



A Stitch in Time? Mutual Trust as the EU’s Fix-All in Case C-183/23 *Commission v Malta*

*Ruairi O’Neill**

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ABSTRACT: In Case C-183/23, the Court of Justice of the European Union ruled on the legality of Malta’s investor citizenship scheme, holding that national citizenship cannot be acquired on a purely transactional basis. Since Union citizenship is automatically conferred upon the acquisition of national citizenship, the Court anchored the former in the EU value of solidarity, effectively imposing analogous conditions on the latter. The judgment further reinforced this reasoning by invoking the principle of mutual trust, which serves as the constitutional foundation for the cross-border recognition of national citizenship and the derived rights of Union citizenship. This landmark ruling is significant for two key reasons: first, it explicitly links Union citizenship to mutual trust, and second, it frames the free movement of Union citizens as a concrete expression of the values enshrined in Article 2 TEU. However, uncertainties remain regarding the judgment’s future implications – particularly whether Member States may refuse to recognise Union citizenship status and its derived rights, or whether more generally the disapplication of a measure based on mutual trust could simultaneously protect an EU value while infringing individual rights. This would be an exceptional, and therefore extremely unlikely, outcome, which raises questions about the reliance on mutual trust (dealing with the effects of citizenship acquisition in other Member States) in an infringement action against a Member State concerning an administrative mechanism for the award of national citizenship in that Member State (dealing with the citizenship status itself).

KEYWORDS: mutual trust – Article 2 TEU – Union citizenship – Malta investor citizenship – enforcing EU values – infringement action.

* Lecturer, University of Warsaw Faculty of Law, and doctoral candidate, Institute of Law Studies, Polish Academy of Sciences, r.oneill@uw.edu.pl.



1. Introduction

In its judgment on 29 April 2025 in *Commission v Malta*,¹ the Grand Chamber held that Malta's investor citizenship scheme, which in general terms grants Maltese nationality in exchange for predetermined payments or investments, was contrary to EU law. Taking as the starting point the statement from *Micheletti* that Member States must have due regard to EU law when laying down the conditions for the acquisition and loss of nationality,² the Court confirmed for the first time that a Member State's naturalisation scheme could be reviewed under EU law and found to be in breach of Article 20 TFEU on Union citizenship and the duty of sincere cooperation in Article 4(3) TEU. Since the case law to date has dealt with the issue of loss of national, and consequently Union, citizenship, it is perhaps unsurprising that the judgment lacked directly relevant jurisprudence concerning citizenship acquisition to ground the decision on. This in turn has resulted in immediate post-judgment criticism of judicial overreach (or, somewhat less diplomatically, judicial gaslighting).³

This article contends that the practical impact of the judgment is narrowly confined to the lawfulness of the Maltese investor citizenship scheme in its current form, and with limited scope for affecting current beneficiaries of the scheme, rendering its immediate consequences minimal. It is argued that the judgment does not change the fact that EU law cannot, by itself, take away a person's citizenship, either of a Member State or of the Union, which is subsidiary to it. Even if not directly intentional, the limited impact of this judgment is that it opens the possibility in EU law for another Member State to deny the derived rights that are guaranteed by Union citizenship in the Treaties (namely, free movement and residence rights, as well as equal treatment for EU citizens and their family members), on the basis that the administrative system for granting national citizenship partially breaches EU law. Even then, this would normally have to follow the existing requirement in EU law of a proportionality review.⁴

As Advocate General Ćapeta clearly stated in her Opinion in *Commission v Hungary*, proceedings under Article 258 TFEU are of an objective nature, and it is part

¹ Case C-181/23 *Commission v Malta*, ECLI:EU:C:2025:283.

² Ibid 81, citing Case C-260/90 *Micheletti*, EU:C:1992:295, para 10; also, Case C-135/08 *Rottmann*, ECLI:EU:C:2010:104, para 39.

³ M Van den Brink, 'Why Bother with Legal Reasoning? The CJEU Judgment in *Commission v Malta* (Citizenship by Investment)' (02 May 2025), at globalcit.eu; S Peers, 'Pirates of the Mediterranean meet Judges of the Kirchberg: the CJEU Rules on Malta's Investor Citizenship Law' (30 April 2025), at eulawanalysis.blogspot.com.

⁴ Confirmed recently in Joined Cases C-684/22 to C-686/22 *Stadt Duisburg (Loss of German nationality)*, EU:C:2024:345, para 42 and cited case law. This obligation is limited only in the situation where the loss of Union citizenship is an automatic consequence of a Member State withdrawing from the European Union, see C-673/20 *Préfet du Gers*, ECLI:EU:C:2022:449, para 62.

of the ordinary competence of the Court of Justice to establish only if a legal provision has or has not been infringed.⁵ As a preliminary point, therefore, it is important to stress that the judgment cannot deprive Maltese citizens of their nationality, and Malta alone retains authority to revoke the citizenship of a Maltese national. On the other hand, the ruling's true significance lies in its novel constitutional development: the explicit anchoring of EU citizenship – and its associated rights – in the value of solidarity and the principle of mutual trust among Member States.

The analysis proceeds in three parts. First, it demonstrates why this doctrinal shift matters, reframing EU citizenship not merely as a derivative status but as a core element of the EU's constitutional order, contingent on reciprocal confidence between States. Second, it explores the broader implications of this linkage, particularly how it expands the EU's toolbox for enforcing Article 2 TEU values. By tethering free movement rights to mutual trust, the judgment effectively subjects them to potential suspension in cases of systemic breaches of Article 2 TEU values – akin to other privileges Member States 'enjoy' under the Treaties. Finally, the article assesses the institutional and federal balance this move entails. While the immediate fallout for Malta's scheme is marginal, the judgment's deeper legacy is its normalisation of conditionality in EU citizenship rights. This transforms free movement from an unconditional guarantee into a right mediated by mutual trust, with profound consequences for future conflicts between the EU and the Member States.

The conclusion argues that the most consequential effect of this ruling is not its technical application to investor citizenship, but its potential to strategically recalibrate EU leverage in cases of systemic backsliding of EU values: by grounding citizenship rights in mutual trust, the Court has subtly expanded the conditions under which the EU may restrict Member State prerogatives – potentially reshaping the enforcement of EU values in the future.

2. The (limited) substance of the judgment in *Commission v Malta*: what it says about citizenship per se

It is not open to dispute that Member States are and remain competent to make rules governing the acquisition of their nationality,⁶ and can decide for themselves who will become a citizen. A citizen of a Member State is automatically a citizen of the Union, without precondition, as confirmed by Article 20(1) TFEU. This is also the internal logic underpinning Declaration No. 2 on nationality of a Member State, annexed to the 1992 Maastricht Treaty.⁷ Further, as the Court stated in C-192/99 *Kaur*,

⁵ Opinion of AG Čapeta in Case C-769/22 *Commission v Hungary*, ECLI:EU:C:2025:408, paras 193–194.

⁶ Opinion of AG Collins in Case C-181/23 *Commission v Malta*, ECLI:EU:C:2024:849, para 17.

⁷ Declaration No 2, attached to the 1992 Maastricht Treaty which established EU citizenship 98. The caveat being that the Declaration has no legal effects, though it is informative. See LJ Wagner,

a person is not deprived of their rights under EU law if they do not satisfy the definition of a national under national law, on the grounds that those rights never arose in the first place.⁸ Additionally, since the status of Union citizenship is automatic, it does not as such become effective only once a person has exercised the free movement rights that attach to that status by virtue of Article 21 TFEU. This is evident in C-673/20 *Préfet du Gers*, where the Court stated that exercising free movement rights was not sufficient justification for UK nationals to retain EU citizenship once their country ceased to be a Member State.⁹ The judgment in *Commission v Malta* has added to this body of case law concerning the personal scope of Union citizenship through the explicit linkage of citizenship in the EU to the relationship of solidarity and good faith and basing Union citizenship on mutual trust.

