Nothing More Than a Rights Catalogue Serving EU Citizens' Private Interests? Three Insights for an Alternative Assessment of EU Citizenship

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Abstract

In its book on 70 Years of European Union (EU) Law, the Commission's Legal Service characterises EU citizenship as a status 'in the service of EU citizens' which, to a large extent, has been developed through European Court of Justice (ECJ) preliminary rulings. Such a narrow approach is unconvincing in several respects. This contribution therefore proposes three insights for an alternative assessment of EU citizenship which essentially rests on the idea that reducing EU citizenship to a catalogue of (free move-

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DOI 10.17104/0044-2348-2026-1-261 ZaöRV 86 (2026), 261-297

https://doi.org/10.17104/0044-2348-2026-1-261 https://www.inlibra.com/de/agb - Open Access -

ment) rights, which individuals can invoke against the Member States, underestimates this status' true significance for the European Union's legal order.

Keywords

European Union – Member States – Nationality – EU Citizenship – Freedom of Movement

I. Introduction

In the fourth Chapter of its book titled *70 Years of EU Law*, the European Commission's Legal Service[1] examines the development of EU citizenship.[2] Its authors emphasise the important contribution of the European Court of Justice in developing the jurisprudence concerning the protection of the rights of the EU citizens. They specifically focus on the rights of family members of EU citizens and the rights of the EU citizen children.

The purpose of the current contribution is not so much to present a full analysis of EU citizenship in itself, but rather to engage with the views and opinions expressed by the Legal Service on this subject. It is therefore, essentially, a comment upon a comment. It will be argued that the views expressed by the Legal Service, and specifically, its narrow interpretation of EU citizenship as a catalogue of (free movement) rights to be enforced against the Member States, rest on a generally unconvincing understanding of EU citizenship and its central position in the Union's legal order. Certainly, a brief chapter such as that written by the Legal Service cannot be expected to hold a complete, in-depth analysis of all facets of EU citizenship. Still, the Legal Service has opted for a remarkably narrow perspective which leaves important aspects of EU citizenship out of sight. Moreover, it does not do full justice to the impact which the Commission (including its Legal Service) itself has had over the past decades. Together with the ECJ and other (institutional) actors, the Commission has indeed contributed significantly to the evolution of EU citizenship from a rather symbolic status, essentially tied to

1 Hereafter referred to as 'Legal Service'.

2 Jonathan Tomkin and Elisabetta Montaguti, 'EU Citizenship: in the Service of EU Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens*, (2nd edn, Publications Office of the European Union 2023), 96-114. This text is hereafter referred to as 'the Chapter'.

 DOI 10.17104/0044-2348-2026-1-261

https://doi.org/10.17104/0044-2348-2026-1-261 https://www.inlibra.com/de/agb - Open Access -

the Member States' nationality legislation, to a vital component of the European Union's identity.

This contribution is structured as follows:

First, I will explain, through four points of criticism and the resulting disappointment, why I consider the Legal Service's perspective on EU citizenship unconvincing. More specifically, I will criticise the Legal Service's very narrow perspective on EU citizenship, its almost exclusive focus on the ECJ's preliminary rulings on EU citizens' free movement rights, its limited thematic choices, and its selective case analysis. Common to these criticisms is the overly narrow approach taken by the Legal Service. Unsurprisingly, the chapter culminates in a disappointingly narrow conclusion that fails to capture the true meaning of EU citizenship.

In a second step, I will therefore propose, still in close interaction with the views expressed by the Legal Service, three insights for an alternative assessment of EU citizenship. As I will explain, it is, in my view, more than a status developed through preliminary references, more than a rights catalogue that accommodates private interests, and more than a status that expresses the bond of nationality.

A brief conclusion will eventually summarise this contribution's findings.

II. The Legal Service's Understanding of the Significance of EU Citizenship: Four Criticisms and a Disappointment

Referring to several remarkable ECJ judgements, the Legal Service describes the evolution of the law with respect to certain selected aspects of EU citizenship.

As it is mentioned in its Introduction, the Chapter 'looks back at the development of EU citizenship with a view to considering some milestones in the Court of Justice's citizenship case-law and the Commission's contributions to this'.[3] This overview of pertinent legal developments, which are singled out by the Legal Service, is brief but accurate and rests on an interesting selection of major citizenship cases which sheds more light on EU citizens' free movement rights, including the limits and effects of these rights.

