilst confirming the procedural autonomy of Member States (which, in the interest of legal certainty, may require specific deadlines to be met), affirms

[55] As clarified by Advocate General Szpunar, "in order for national legislation [...] which provides for the loss of EU citizenship, to be compliant with EU law, it must not only seek to pursue legitimate public interest grounds, but also comply with the principle of proportionality" (*Stadt Duisburg*, Opinion of AG Szpunar, cit. para. 53).

[56] *Tjebbes* cit. para. 41.

[57] *Stadt Duisburg* cit. para. 47.

[58] *Stadt Duisburg*, Opinion of AG Szpunar, cit. para. 70.

that the concerned person must have a reasonable period to make a request for an examination of the proportionality of the consequences of the loss of the citizenship.[59] Secondly, such a reasonable period cannot run unless the competent authorities have duly informed the person about the loss of nationality, or the imminent loss of nationality by operation of law; the right to apply for retention or recovery of the nationality; the right to request an individual examination of the proportionality of the consequences of the loss of nationality from the point of view of EU law.[60] Finally, when failing to fulfil such preemptive rights of information and to have a reasonable time to access the pertinent procedures, the Court adds the duty of competent national authorities to examine, *a posteriori*, the proportionality of the loss of nationality and, if need be, to allow the person concerned to recover the nationality *ex tunc*.[61]

## V. Concluding Remarks

When dealing with the case *Micheletti,* Advocate General Tesauro considered the concept of effective citizenship as related to "a 'romantic period' of international relations"[62]. The 1992 landmark judgment at this point probably belongs to a past era, where the citizenship was a rising star, in its ascending phase as the fundamental status of a Union that was undergoing significant changes. The *Grzelczyk* formula is reiterated over and over again in the case-law, but the impetus has lost its intensity. So that, the "fundamental status" is currently in a stagnating stage, caught in between the desire to evolve and the brakes of Member States' sovereign prerogatives.[63] Moreover, it is entangled in an array of complex and often controversial concepts, such as those of territoriality, habitual residence, dual nationality and genuine link. In the meantime, though, regardless of the legal disputes and theoretical dissertations, *the society of European peoples* evolves, blending and taking new shapes.

In this scenario, the Court of Justice does what it can: it does not intervene on the *if* but on the *how,* proceeding with caution by building the procedural protection of the European citizens against the – sometimes even unexpected and automatic – loss of their fundamental status. The examined case-law reveals stories of citizens who often find

[59] *Udlændinge- og Integrationsministeriet* cit. para. 50.

[60] *Ibid.* para. 51; *Stadt Duisburg* cit. para. 56. In the latter case, the Court refers to the fact that "the reform [of the German Law on nationality] was not clearly explained or brought to their [the applicants'] attention", so as to pose questions as whether they "were able actually to benefit [...] from an individual examination of the consequences of the loss of German nationality in the light of EU law" (*Stadt Duisburg* cit. paras 59 and 61).

[61] This shall happen, as an ancillary matter, also in the context of applications for travel documentation or documents otherwise certifying the nationality, "even if such an application has not been lodged within a reasonable period" (*Udlændinge- og Integrationsministeriet* cit. para. 52).

[62] Case C-369/90 *Micheletti* ECLI:EU:C:1992:47, Opinion of AG Tesauro, para. 5.

[63] JY Carlier and E Frasca, 'Libre circulation des personnes dans l'Union européenne. Chroniques' cit. 193.

themselves caught into the bureaucratic machinery of the national administrations, becoming the victims of obscure automatisms and sudden "legal surprises" that take their status away. By surrounding the loss of EU citizenship – which remains possible and legitimate in principle – with due process guarantees, the Court implies the need to inform citizens, warn them and explain (and remedy) the possible consequences of the loss of their status. At the end of the day, it is, after all, a matter of good administration, transparency, accessibility and respect vis-à-vis the European citizens.

Since the Member States' competence in the area is confirmed, and the legitimacy of forms of *de jure* loss of nationality is upheld, the Court locks the exercise of such a competence in a necessary judicial scrutiny, which must be carried out in accordance with the European parameters of proportionality, effectiveness and due process. The procedural, rather than substantial, protection of EU citizens might sound unsatisfactory. The aspiration for a stronger and more significant level of protection belongs, perhaps, to that romantic idea of citizenship evoked by Advocate General Tesauro in *Micheletti*. Time will tell whether the Court will be willing to restore such an approach in the future.