The salient legal principles leading to the conclusion in *Commission v Malta* can be found in paras 93-97. Firstly, the Court stated that Union citizenship is one of the principle concrete expressions of solidarity which forms the very basis of the process of integration that is the *raison d'être* of the European Union itself.¹⁰ The Court then went on to state that national citizenship is based on a relationship of solidarity and faith between each Member State and its nationals, required by Article 20(1) TFEU.¹¹ Normatively, it then held that Malta's investor citizenship scheme breached Article 20 TFEU and Article 4(3) TEU, stating that:

‘a Member State manifestly disregards the requirement for such a special relationship of solidarity and good faith, characterised by the reciprocity of rights and duties between the Member State and its nationals, and thus breaks the mutual trust on which Union citizenship is based, in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU, when it establishes and implements a naturalisation scheme based on a transactional procedure between that Member State and persons submitting an application under that programme, at the end of which the nationality of that Member State and, therefore, the status of Union citizen, is essentially granted in exchange for predetermined payments or investments’.¹²

With this paragraph, the Court has taken its own understanding of the bond between a country and its citizens as being a special relationship of solidarity and good faith,¹³ and infused it into Article 20(1) TFEU to form the ‘basis of the rights and obligations reserved to Union citizens by the Treaties’.¹⁴ It then proceeded to refer

‘Member State Nationality under EU Law – To Be or Not to Be a Union Citizen?’ (2021) 28 *Maastricht Journal of European and Comparative Law* 304–331.

⁸ Case C-192/99 *Kaur*, ECLI:EU:C:2001:106, para 25.

⁹ Case C-673/20 *Préfet du Gers*, ECLI:EU:C:2022:449, para 52.

¹⁰ *Commission v Malta* (n 1), para 93.

¹¹ *Ibid* paras 96–97.

¹² *Ibid* para 99.

¹³ *Ibid* para 96.

¹⁴ *Ibid* para 97.

to transactional naturalisation within the EU as manifestly disregarding this relationship.

In his Opinion, Advocate General Collins relied on existing case law, specifically *Micheletti* and *Zhu and Chen* to make the point that EU law does not allow Member States to impose additional conditions in their national law on an individual as a prerequisite for recognising their nationality of another Member State.¹⁵ Thus, while a Member State may require a genuine link before granting its own citizenship to an individual, no such requirement exists generally in EU law. Furthermore, in other decisions, the Court has held that the automatic loss of nationality of a Member State would be in breach of the principle of proportionality if the relevant national rules did not allow for an individual assessment of the consequences of that loss for the individuals concerned in light of EU law.¹⁶

The judgment expressly deviates from the Opinion of Advocate General Collins on the point about the requirement of a genuine link in Article 20 TFEU before granting national citizenship. It also goes further than the Advocate General's Opinion with regards to the relationship between EU citizenship and mutual trust. According to the Advocate General, the agreement of the Member States to abide by decisions of other Member States as to whether an individual has lawfully acquired national citizenship is taken in the 'spirit of mutual trust and respect'.¹⁷ The Court instead held that Union citizenship is based on mutual trust,¹⁸ which is 'called into question' when a Member State is required to recognise the rights of a Union citizen who acquired their EU citizenship under the scheme.¹⁹ It is this divergence between the Advocate General and the Grand Chamber on the scope of EU law regarding acquisition of national citizenship that has led to such a wide range of views on what the judgment says about the nature of Union citizenship.

There are three legal innovations that flow from this reasoning. The first is confirmation that Union citizenship is one of the principle concrete expressions of the value of solidarity that is 'an integral part of the identity of the European Union as a specific legal system'.²⁰ The second is that EU citizenship is based on mutual trust. The third is, perhaps most obvious, that the Court found that the Maltese investment citizenship scheme breached Article 20 TFEU and Article 4(3) TEU. The first two innovations will be dealt with separately in the following sections and then contextualised as they relate to the third in the remainder of the text.

¹⁵ Opinion of AG Collins in *Commission v Malta* (n 6) para 48.

¹⁶ E.g. C-212/17 *Tjebbes*, ECLI:EU:C:2019:189, para 41; C-689/21 *X*, ECLI:EU:C:2023:626, para 39.

¹⁷ Opinion of AG Collins in *Commission v Malta* (n 6) para 47.

¹⁸ *Commission v Malta* (n 1) para 99.

¹⁹ *Ibid* para 101.

²⁰ *Ibid* para 93.

3. The concrete expression of solidarity

In the judgment, the Court started by stating the formula that Union citizenship constitutes the fundamental status of nationals of the Member States, explaining that this is both because of the rights that attach to Union citizenship and also because the status is derived automatically from the fact of being a national of a Member State.²¹ The Court then stated that Union citizenship is one of the concrete expressions of solidarity, in particular the 'solidarity which forms the very basis of the process of integration', which is an integral part of the Union's identity, and which is accepted by the Member States on the basis of reciprocity.²² It provides justification for this statement by reference to the paragraph from *Eurobox Promotion* that grounded the principle of supremacy in reciprocity, which makes it 'impossible' for Member States to unilaterally adopt acts that risk rights' losing their 'Community character'.²³ Finally, the Court stated that Union citizenship is based on the common values in Article 2 TEU and on mutual trust between the Member States, and as such the granting of national citizenship cannot be exercised in a way that is 'manifestly incompatible' with the very nature of Union citizenship.²⁴ It is this last paragraph which acts as the hook that now forms the basis of EU interference with the granting of national citizenship, which must be based on solidarity and good faith.²⁵ Yet in both the abstract and the concrete, it is not at all obvious what it means.

In his Opinion, Advocate General Collins cited existing case law to conflate the 'genuine link' requirement with the special relationship of solidarity and good faith between a Member State and its citizens, which Member States are free to impose as a requirement of their citizenship acquisition schemes.²⁶ There is no consensus in the literature on whether this a correct reading of the law prior to the judgment. According to Lamprinoudis, this special relationship is a repackaged version of the genuine link.²⁷ Others have questioned whether this now means that EU law requires national laws on naturalisation to possess a genuine link requirement.²⁸ Spieker argues that it is already

²¹ Ibid para 92, citing Case C-184/99 *Grzelczyk*, EU:C:2001:458, para 31; Case C-118/20 *Wiener Landesregierung*, EU:C:2022:34, paras 38 and 58; Case C-689/21 *Udlændinge- og Integrationsministeriet*, EU:C:2023:626, paras 29 and 38. The status of Union citizenship has seemingly evolved from being 'destined' (*Grzelczyk*) to 'constituting' (*Wiener Landesregierung*) the fundamental status of nationals of the Member States.

²² *Commission v Malta* (n 1) para 93.

²³ Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para 246.

²⁴ *Commission v Malta* (n 1) para 95.

²⁵ Ibid para 99. While English is the language of the judgment, other language versions describe the relationship as being based on solidarity and loyalty.

²⁶ Opinion of AG Collins in *Commission v Malta* (n 6) para 55, relying on *Tjebbes* (n 16) para 33.

²⁷ K Lamprinoudis, 'Money Cannot buy Everything! Catharsis Reached in the *Commission v. Republic of Malta* Tragedy?' (EU Law Live, 15 May 2025), at eulawlive.com.

²⁸ J Koudron, 'Op-Ed: "Not Yours to Sell: The Long-Awaited *Commission v. Malta* Judgment (Case C-181/23)"' (EU Law Live, 12 May 2025), at eulawlive.com.

a general principle of public international law that expresses the prohibition of abuse of rights.²⁹ Wagner contends that recognition of a nationality under EU law presupposes that it conforms with and is recognised under international law.³⁰ If the genuine link requirement is indeed a general principle of public international law, then it could be required by EU law through the constitutional norm that requires EU action to be based on the strict observance of international law. The case law of the Court of Justice and General Court concerning the territory of the Western Sahara could be applied by analogy.³¹ In *Front Polisario II*, the Court of Justice stated that the EU is bound, when exercising its powers, to observe international law in its entirety, which includes the rules and principles of general and customary international law.³²

In *Commission v Malta*, the Court confirmed a variation of this obligation through a two-step process. Firstly, it repeated existing case law that requires Member States to have 'due regard' to international law when laying down the conditions for the grant and loss of the nationality of a Member State, and that those powers must be exercised in accordance with EU law.³³ It is this element that potentially limits the material scope of the judgment to EU law review of naturalisation processes, leaving initial attribution of nationality under the principles of *ius sanguinis* and *ius soli* to be determined exclusively by reference to national law, since they are not subject to any further requirements.³⁴

Secondly, the Court defined citizenship as a special relationship of solidarity and good faith between a State and its nationals and the reciprocity of rights and duties,³⁵ which also forms the basis of the rights and duties reserved to Union citizens by the Treaties via Article 20(1) TFEU.³⁶ The political rights afforded to EU citizens under the Treaties allow them to participate in the democratic life of the Union, whose functioning is founded on representative democracy, which gives concrete expression to democracy as a value in Article 2 TEU.³⁷ Further, EU citizenship is one of the principal concrete expressions of the solidarity which forms the very basis of the process of integration.³⁸ Granting nationality, and thereby Union citizenship, without

²⁹ LD Spieker, 'It's Solidarity, Stupid!: In Defence of *Commission v Malta*' (VerfBlog, 7 May 2025), at verfassungsblog.de.