In my view, however, the Legal Service's approach suffers from several shortcomings, which inevitably result in an all-too-limited understanding of the significance of EU citizenship. Overall, its Chapter is characterised by an

3 Tomkin and Montaguti (n. 2), 96.

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excessively narrow approach. This can be concretised in the four criticisms which I will mention and explain hereafter.

1. The Legal Service's Very Narrow Perspective on EU Citizenship

A first and essential criticism is that the Legal Service adopts a very narrow perspective on EU citizenship, which does not allow the Chapter's readers to fully grasp the multidimensionality of this status. Its main focus is that of the right of free movement, which is rightly referred to as 'a cornerstone of European integration'.[4] As the Legal Service mentions, freedom of movement indeed has been at the very heart of the European project since its inception.[5] Undoubtedly, it deserves a central spot in any analysis of the significance of EU citizenship for the development of EU law and the Commission's contribution to it. Yet, the right to freedom of movement constitutes but one of several key characteristics of the status of EU citizenship. As evidenced by Article 20(2) Treaty on the Functioning of the European Union's (TFEU) non-exhaustive enumeration of rights (and duties) of EU citizens and their further development in Articles 21-24 TFEU, EU citizenship is a multidimensional status which is not limited to a free movement right, but *inter alia* includes active and passive voting rights in municipal and European elections (Article 22 TFEU) as well as a right to diplomatic protection (Article 23 TFEU). Moreover, as a result of the connection which the ECJ has made between the first sentence of Article 20(2) TFEU, according to which citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties, and Article 18 TFEU, the right not to be discriminated against on the grounds of nationality constitutes a crucial component of the EU citizenship as well.[6] As the ECJ considered in *Grzelczyk*, EU citizenship 'is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.[7]

4 Tomkin and Montaguti (n. 2), 96.

5 Tomkin and Montaguti (n. 2), 97.

6 ECJ, *María Martínez Sala v. Freistaat Bayern*, judgement of 12 May 1998, case no. C-85/96, ECLI:EU:C:1998:217, para. 62.

7 ECJ, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, judgement of 20 September 2001, case no. C-184/99, ECLI:EU:C:2001:458, para. 31.

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One cannot but wonder about the Legal Service's choice to leave these other essential characteristics of EU citizenship unmentioned. And there's also the concept of EU citizenship itself: wouldn't it have been worthwhile for the Legal Service to reflect, and possibly interact with legal scholarship,[8] on the credibility or perhaps the ingenuity of EU law to have introduced citizenship status? After all, this notion has a long history in national constitutional law and does not fit that naturally within the legal order of an international organisation.

The Charter's Preamble declares that the Union, *inter alia* by establishing EU citizenship, 'places the individual at the heart of its activities'. In the concluding chapter of the Legal Service's book on 70 Years of EU Law, Calleja and Ladenburger more specifically consider that the Treaty of Lisbon has 'undoubtedly […] put the citizen at the heart of the democratic life of the Union'.[9] Along those lines, the book's subtitle – 'A Union for Its Citizens' – promises a similar key position for EU citizens in the Legal Service's narrative. Unfortunately, the Chapter does not live up to these expectations as the chosen approach fails to communicate to its readers the reasons why EU citizenship is significantly important for the Union's democracy and legal order. As is mentioned by other contributors to this special issue as well,[10] the Chapter sketches only an incomplete picture of this status which is stripped, to name only these, of its crucial political dimension, its major significance for EU non-discrimination law, and its often controversial impact on the reach and effects of EU integration.

2. The Legal Service's Almost Exclusive Focus on the ECJ's Preliminary Rulings on EU Citizens' Free Movement Rights

A second criticism concerns the almost exclusive attention which the Legal Service gives to the ECJ case-law on EU citizenship, and even more specifically to preliminary rulings in cases introduced by litigants claiming their free movement rights under EU law. As a result, other ECJ case-law (e. g. resulting from infringement actions) as well as important legal provisions and

8 See e. g., with further references, Lorin-Johannes Wagner, 'Member State Nationality Under EU Law – To Be or Not to Be a Union Citizen?', Maastricht J. Eur. & Comp. L. 28 (2021), 304-331 (312-314).

9 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens*, (2nd edn, Publications Office of the European Union 2023), 381-392 (381).