³⁰ LJ Wagner, 'Fury and Surprise Anchored in Dogmas and Myths: Reflections on *Commission v. Malta* and its Discontents' (VerfBlog, 26 May 2025), at verfassungsblog.de.

³¹ This is analogous, since these cases concerned the external acts of the Union, and flow from the objective of the Union in Art 3(5) TEU requiring the strict observance and development of international law through the EU's relations with the wider world.

³² Case C-779/21 *Commission v Front Polisario*, ECLI:EU:C:2024:835, para 173.

³³ *Commission v Malta* (n 1) para 81, and cases cited therein.

³⁴ For discussion, see R Bauböck, 'Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship' (2019) 45 *Journal of Ethnic and Migration Studies* 1015, 1020.

³⁵ *Commission v Malta* (n 1) para 96.

³⁶ *Ibid* para 97.

³⁷ *Ibid* para 89.

³⁸ *Ibid* para 93.

the links demonstrating solidarity and belonging to the community,³⁹ manifestly disregards that requirement in EU law.⁴⁰

According to Spieker and Weber, belonging to European society is a central precondition for solidarity between the Member States and Union citizens, and the genuine link may be an expression of this belonging.⁴¹ Commercialising Union citizenship infringes this mutual solidarity between the Member States, by upsetting the balance between the advantages and obligations of EU membership.⁴²

In *Germany v Poland*, the Court referred to the role of solidarity in Article 194 TFEU regarding the EU's energy policy, and also listed other provisions of the Treaties that specifically reference it.⁴³ It added that the principle is capable of producing binding legal effects, and agreed with the Advocate General in that case that solidarity is the thread that brings together all the objectives of the EU's energy policy and gives them coherence.⁴⁴ It creates binding obligations for the EU towards the Member States and between the Member States inter se.⁴⁵ The Court stated that the principle of solidarity underpins the entire legal system of the EU and is closely linked with the principle of sincere cooperation in Article 4(3) TEU.⁴⁶ In the words of the FIDE 2025 Report, 'solidarity was "present at the creation," as European integration is founded on the idea of solidarity'.⁴⁷

Writing prior to the publication of the judgment in *Commission v Malta*, but after the Advocate General's Opinion was released, Spieker noted that, regarding the vertical relationship with the Union, Member States are obliged to refrain from any measure which could jeopardise the attainment of the Union's objectives or the effectiveness of

³⁹ See the Opinion of AG Ćapeta in Case C-488/21 *GV*, ECLI:EU:C:2023:115, para 134, where she asserted: 'The second way in which the unreasonable burden argument can be understood is in terms of solidarity, viewed as a readiness to participate in burden sharing. Such solidarity is usually based on belonging to a community, be it national, professional, family or European, which allows for the exclusion of those who are not members of the community, given that burden sharing with them is perceived as unreasonable'.

⁴⁰ *Commission v Malta* (n 1) para 99.

⁴¹ L Spieker and F Weber, 'Bonds without Belonging? The Genuine Link in International, Union, and Nationality Law' (2025) 00 *Yearbook of European Law* 1–39, 27.

⁴² *Ibid* citing Case C-132/22 *Commission v Hungary*, ECLI:EU:C:2024:493, para 127.

⁴³ Case C-848/19 *P Germany v Poland (Baltic Pipeline Connector)*, ECLI:EU:C:2021:598, paras 39–41.

⁴⁴ *Ibid* para 43.

⁴⁵ *Ibid* para 49.

⁴⁶ *Ibid* para 41. See, for discussion, A Bobić, 'Imagining Transnational Solidarity in the EU through Hegel's Idea of Mutual Recognition' (2025) 31 *Maastricht Journal of European and Comparative Law* 676–690.

⁴⁷ O Beynet and T Scharf, 'Energy Solidarity and Energy Security – from Green Transition to the EU Crisis Management', (Federation Internationale Pour le Droit Européen, 28–31 May 2025) at www.fide-europe.org, citing K Huta and L Reins, 'Solidarity in European Union Law and its Application in the Energy Sector' (2023) 72 *International and Comparative Law Quarterly*; D Calleja, T Maxian Rusche and T Shipley, 'EU Emergency-call 122? On the Possibilities and Limits of Using Article 122 TFEU to Respond to Situations of Crisis' (2024) 29 *The Columbia Journal of European Law* 27–28.

Union law.⁴⁸ Further, the horizontal relationship between the Member States is characterised by the obligations of cooperation, consideration and solidarity.⁴⁹

Convincingly, Bobić reconfigures solidarity, in its transnational sense, as mutual recognition,⁵⁰ which could become a 'vehicle for a more serious rethink of redistribution in the EU and the starting point towards a genuine political community of citizens'.⁵¹ Following *Commission v Malta*, this statement accurately reflects the relationship envisaged by the Court of Justice. At the same time though, by grounding Union citizenship in mutual trust and framing it as an expression of the value of solidarity, the most probable short-term effect of this judgment will not in fact be further development toward of a community of citizens (if anyone outside Malta or the legal blogosphere is paying attention), but rather to provide an EU law basis for rejecting the administrative mechanisms that determine individual membership of the current version of that community.

As with any status, rules that influence its acquisition have the necessary side effect of deciding who the 'other' will be. That 'other' now includes wealthy third-country investors looking for a convenient entry into the community of Union citizens. In any event, in *Commission v Malta* the absence of a legal requirement in Maltese law of actual physical residence prior to naturalisation was clearly a major factor in demonstrating the absence of a special relationship of solidarity and mutual trust.

4. EU citizenship is based on mutual trust

In its judgment, the Court explicitly stated that Union citizenship is based on mutual trust.⁵² To understand the consequences of linking Union citizenship to mutual trust, and also what role mutual trust plays in the EU legal order generally, it is important to understand why the Court may have chosen to make the connection explicit in the judgment.

In the Commission Press Release announcing the infringement action against Malta, no reference was made to mutual trust,⁵³ and the grounds for infringement were solely the failure to fulfil obligations under Article 20 TFEU and violation of the principle of sincere cooperation in Article 4(3) TEU.⁵⁴ Neither of these Treaty articles make explicit reference to mutual trust. Instead, the Court accepted the arguments of the Commission that when Member States exercise their exclusive competence to grant nationality to an individual – who will automatically become a Union

⁴⁸ Spieker and Weber (n 41) 21.

⁴⁹ Ibid.

⁵⁰ Bobić (n 46) 689.

⁵¹ Ibid.

⁵² *Commission v Malta* (n 1) para 99.

⁵³ European Commission Press Release, 'Investor Citizenship Scheme: Commission Refers Malta to the Court of Justice' (29 September 2022), at ec.europa.eu.

⁵⁴ Action brought on 21 March 2023, at curia.europa.eu.

citizen – they are under an ‘obligation to ensure that it does so without compromising or undermining the essence, value and integrity of Union citizenship, in order to preserve the mutual trust which underpins that status’.⁵⁵ At the same time, the Court could have reached the conclusion that the Maltese scheme breached Article 20 TFEU and Article 4(3) TEU without referring to mutual trust, which rather concerns the cross-border effects of national citizenship, which are infused into EU citizenship status by the common value of solidarity.

The grounds of infringement did not refer to mutual trust. Even if they did, *Latvia v Sweden* is precedent for an infringement action – albeit under Article 259 TFEU – where the explicit allegation was a failure to fulfil obligations under Article 4(3) TEU which undermined mutual trust between the Member States, only for the Court to ignore the mutual trust element in its entirety and instead focus (correctly) on the sincere cooperation component in the operative part.⁵⁶

In addition to not being strictly necessary for the judgment, the Opinion of the Advocate General provided sufficient cover to allow the Court to gloss over this part of the Commission’s argumentation. Advocate General Collins does not associate mutual trust with Union citizenship in his Opinion at all. The single reference that comes close can be found in paragraph 47, where he asserts that in ‘a spirit of mutual respect and trust, Member States have unconditionally agreed to abide by the decisions of other Member States as to whether an individual possesses the nationality of a Member State and, therefore, EU citizenship, irrespective of the particular relationship between that person and that Member State’.⁵⁷ From a purely linguistic point of view, the ‘spirit of mutual trust and confidence’ is not the same as the Court’s own formula for the principle of mutual trust in EU law, but also the action defined by the Advocate General, namely that Member States must unconditionally accept an EU migrant’s nationality, more closely resembles the principle of mutual recognition. Support for this understanding can be found in the Opinion of Advocate General Szpunar in *Alchaster*, where he claimed that a high level of mutual trust and confidence ‘translates legally to what is known as the principle of “mutual recognition”’.⁵⁸

While the Court and the Advocates General have often expounded the connection between mutual trust and mutual recognition,⁵⁹ they are not synonymous concepts. This is the case, even though the Court has stated that mutual recognition is

⁵⁵ *Commission v Malta* (n 1), para 42.

⁵⁶ Case C-822/21 *Latvia v Sweden*, ECLI:EU:C:2024:373, para 98. Latvia argued that Sweden was in breach of mutual trust under Art 4(3) TEU concerning arrangements for collecting contributions payable by certain banks under the Deposit Guarantee Scheme (DGS), which the Court reinterpreted as referring to the duty of sincere cooperation under Art 4(3) TEU.

⁵⁷ AG Collins in *Commission vs Malta* (n 6) para 47.

⁵⁸ Opinion of AG Szpunar in Case C-202/24 *Alchaster*, ECLI:EU:C:2024:559, para 35.

⁵⁹ E.g. in Case C-359/16 *Criminal proceedings against Ömer Altun and Others*, ECLI:EU:C:2018:63, para 40. In the original language version of the judgment, the Court stated ‘Het

based on mutual trust with increasing regularity.⁶⁰ Mutual trust requires Member States to presume that all other Member States comply with EU law and the fundamental rights recognised by EU law.⁶¹ According to Advocate General Szpunar in *Real Madrid Club de Fútbol*, mutual trust 'permits the inference' that national legal systems and judicial institutions, together with the Article 267 TFEU procedure, afford a sufficient guarantee of protection to individuals in the event of a misapplication of national or EU law.⁶² The Advocate General additionally referred to mutual trust as 'not merely the result of the legislative choice made by the EU institutions. It has its basis in primary law'.⁶³ Mutual recognition is one of the mechanisms employed to ensure fulfilment of the EU's objectives, by providing for the free movement of, for example, goods, services, court decisions and professional diplomas, without the need for full harmonisation of national laws underpinning them.⁶⁴ As such, while the mutual trust reference wasn't necessary for the Court to reach the conclusion it did, the effect of doing so was nevertheless of a declaratory nature. To understand why that is, an overview of the role played by mutual trust specifically in the internal market will be presented, followed by how it may find application in Union citizenship.

beginsel van loyale samenwerking gaat immers gepaard met het beginsel van wederzijds vertrouwen', which roughly translates to English as 'going hand in hand', which may imply that they are the same obligation, but this is not borne out by later case law, so it can be assumed that they are not synonymous.

⁶⁰ Case 318/24 *PPU Breian*, ECLI:EU:C:2024:658, para 36; Case 261/22 *GN*, ECLI:EU:C:2023:1017, para 33; Case C-158/21 *Minister of Finance v Puig Gordi*, ECLI:EU:C:2023:57, para 134; Case C-699/12 *E.D.L.*, EU:C:2023:295, para 21; Joined Cases C-354/20 *PPU* and C-412/20 *PPU Openbaar Ministerie* ECLI:EU:C:2020:1033, para 35.

⁶¹ Opinion 2/13 *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, para 191.

⁶² Opinion of AG Szpunar in Case 633/22 *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:127, para 62.

⁶³ *Ibid* para 60. In footnote 36 of the Opinion, the Advocate General listed the primary law bases for mutual trust: 'First, Article 4(3) TEU provides that, pursuant to the principle of sincere cooperation, the European Union and the Member States must, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. Next, under Article 67(4) TFEU, the European Union is to facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. Furthermore, under Article 81(1) TFEU, the European Union is to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. For those purposes, on the basis of Article 81(2)(a) TFEU, the European Union is to adopt measures aimed at ensuring the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases'.

⁶⁴ See, for example, J Pelkmans, 'Mutual Recognition: Economic and Regulatory Logic in Goods and Services' (2012) 24 *Bruges European Economic Research Papers*; JHH Weiler, 'Mutual Recognition, Functional Equivalence and Harmonization in the Evolution of the European Common Market and the WTO' in F Kistoris Padoa Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan 2005); S Prechal, 'Mutual Trust Before the Court of Justice of the European Union' (2017) 2 *European Papers* 75–92, 77.

4.1. How has mutual trust been applied in the internal market already?

Mutual trust assumes that, despite differences in national laws and procedures, Member States share a commitment to common values and principles, such as the rule of law, democracy, and respect for fundamental rights, as enshrined in Article 2 TEU. This trust enables the EU to create frameworks – such as mutual recognition, mutual assistance, and information-sharing mechanisms – that allow national decisions to have extraterritorial effects without requiring full harmonisation of national laws and procedures. For example, in areas like judicial cooperation – part of the Area of Freedom, Security and Justice (AFSJ) – mutual trust allows a court decision in one Member State to be recognised and enforced in another, even if the underlying legal systems differ. Similarly, in competition law, mutual trust underpins the cooperation between national competition authorities and the European Commission within the European Competition Network (ECN).⁶⁵

Mutual trust and mutual recognition make it possible for the AFSJ to be created and maintained.⁶⁶ Union citizenship is also based on mutual trust. It is not a mechanism established within the AFSJ, but the right to move and reside freely within that area without internal borders is an ‘achievement’ of the AFSJ.⁶⁷ Two possible interpretations can be derived from this statement: either the status of Union citizenship is based on mutual trust or the free movement and political rights derived from that status are based on mutual trust.

Since mutual trust requires national authorities to recognise and refrain from questioning national acts and decisions of other Member States, the rights of Union citizens must be guaranteed subject to existing restrictions in EU law, and cannot be refused on the grounds of doubts about the status of an EU citizen. At the same time, it is the status of citizen that guarantees those rights, and other Member States cannot question that status, which is granted solely on the basis of national law. The granting of national citizenship of a Member States is thus comparable in the external effects it produces to the transnational administrative procedures that allow the internal market to function properly. It is on this point that an investor citizenship scheme, which may not be controversial in other polities, is problematic within the EU, since it undermines solidarity between the Member States.

Within the EU regulatory space, it is Member State bodies that are responsible for general administration, unless EU law has expressly delegated or conferred these powers on EU institutions or agencies. According to Hofmann, this approach to the

⁶⁵ Case T-791/19 *Sped-Pro v Commission*, ECLI:EU:T:2022:67, para 85.

⁶⁶ *Commission v Malta* (n 1) para 85.

⁶⁷ *Ibid* para 86.

implementation of EU law arises from the concepts of subsidiarity, limited attribution of powers and the principle of mutual trust,⁶⁸ and that by administering EU policies using existing authorities in the Member States and at EU level, a degree of national autonomy is preserved while representing the 'cheap option' for the Union.⁶⁹ The different types of 'composite' procedural cooperation⁷⁰ include 'vertical' cooperation as between EU and national bodies, 'horizontal' cooperation involving domestic administrative organs as well as 'diagonal' cooperation between several Member State bodies possibly in cooperation with EU bodies.⁷¹ The various forms this cooperation can take include exchanges of information – which exist in the fields of, for example, competition law,⁷² immigration,⁷³ cooperation on criminal matters,⁷⁴ customs,⁷⁵ product safety,⁷⁶ maritime traffic monitoring,⁷⁷ cyber threats⁷⁸ and cyber threats involving financial entities⁷⁹ – cooperation between organisations and

⁶⁸ H Hofmann, 'Multi-Jurisdictional Composite Procedures: The Backbone to the EU's Single Regulatory Space' (2019) 3 *Law Working Paper Series*.