10 See Armin von Bogdandy, 'The Republican Thrust of *70 Years of EU Law*: Theorizing "A Union for Its Citizens"', HJIL 86 (2026), 379-408, and Päivi Leino-Sandberg, "'70 Years of EU Law" – The Politics of a Professional Language', HJIL 86 (2026), 59-83.

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policy developments remain out of sight. This lacuna affects the attention that could (or should) have been given to pertinent Treaty on European Union (TEU) and TFEU provisions on EU citizenship.[11] It also concerns important secondary EU law, even with respect to the right to free movement, such as Directive 2004/38.[12] Although some of these major sources of EU citizenship law, as well as pertinent provisions of the Charter of fundamental rights of the EU, are mentioned at times by the Legal Service, they are neither subjected to any thorough analysis nor put in a broader legal or policy context that would have shed more light on the importance and significance of EU citizenship more generally. Moreover, academic references which could have served that same purpose too remain absent.

Let me take Directive 2004/38 as an example: can one really explain the pertinence of EU citizenship for 70 Years of EU Law, and the Commission's contribution to it, without a proper, more systemic attention for this Directive which would stretch beyond those few aspects of the status of family members and children which the Chapter examines? In academic doctrine, the legal status of EU citizens has rightly been described as 'an ongoing process resulting from a joint evolving endeavour of the EU legislator, the Court of Justice of the European Union […] and EU scholarship'.[13] Unfortunately, this is not quite reflected in the Legal Service's Chapter.

According to the Legal Service, its approach allows better insight into the human side of the disputes concerned as the cases selected offer a glimpse in the life stories of litigants battling legal anomalies and thus seeking justice and a better life for themselves and their families.[14] It is true that such a personal perspective must not be ignored: the development of EU law, and EU citizenship status in particular, cannot really be understood without full appreciation for the huge personal and often also financial investment of those seeking justice through the enforcement of their rights under EU law. The approach chosen by the Legal Service, with its focus on a detailed description of what was stake in a handful of free movement cases before the ECJ, indeed sheds proper light on the human side of the law. Equally important is that it may allow its entire readership, which is not limited to

11 See in particular Article 9 TEU and Articles 20-25 TFEU.

12 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 1612/68/EEC and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158/77.

13 Ricardo García Antón, 'Rethinking the Social Contract in a Regional Integration Dimension (The European Union): A Response to the 2024 Montesquieu Lecture by Prof. Tsilly Dagan', *Tilburg Law Review* 29 (2024), 25-32 (27).

14 Tomkin and Montaguti (n. 2), 96.

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experts in EU law, to grasp what EU citizenship is really about. Undoubtedly, however, the book's readers would have gained a much broader understanding of what EU citizenship entails if the Legal Service would not have restricted its analysis to a brief overview of selected preliminary rulings.

And even insofar as the Chapter does examine the ECJ's preliminary rulings concerning EU citizenship, it would have profited from a broader reach of the subjects covered. It is not only so that the Legal Service examines only a few of the many questions which the right of free movement implies (see *infra* II. 3.). Also, the analysis of major recent cases on other pertinent issues would have facilitated a more complete understanding of EU citizenship rights. I may refer here to important ECJ judgements, which have often provoked intense academic debate,[15] on – to name a few themes – the interaction between EU citizenship and the Member States' nationality laws,[16] the voting rights of former EU citizens after Brexit,[17] or the protection against extradition to third States.[18] The inclusion of these judgements in its analysis

15 As regards the interaction between EU citizenship and the Member States' nationality laws, see *infra* III. 3. As regards the other themes mentioned, see *inter alia* (with further references): Niamh Nic Shuibhne, 'Protecting the Legal Heritage of Former Union Citizens: EP v. Préfet du Gers', CML Rev. 60 (2023), 475-516; Eleanor Spaventa, 'Brexit and the Free Movement of Persons: What Is EU Citizenship Really About?' in: Niamh Nic Shuibhne (ed.), Revisiting the Fundamentals of the Free Movement of Persons in EU Law (Oxford University Press 2023), 158-185; Stephen Coutts, 'From Union citizens to national subjects: *Pisciotti*', CML Rev. 56 (2019), 521-540; Stefano Maffei, 'The Decision on the Surrender/Extradition of Own Nationals, EU-Citizens and Persons Residing in the Executing State', EuCLR 12 (2022), 53-65 and, with regard to the two themes respectively, Niamh Nic Shuibhne, *EU Citizenship Law* (Oxford University Press 2023), 97-106 and 124-129.