⁶⁹ Ibid. F Brito Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law' (2020) 16 *European Constitutional Law Review* 66 describes this form of cooperation as 'an approach that can secure effective and consistent implementation of EU law across the member states while respecting their reluctance to centralise administrative powers at the EU level'.

⁷⁰ H Hofmann (n 68) 18 describes 'composite procedures' on p 2 as 'implementing procedures for EU law involve actors from several jurisdictions, both national and EU, applying law from various levels'. Also, discussed by G Gentile and O Lynskey, 'Deficient by Design? The Transnational Enforcement of the GDPR' (2022) 71 *International & Comparative Law Quarterly* 800.

⁷¹ H Hofmann (n 68) 18.

⁷² Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Art 12.

⁷³ Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, Art 8.

⁷⁴ Directive (EU) 2023/977 of the European Parliament and of the Council of 10 May 2023 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA.

⁷⁵ Council Regulation (EC) 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, Title V.

⁷⁶ Consolidated text: Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (Text with EEA relevance), Chapter V.

⁷⁷ The 'Union Maritime Information and Exchange System (SafeSeaNet)', Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, Art 14.

⁷⁸ Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) (Text with EEA relevance) Text with EEA relevance.

⁷⁹ Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 (Text with EEA relevance), Art 45.

procedural cooperation through the creation of composite procedures in legislative acts.

4.2. How could mutual trust impact upon Union citizenship?

Demonstrating the role of mutual trust in the internal market by focusing on transnational administrative law is more than merely incidental as an example of an EU mechanism that depends on mutual trust. The granting of national citizenship is an administrative act of one national authority that produces cross-border effects that create obligations for another national authority.

The connection between Union citizenship and the AFSJ was explicit in the Court's reasoning, which directly linked the alleged infringement of Article 20 TFEU and Article 4(3) TEU with the objective of the EU offering 'its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured through the existence of appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.⁸⁰ The Court then added that the AFSJ is made possible by the principles of mutual trust and mutual recognition,⁸¹ and has achieved an area without internal borders for the benefit of Union citizens and their families to exercise their free movement rights, both as citizens and through the exercise of economic activity.⁸²

This is a logical continuation of recent case law, such as *Alchaster*, where the Court of Justice stated that the obligation to consider that all other Member States comply with EU law and fundamental rights applies *particularly* in the AFSJ.⁸³ This means that, when implementing EU law, a Member State cannot check if another Member State is observing fundamental rights protected by EU law in a particular case.⁸⁴

By basing Union citizenship on mutual trust, it is more possible than ever to reconceptualise the EU as an internal market – and the overlapping AFSJ – for the mutual recognition of administrative and judicial decisions. This means it is not just goods produced in one Member State that are allowed to be marketed and distributed in others, but the regulatory acts permitting their production and distribution in the Member State of production that are recognised as valid. Similarly, it is not just the EU citizen who is permitted to move and reside in another Member State, but the administrative document granting their citizenship in their home country that is accepted, as well as the procedure preceding its production.

This understanding of both Union citizenship and mutual trust demonstrates that the Court was correct as a matter of EU law to link the two institutions. However, doing so explicitly is not without risk. In the Court's case law, mutual trust is only

⁸⁰ *Commission v Malta* (n 1) para 84.

⁸¹ *Ibid* para 85.

⁸² *Ibid* para 87.

⁸³ Case C-202/24 *Alchaster*, ECLI:EU:C:2024:649, para 57.

⁸⁴ *Ibid* para 58.

contentious in those exceptional circumstances when the effect of mutual recognition of a national act results in a real risk of the concerned person's fundamental rights being violated.⁸⁵ The purpose of judicial review to determine if the presumption of mutual trust may be rebutted in a particular case is always about protecting the EU fundamental rights of the affected person at the expense of the near automaticity required by EU law.⁸⁶ According to Leloup et al, a manifest breach of any fundamental right, whether procedural or substantive, has the potential to override the presumption of mutual trust, particularly following the Court's judgment in *Real Madrid Club de Fútbol*.⁸⁷

It would be very difficult to imagine a situation where a national refusal of EU citizenship rights (such as the third country national child of a Maltese citizen being charged the international level of course fees for a university programme rather than the fees paid by home students) would be about protecting the fundamental rights of the individual concerned. An alternative reading of the judgment is that the issue is not so much about refusing to recognise the free movement rights afforded to Maltese citizens who are also Union citizens in individual situations at all, but about refusing to recognise that (certain) Maltese citizens have the status of Union citizens in the first place, even if they are still Maltese (i.e. reading the judgment as representing an EU-level version of the *Kaur*⁸⁸ ruling). A literal reading of Article 20 TFEU demonstrates that it is only the exercise of rights contained in Article 20(2) TFEU that can be limited by EU law, and not the granting of Union citizen status, thus precluding this possible reading of the judgment.

However, this understanding of the judgment may help to explain why the Court emphasised the effects of EU citizenship status through mutual trust as part of a ruling on the lawfulness of a national citizenship acquisition scheme: the cross-border effects of EU citizenship require a degree of solidarity in a shared community, and since it cannot be inferred into Article 20(1) TFEU that EU citizenship can only be granted in accordance with EU law, the same constitutional value must be inferred into national citizenship. Mutual trust is the amplifier for the normative argument based on Article 2 TEU.

⁸⁵ E.g., Case C-261/22 *GN*, EU:C:2023:1017, para 57. AG Čápeka in *GN* made the claim that the two-stage test for discerning the exceptional circumstances is the “guardian of the principle of mutual trust” (Case C-261/22 *GN*, ECLI:EU:C:2023:582, para 43). The Grand Chamber has also stated, in the context of the Brussels I Regulation (Recast), that a court may refuse to enforce a judgment on mutual trust grounds if enforcement would give rise to a *manifest breach* of a fundamental right in the Charter (Case C-633/22 *Real Madrid Club de Fútbol*, ECLI:EU:C:2024:843, para 44).

⁸⁶ For discussion of this point, see for example E Di Franco and M Correia de Carvalho, ‘Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?’ (2023) 8, *European Papers* 1221–1233.

⁸⁷ E Sandri, J Meeusen and M Leloup, ‘The End does (not) Justify the Means: Mutual Trust and Fundamental Rights Safeguards after the ECJ's Real Madrid Judgment’ (2025) *Maastricht Journal of European and Comparative Law* 14.

⁸⁸ See *Kaur* (n 8).

In summary, while it would be virtually impossible to do so, if a national authority were to rely on *Commission v Malta* to deny residence and associated rights to a Maltese national – and their family members – who had obtained citizenship through Malta's investor scheme, it would mark an unprecedented scenario. In such a case, the disapplication of a measure grounded in mutual trust (specifically, the recognition of Union citizenship status or the rights guaranteed by it) would, for the first time, cause the actual infringement of individual fundamental rights. These rights include the legitimate expectation that Maltese nationality confers EU residence rights, as well as protections for family life and economic activities. Such a limitation would be imposed in defence of an EU foundational value, solidarity, which underpins the concept of Union citizenship. That the investment citizenship beneficiary could still reside in Malta, as well as perhaps claim non-contractual damages against Malta before Maltese courts for the false representation of EU free movement rights,⁸⁹ is cold comfort, even if the judgment is constitutionally correct and appropriate.

5. The practical outcome of the judgment: legal certainty and existing beneficiaries

When the Commission commences an action for infringement against a Member State under Article 258 TFEU, it is fulfilling its role of ensuring that Member States give effect to EU law.⁹⁰ The procedure under Article 258 TFEU presupposes an objective finding that a Member State has failed to fulfil its obligations under EU law,⁹¹ and judgments of the Court are declaratory in nature. As discussed by Advocate General Medina in his recent Opinion in *Commission v Hungary (UN Commission on Narcotic Drugs)*, rulings given under Article 258 TFEU do not identify any specific measures a Member State must adopt in order to put an end to an infringement of EU law.⁹² The judgment as such does not have automatic legal effects outside the Maltese legal system, and it also cannot have the effect of requiring Malta to change the law in a prescribed manner or even at all.⁹³ Bringing Malta's naturalisation regime in line with the requirements of the judgment is now a matter for negotiations between the Commission, as guardian of the Treaties under Article 17 TEU, and the Maltese authorities. The Maltese authorities have already taken the first step in this direction. At the time of publication, the Maltese Parliament had held the first reading of an amendment to

⁸⁹ Under the normal principles of state liability for sufficiently serious breaches of EU law, see the Opinion of AG Hogan in Case C-497/20 *Randstad Italia*, ECLI:EU:C:2021:725, para 79 and cases cited therein.