16 ECJ, *Janko Rottman v. Freistaat Bayern*, judgement of 2 March 2010, case no. C-135/08, ECLI:EU:C:2010:104; ECJ, *M. G. Tjebbes and Others v. Minister van Buitenlandse Zaken*, judgement of 12 March 2019, case no. C-221/17, ECLI:EU:C:2019:189; ECJ, *JY v. Wiener Landesregierung*, judgement of 18 January 2022, case no. C-118/20, ECLI:EU:C:2022:34; ECJ, *X v. Udlændinge- og Integrationsministeriet*, judgement of 5 September 2023, case no. C-689/21, ECLI:EU:C:2023:626; ECJ, *S. Ö. v. Stadt Duisburg, M. Ö. v Stadt Wuppertal*, *M. S. and S. S. v. Stadt Krefeld*, judgement of 25 April 2024, joined cases C-684/22 to C-686/22, ECLI:EU:C:2024:345; ECJ, *European Commission v. Republic of Malta*, judgement of 29 April 2025, case no. C-181/23, ECLI:EU:C:2025:283.

17 ECJ, *EP v. Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)*, judgement of 9 June 2022, case no. C-673/20, ECLI:EU:C:2022:449; ECJ, *EP v. Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)*, judgement of 18 April 2024, case no. C-716/22, ECLI:EU:C:2024:339.

18 ECJ, *Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra*, judgement of 6 September 2016, case no. C-182/15, ECLI:EU:C:2016:630; ECJ, *Romano Pisciotti v. Bundesrepublik Deutschland*, judgement of 10 April 2018, case no. C-191/16, ECLI:EU:C:2018:222; ECJ, *Proceedings relating to the extradition of Denis Raugevicius*, judgement of 13 November 2018, case no. C-247/17, ECLI:EU:C:2018:898; ECJ, *Proceedings relating to the extradition of BY*, judgement of 17 December 2020, case no. C-398/19, ECLI:EU:C:2020:1032; ECJ, *Generalstaatsanwaltschaft München v. S. M.*, judgement of 22 December 2022, case no. C-237/21, ECLI:EU:C:2022:1017.

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would have allowed the Legal Service to share its views on those important new strands of case-law which now remain completely out of sight.

3. The Legal Service's Limited Thematic Choices

A third criticism concerns the particular thematic choices which the Legal Service has made when examining the ECJ case-law on the free movement rights connected with EU citizenship. Without justifying this selection in any way, the Chapter's introduction announces that it will focus on the rights of family members of EU citizens and those of EU citizen children.[19] It is true that this choice allows the Legal Service, as it announces,[20] to take a closer look at some milestones in the ECJ's case-law. But from a more substantive point of view, this choice is not particularly convincing.

First of all, as mentioned by the Legal Service,[21] family members enjoy derived free movement rights, and their legal status hence is dependent on that of the EU citizens concerned.[22] One cannot but wonder whether the very brief space specifically allotted to EU citizenship in the Commission's book would not have justified a direct emphasis on the position of the EU citizens themselves in order to clarify their precise legal status and its importance.

Further, where the position of EU citizen children is concerned, a pertinent question is whether the Legal Service's perspective should be reversed. EU law approaches these children first and foremost as EU citizens – who happen to be children. Categorising them first and foremost as children, as the Legal Service primarily does for the sake of its analysis, is unfortunate, as this particular perspective risks leaving out of sight important ECJ judgements which examined closely related questions of citizenship rights in cases which did not primarily involve children. Take, for example, (the recognition of) the names of EU citizens. The Legal Service examines the *Garcia Avello*[23] and *Grunkin and Paul*[24] cases, which both related to minor EU citizen children, but neglects that the ECJ interpreted the impact of EU citizenship law on names in other, equally important and relevant judge-