⁹⁰ Case C-20/09 *Commission v Portugal*, ECLI:EU:C:2011:214, para 41.

⁹¹ Case C-336/16 *Commission v Poland*, EU:C:2018:94, paras 61 and 62; Case C-620/16 *Commission v Germany*, ECLI:EU:C:2019:256, para 40; Opinion of AG Čapeta in *Commission v Hungary* (n 5) para 33.

⁹² Opinion of AG Medina in Case C-271/23 *Commission v Hungary*, ECLI:EU:C:2025:128, para 33, and cited case law.

⁹³ *Ibid.*

align the law with the CJEU's judgment.⁹⁴ Considering the judgment in the context of its value-laden reasoning, however, allows for two additional observations to be made.

Firstly, while the reasoning of the Court in reaching its decision underscores the centrality of mutual trust and EU values, its primary focus is systemic and constitutional in nature. At its core, mutual trust requires national authorities – whether administrative or judicial – to accept that their counterparts in other Member States are complying with EU law when they make decisions that have extraterritorial, horizontal effects within the EU. Now that EU citizenship is confirmed to be based on mutual trust, a national administrative authority or judicial body that refuses to recognise a migrant's citizenship of a Member State on grounds not already provided for in EU law would not only be in breach of the EU right being exercised but potentially also Article 4(3) TEU.⁹⁵ Furthermore, by adopting a naturalisation scheme that goes against the fundamental nature of EU citizenship, Malta has undermined that mutual trust which Member States have in, at a minimum, its naturalisation process, and to the maximum extent, in any personal documentation proving Maltese nationality.

Semantics may play a role in what may happen next. The Court stated that transactional naturalisation is both contrary to sincere cooperation but also is 'liable, by its nature, to call into question the mutual trust which underlies that requirement of recognition'.⁹⁶ The last time the Court of Justice determined that Member State authorities may refuse to give effect to an EU law measure based on mutual trust (and its precursor, mutual confidence) as it applied to an individual Member State, on the grounds of systemic deficiencies in an entire administrative scheme of a Member State, was in *N.S.*, which concerned asylum procedures and reception conditions in Greece.⁹⁷ In that case, because Greece was structurally incapable of guaranteeing the fundamental rights of asylum seekers, other Member States could not be sure they wouldn't be liable themselves for breaching the same fundamental rights by sending asylum seekers to Greece pursuant to EU law.⁹⁸ That is where the similarities in the two judgments ends, since the effects on certain Maltese nationals is potentially the opposite to those for the asylum seekers who may have been transported to Greece

⁹⁴ Motion No. 381, First Reading of the Maltese Citizenship (Amendment) Bill.

⁹⁵ The judgment of the Court in Case C-158/21 *Puig Gordi*, ECLI:EU:C:2023:57 is an example of a failure of mutual trust resulting in a breach of the duty of sincere cooperation (particularly, see para 134). Further, in Case C-822/21 *Latvia v Sweden*, ECLI:EU:C:2024:373, the Court considered that a failure to fulfil the general obligation of sincere cooperation under Art 4(3) TEU is only possible if it covers conduct that is distinct from conduct amounting to an infringement of distinct obligations (para 98), and it may be considered that the individual expressions of free movement rights represent distinct obligations, thus removing the need to rely on Art 4(3) TEU in any event.

⁹⁶ *Commission v Malta* (n 1) para 101.

⁹⁷ Case C-411/10 *N.S.*, ECLI:EU:C:2011:865.

⁹⁸ Discussed by AG Sharpston in her Opinion in Case C-396/11 *Radu*, ECLI:EU:C:2012:648, para 76. See also, K Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (yet not blind) Trust' (2017) 54 *Common Market Law Review* 808–809.

to have their request for international protection processed. The door has theoretically now been opened for national authorities and courts to refuse to recognise the rights of certain Maltese citizens. This is a real, albeit unlikely, possibility, given that the judgment does not explicitly provide for temporal limitations.

The second point derives from the legal certainty problem with this judgment. Before the ruling, Malta's investor citizenship scheme was, at the very least, not unlawful under EU law, since the presumption was that Member States had exclusive competence to decide how a person becomes a citizen of that country. As articulated by Advocate General Collins in both *Préfet du Gers*⁹⁹ and *Commission v Malta*,¹⁰⁰ the Member States could have pooled competences and conferred on the Union the power to decide who may become an EU citizen, but they chose not to do so. Given the force of the constitutional language employed by the Court in the current judgment, it would be unthinkable for Malta to continue to operate its investor citizenship scheme.

At the same time though, should the authorities of a host Member State determine that an existing beneficiary of the Maltese investment citizenship scheme does not have the right to exercise the rights and benefits that come with the status of EU citizenship, it would not necessarily follow that to do so goes against anything the Court stated in *Micheletti*. EU law requires a proportionality assessment of the affected individual's circumstances.¹⁰¹ What EU law cannot do is deny Maltese citizenship to beneficiaries of the scheme, and this cannot be a consequence assumed from the judgment. Furthermore, even if a Member State authority chooses to exercise its authority to deny residence rights to a Maltese beneficiary of the scheme, as a matter of practicalities it would be difficult to determine initially that a Maltese citizen acquired their citizenship under a scheme that infringes EU law, as a Maltese passport or valid ID should be enough to prove a right of entry and residence in the host Member State.¹⁰² Malta could require that the passports of investment citizenship schemes contain information to that effect, which would make it easier for other Member State authorities to distinguish which Maltese citizens should be investigated prior to granting rights that are reserved for EU citizens and their families.¹⁰³ Technically, it would not be prohibited from a policy of reverse discrimination

⁹⁹ Opinion of AG Collins in Case C-673/20 *Préfet du Gers*, ECLI:EU:C:2022:129, para 22.

¹⁰⁰ AG Collins in *Commission vs Malta* (n 6) para 44.

¹⁰¹ E.g. Joined Cases C-684/22 to C-686/22 *Stadt Duisburg (Loss of German nationality)*, EU:C:2024:345, para 42 and cited case law.

¹⁰² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Art 5(1) (right of entry with a valid passport or ID) and Art 6(1) (right of residence for up to 3 months with a valid passport or ID).

¹⁰³ How national authorities would perform the same task as it relates to the third country national family members of the Maltese national is another matter entirely.

against its own citizens in this way.¹⁰⁴ Also, if it chooses not to repeal the investor citizenship scheme, it may be required to do something along these lines in order to comply with the duty of sincere cooperation.

This highlights a clear problem with the judgment. The Court could have concluded that Union citizenship is an expression of the Article 2 TEU value of solidarity and then concluded on that basis that the Maltese scheme infringed Article 20 TFEU and Article 4(3) TEU by reducing the acquisition of citizenship to a transaction. Beneficiaries of the scheme should not thus be entitled to the status of an EU citizen. This argument would have essentially added new text to Article 20 TFEU in order to achieve a particular result. The Court could alternatively have concluded that the Maltese scheme infringed the value of solidarity in Article 2 TEU as expressed in Union citizenship and in doing so undermined the mutual trust necessary for cross-border recognition of that status as it applies to Maltese citizens. An infringement on this basis would apply the same normative grounds, albeit with different effects, since this argument only indirectly targets the national scheme at issue by focussing on its effects on the internal market. Instead, the Court chose to find an infringement of EU law based on both the national status and the cross-border effects of it. Both are arguably correct statements of EU law, but it isn't obvious that both are strictly necessary for the purpose of resolving the problem with Malta's investor citizenship scheme.

6. The wider influence of Article 2 TEU on the EU legal order

The pattern of infusing EU rights with the values in Article 2 TEU is now an established feature of the Court's jurisprudence. Union citizenship is one of the principle concrete expressions of the solidarity which 'is an integral part of the identity of the European Union as a specific legal system'.¹⁰⁵ Additionally, Article 22 TEU, which allows EU migrants to participate in municipal and European Parliamentary elections, gives concrete expression to the principles of democracy and equal treatment of EU citizens, which are also 'an integral part of the identity and common values of the European Union'.¹⁰⁶ This is because the 'functioning of the European Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in Article 2 TEU'.¹⁰⁷ These references to EU values in Article 2 TEU repeatedly confirm the scheme developed in the *Rule of Law Conditionality Mechanism* judgments, namely that actions of the Member

¹⁰⁴ Not unlike Scotland charging university fees only to students from England, Wales and Northern Ireland but not Scotland or the EU, when the UK was a Member State.

¹⁰⁵ *Commission v Malta* (n 1) para 93.

¹⁰⁶ Case C-814/21 *Commission v Poland*, ECLI:EU:C:2024:963, para 159; Case C-808/21 *Commission v Czech Republic*, ECLI:EU:C:2024:962, para 162.

¹⁰⁷ Case C-502/19 *Junqueras Vies*, EU:C:2019:1115, para 63.

States can be challenged in infringement proceedings for a breach of any values in Article 2 TEU, but only when they are given concrete expression in principles containing legally binding obligations for the Member States.¹⁰⁸

This reading of the normative application of Article 2 TEU values lends further credence to the prediction that the final judgment in the current infringement proceedings against Hungary concerning its LGBTIQ+ laws will be a finding against Hungary and at least partly on the basis of Article 2 TEU. The Commission in that case alleges a breach of numerous EU laws, as well as Article 2 TEU, which the Commission agent on being questioned before the CJEU in the oral proceedings suggested could not be applied autonomously, but rather through other obligations.¹⁰⁹ Since functionally the Hungarian law could be challenged solely on the basis of EU secondary laws, this raises the question about the added value of relying also on Article 2 TEU. In the Opinion of Advocate General Ćapeta in *Commission v Hungary*, it was put forward that Art 2 TEU values are deliberately abstract, on the grounds that their open content ‘leaves room for constitutional dialogue between Member States and the parallel existence of different “concretisations” of values’.¹¹⁰ Going further than the Grand Chamber in the *Rule of Law Conditionality Mechanism* judgments, the Advocate General asserts that ‘Article 2 TEU expresses the choice of the founders of the European Union as to the type of society that the Member States have pledged to create together within the framework of the European Union’.¹¹¹ The ‘vision of what a good society is in the EU constitution’ is expressed in Article 2 TEU, and when the values are read together, they paint a picture of *a constitutional democracy that respects human rights*.¹¹² At the same time, the Advocate General acknowledges that the values in Article 2 TEU are interrelated, and that the ‘finding of the breach of one of them is an indication about the negation of the model of a constitutional democracy that is based on the respect of human rights by the Member State at issue’, which results in a ‘deviation from the model of society as set out in Article 2 TEU’.¹¹³ Further, since in infringement proceedings, the Court is only being asked to determine what cannot be tolerated – whether a Member State has

¹⁰⁸ Case C-156/21 *Hungary v Parliament and Council*, EU:C:2022:97, para 232; Case C-157/21 *Poland v Parliament and Council*, EU:C:2022:98, para 264; Case C-814/21 *Commission v Poland*, ECLI:EU:C:2024:963, para 157; Case C-808/21 *Commission v Czech Republic*, ECLI:EU:C:2024:962, para 160.

¹⁰⁹ Case C-769/22 *Commission v Hungary*, pending; see also, W Bruno, ‘Op-Ed: “Three Questions to rule (on) them All: the full Court Hearing in the Case Commission v. Hungary on the Justiciability of EU Values against Member States (C-769/22)”’ (EU Law Live, 25 November 2024), at eu-lawlive.com; L Rossi, ‘“Concretised”, “Flanked”, or “Standalone”? Some Reflections on the Application of Article 2 TEU’ (2025) 10 *European Papers* 1–24, 22.

¹¹⁰ AG Ćapeta in *Commission v Hungary* (n 5) para 203.

¹¹¹ *Ibid* para 155.

¹¹² *Ibid* para 157.

¹¹³ *Ibid* para 265.

crossed 'red-lines' – and not to determine the content of the values involved,¹¹⁴ the finding of a breach of Article 2 TEU is the negation of a value which is the 'root cause of other breaches of EU law'.¹¹⁵

Bonelli and Claes, for example, have expressed concern that a Court that adjudicates on the basis of 'political' values rather than on clear legal rules may not adequately contribute to the protection of EU values.¹¹⁶ Rossi takes a view much closer to that provided by Advocate General Čapeta in her Opinion, asserting that the novelty of the Hungarian legislation at issue is that collectively it appears to violate almost all of the values and principles in Article 2 TEU, challenging the very model of values and common identity of the Union.¹¹⁷

Equally, the use of Article 2 TEU may be a necessary addition in infringement proceedings, if the national act under review is both of a systemic/structural nature and is so severe that it undermines core features of the EU legal order as a constitutional order.¹¹⁸ As Spieker points out, the Charter does not cover threats of a structural or institutional nature detached from individual rights violations, and also, that not every value has a fundamental rights counterpart.¹¹⁹ The limitation on its use would be, as demonstrated by the Court thus far, in the structural nature of the national measure at issue and the significance of the effect of the measure on the basic tenets of the EU's identity.

At the same time, even if this is warranted, or even necessary, the values in Article 2 TEU are common to the Member States; in situations where the Court applies them negatively to answer the binary question of whether the national measure is or is not in breach of any value, each iteration adds substantive flesh to those values, making them more supranational in character.¹²⁰ In any event, both the judgment in *Commission v Malta* and the Opinion of the Advocate General in *Commission v Hungary* represent a new direction for the protection of rights in EU law. During the first phase,

¹¹⁴ Ibid para 212.

¹¹⁵ Ibid para 247.

¹¹⁶ M Bonelli and M Claes, 'Crossing the Rubicon? The Commission's use of Article 2 TEU in the Infringement action on LGBTIQ+ rights in Hungary' (2023) 30 *Maastricht Journal of European and Comparative Law* 3–14, 12.

¹¹⁷ L Rossi (n 109) 18.

¹¹⁸ A pertinent example based on severity of harm is the infringement proceedings against Poland following rulings of the constitutional tribunal that Arts 2, 4(3) and 19(1) TEU were unconstitutional. According to AG Spielmann in Case C-448/23 *Commission v Poland*, ECLI:EU:C:2025:165, para 94 this represents a 'manifest infringement' and disregards all the values and obligations which the Treaties impose on the Member States.

¹¹⁹ L Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal* 1187.

¹²⁰ And therefore coming closer to the homogeneity clause, or a core minimum of constitutionality. See, e.g. A Von Bogdandy and L Spieker, 'Die Verfassungsprinzipien' in J Bast and A von Bogdandy, *Unionsverfassungsrecht. Eine Neubestimmung anhand der Grundlagen im EU-Vertrag* (Nomos 2024) 123–178, 149–150; P Cruz Mantilla de los Ríos, 'European Constitutional Identity as the Unamendable Core of the EU Treaties' (2024) 20 *European Constitutional Law Review* 545–568.

the Court of Justice incorporated human rights into EU law through the general principles of EU law. In the second phase, fundamental rights, which includes the protection of human rights, were given application through the EU Charter, subject to the limitation in Article 51(1) CFR.¹²¹ With the third wave of protection, national laws can be challenged for compliance with EU law when they manifestly disregard (*Commission v Malta*) or, potentially, negate (Advocate General Čapeta in *Commission v Hungary*) the values in Article 2 TEU, and have the effect of undermining the type of society that the Member States have pledged to create.¹²²

Nevertheless, it is difficult to envisage what new role the relationship of solidarity and good faith could play as a normative concept in EU law applicable to Union citizenship. The relationship between a citizen and the State is a deeply personal one that cannot be so readily reduced to a legal test of general application to review Member States' naturalisation or citizenship laws.¹²³

There may still be an internal logic that can be deduced from the judgment that necessitates a finding that national citizenship is connected in some way to the value of solidarity in Article 2 TEU, even if it is not exactly a concrete manifestation of it but something more akin to the 'real link'. Firstly, the majority of rights that attach to Union citizenship manifest when a citizen exercises free movement within the Union, and so the solidarity inherent in Union citizenship is undermined when Malta accepts payments from individuals to become citizens and then those individuals move to and reside, with their families, to another Member State, where they then benefit from public services provided for by the State on a non-discriminatory basis. The problem from an internal market perspective therefore stems from the mutual recognition of Maltese citizenship rather than the granting of Maltese citizenship itself. Secondly, if the judgment was normatively framed exclusively around this issue, then the legal solution would be to potentially deprive Maltese citizens of their free movement rights on the grounds that certain Maltese citizens may not possess the necessary bond of solidarity to be Union citizens, resulting from a systemic breach of a value in Article 2 TEU. This normative argument only indirectly concerns the Maltese investor citizenship scheme itself, since it would be the Union citizenship status derived from successfully concluding the national naturalisation scheme that is undermined. Which is why, thirdly, the Court needed to extend the scope of Article 2 TEU also to national citizenship, as being based on solidarity and good faith. This is quite a leap, but perhaps a necessary one: Union citizenship is an expression of a value in Article 2 TEU, and since the EU status is derived from the

¹²¹ When Member States are acting within the scope of EU law, see Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105, para 19.

¹²² To use the language of AG Čapeta in *Commission v Hungary* (n 5) para 158.

¹²³ Even if non-representative, a significant proportion of the people of Northern Ireland would not consider their relationship with the United Kingdom as one of solidarity and good faith, and yet once they 'activate' their Irish citizenship birthright, they must reside within the administrative borders of Ireland in order to exercise most of the rights associated with it.

national citizenship status pursuant to Article 20(1) TFEU, so it too must be based to some extent on the same value in Article 2 TEU. Thus, a transactional citizenship scheme infringes Article 20(1) TFEU by design, because it undermines the EU value on which it is based, thereby undermining the effect of the status, namely cross-border mutual trust in Maltese citizenship generally (resulting in a breach of Article 4(3) TEU), and in doing so undermining the solidarity in the national citizenship status it applies to, on the basis of both Article 20(1) TFEU and Article 4(3) TEU.

7. The continuation of an emerging pattern

Ever since the *Portuguese Judges* case, where the Court of Justice stated that Article 19(1) TEU was an expression of the value of the rule of law in Article 2 TEU, questions have existed about how far Article 2 TEU can be substantively interpreted and procedurally applied.¹²⁴ One possible avenue that has opened up with the Maltese judgment is that a national status of constitutional importance such as citizenship may have to be interpreted on the same normative basis as a corresponding status in EU law when the EU status is an expression of a value in Article 2 TEU. To a large extent, something similar has already been done to the administration of justice through a combined reading of Article 19 TEU, Article 2 TEU and Article 47 of the Charter.¹²⁵

Secondly, a maximalist approach to interpreting this judgment, such as the one presented here, has other potential implications. Mutual trust requires Member States to presume that all the other Member States comply with EU law and fundamental rights. It is one thing for the Court of Justice to say that mutual trust is absent from a particular national scheme creating cross-border effects, giving limited license to other Member States to refuse to recognise the measures produced by that scheme. It is quite another thing should the day arrive that a Member State is found to be in breach of the values contained in Article 2 TEU on a more general and systematic basis pursuant to Article 7(2) TEU.

For example, during the rule of law crisis in Poland, it was argued that specific judicial cooperation measures based on mutual trust (such as the European Arrest Warrant) be suspended as they relate to Poland, on the grounds that the national judiciary lacked independence and therefore did not satisfy the requirements inherent in the value of the rule of law in Article 2 TEU and given concrete expression in

¹²⁴ R O'Neill, 'Effet Utile and the (Re)organisation of National Judiciaries: A Not so Unique Institutional Response to a Uniquely Important Challenge?' (2021) 27 *European Law Journal* 240–261; LD Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in A von Bogdandy, P Bogdanowicz, I Canor, C Grabenwarter, M Taborowski and M Schmidt (eds), *Defending Checks and Balances in EU Member States*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Springer 2021).

¹²⁵ And, more formally, to rights contained in the Charter that correspond with equivalent rights in the ECHR, pursuant to Art 52(3) CFR.

Article 19 TEU.¹²⁶ Beyond individual cases, Article 7 TEU remains the only currently available mechanism, albeit a political one, for finding that a Member State has seriously and persistently breached the values in Article 2 TEU. The proposition being made here is that, since mutual trust presumes respect for Article 2 TEU values, a confirmed breach of those values should lead to the judicially-sanctioned suspension of mutual trust regarding that Member State, independently of any sanctions established by the Council under Article 7(3) TEU.

There are strong arguments against this nuclear option, of course. In the Opinion in *Commission v Hungary*, for example, Advocate General Ćapeta defines the consequences that flow from Article 7 TEU are leading to the exclusion from decision-making at the EU level.¹²⁷ Yet the Advocate General also acknowledges the effect of a deviation from values is not internal to a Member State, but affects the functioning of the EU legal order and reduces that Member State's ability to comply with other obligations under EU law.¹²⁸ It is difficult to comprehend how a Member State that is found to have negated those values in infringement proceedings before the Court could still be capable of having its legal and administrative mechanisms immune from review by the courts of other Member States when they create cross-border legal effects, on the basis of mutual trust (once it is added into the mix).

And given that mutual trust is the basis for so much more than the instruments adopted within the AFSJ, and now also includes EU citizenship, any suspension applies not only to specific instruments but to the entirety of the free movement of people from that Member State. This has not hitherto been considered as an obvious consequence of a serious breach of Article 2 TEU.

8. Conclusion

The judgment of the Court in *Commission v Malta* is a landmark decision, and not because it is the first time the Court has ruled that the mechanism for granting national citizenship breaches EU law, though this is undoubtedly a huge milestone – or rubicon, depending on the reader's persuasion.

The big constitutional innovation is the confirmation that Union citizenship is one of the principle concrete expressions of the value of solidarity that is 'an integral part of the identity of the European Union as a specific legal system',¹²⁹ and, to a lesser extent, that it is based on mutual trust. With these two developments, the author will dare to predict that the former will directly or indirectly result in a large

¹²⁶ For example, P Bárd and A Bodnar, 'The End of an Era. The Polish Constitutional Court's Judgment on the Primacy of EU Law and Its Effects on Mutual Trust' (2021) *CEPS Policy Insights* 1.

¹²⁷ Opinion of AG Ćapeta in *Commission v Hungary* (n 5) para 122.

¹²⁸ *Ibid* para 242.

¹²⁹ *Commission v Malta* (n 1) para 93.

volume of academic commentary and the latter may potentially result in a novel avenue for future litigation.¹³⁰

The reason for the cynical assessment of the first development is to do with the lack of added value in normatively defining citizenship status in terms of values, even if this is juxtaposed onto all communities generally. Citizenship and its meaning are personal to every individual and their identity and often have little to do with belonging or solidarity and perhaps have more to do with practical convenience.

On the second development, by concluding that the Maltese scheme undermines mutual trust, the status of Union citizenship for Maltese beneficiaries of the scheme may potentially not be recognised abroad. This cannot though affect the existence of citizenship status in Malta itself, which is a matter for the Maltese State and those who it deems to be a citizen. This is a problematic reading of the judgment, however: the authorities of a host Member State would not be refusing to recognise the rights of a Maltese EU citizen migrant so as to protect their fundamental rights, but rather to protect an EU value. Doing so may even cause the rights of the individual to be denied, which would be unprecedented in the mutual trust case law concerning fundamental rights.

The grounding of Union citizenship and associated free movement rights in mutual trust also has a potentially much wider scope of application: as a tool to prevent and punish EU value backsliding. That now includes free movement and residency rights for citizens of a Member State that deviates so far from the common values of the Member States that such an outcome becomes necessary.

Regarding mutual trust more generally, a pattern is emerging: where EU law does not fully harmonise an administrative or judicial procedure which has cross-border effects, mutual trust is the adhesive substance, the glue that holds the inherent legal-systemic diversity together: constitutional Polyfilla.

¹³⁰ There will need to be at least one preliminary reference from a national court asking the Court of Justice what test should be applied before denying rights to Maltese citizens in the host Member State.