19 Tomkin and Montaguti (n. 2), 96.

20 Tomkin and Montaguti (n. 2), 96.

21 Tomkin and Montaguti (n. 2), 97.

22 For more details, see Nic Shuibhne, *EU Citizenship Law* (n. 15), 8 and 139 et seq.

23 ECJ, *Carlos Garcia Avello v. Belgian State*, judgement of 2 October 2003, case no. C-148/02, ECLI:EU:C:2003:539.

24 ECJ, *Stefan Grunkin and Dorothee Regina Paul*, judgement of 14 October 2008, case no. C-353/06, ECLI:EU:C:2008:559.

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ments as well.[25] Although these judgements for the most part did not cover children's rights under EU law, some of them included very interesting considerations by the ECJ on the interaction between EU citizenship and other topical subjects or provisions of EU law, such as fundamental rights protection, the protection of minorities and, in particular, the delicate tension between respect for the Member States' national identities and the private interests of the EU citizens concerned. I regret to note that the Legal Service did not integrate these judgements as well in its analysis, as it would have resulted in a more precise picture of (the significance of) EU citizenship as a legal status and, more specifically, the tension between the various interests at stake (see *infra* III. 2.).

Moreover, even if there are reasons to limit the analysis to family members and children, would it not have been worthwhile for the Legal Service to widen its scope? For instance, why not also pay attention to the ECJ case-law on the legal position of young persons who are not direct descendants but so-called 'other family members' of mobile EU citizens, with respect to the application of other Member State private law provisions than those on names? This would have led to interesting insights on the way in which EU law may oblige Member States, through the recognition of citizenship rights and their interaction with migration law, to openness to foreign legal concepts.[26]

4. The Legal Service's Selective Case Analysis

A fourth and final criticism concerns the points of interest identified by the Legal Service in its analysis of particular case-law, as these sometimes imply a rather awkward, unconvincing selection of pertinent issues. Its all-too-selective case-law analysis does not always lead the Chapter's readers to grasp the full significance of these judgements for the interpretation and development of EU citizenship rights.[27]

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25 ECJ, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, judgement of 22 December 2010, case no. C-208/09, ECLI:EU:C:2010:806; ECJ, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, judgement of 12 May 2011, case no. C-391/09, ECLI:EU:C:2011:291; ECJ, *Nabiel Peter Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*, judgement of 2 June 2016, case no. C-438/14, ECLI:EU:C:2016:401; ECJ, *Proceedings brought by Mircea Florian Freitag*, judgement of 8 June 2017, case no. C-541/15, ECLI:EU:C:2017:432; ECJ, *Mirin*, judgement of 4 October 2024, case no. C-4/23, ECLI:EU:C:2024:845.

26 See in particular ECJ, *SM v. Entry Clearance Officer, UK Visa Section*, judgement of 26 March 2019, case no. C-129/18, ECLI:EU:C:2019:248.

27 Compare Jacob van de Beeten, 'Festschrift or Fiction? Omissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196, where he refers to the Legal Service's 'various gaps and omissions' on the ways in which EU law affects the lives of its citizens.

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Take for example the quite detailed analysis of the *Coman* case in the Chapter's part on family members.[28] According to the Legal Service, this case essentially raised the question whether the term 'spouse' in Directive 2004/38 must be understood as an autonomous, uniform concept under EU law.[29] Other aspects of the judgement are not or only superficially touched upon, although they would allow to understand why *Coman* indeed constitutes such an important judgement for EU citizenship law. The gender-neutral sense of the autonomous interpretation (which differs from earlier ECJ interpretations[30]) and its precise reach, the interpretation of Article 21(1) TFEU as including 'the right to lead a normal family life', the delimitation between the reach of EU law and the Member States' competences, the rejection of some Member States' reliance on national identity and public policy as public interest considerations justifying restrictions of the freedom of movement as well as the impact of fundamental rights protection. All these issues come to the fore in the ECJ's *Coman* judgement but remain largely unmentioned in the Legal Service's Chapter.[31] It cannot be doubted, however, that highlighting and examining the Court's considerations on these issues would have allowed the Chapter's readers to obtain greater insight in (the reach of) EU citizenship rights.

The same is true for the Legal Service's analysis of the judgements on the rights of EU citizen children. Its observation that the ECJ in the aforementioned *Garcia Avello* and *Grunkin and Paul* cases as well as in its more recent judgement in *V. M. A.*[32] underlined 'that national administrative rules must be able to take sufficient account of the situation of EU citizen children in free

28 ECJ, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, judgement of 5 June 2018, case no. C-673/16, ECLI:EU:C:2018:385.

29 Tomkin and Montaguti (n. 2), 101-103.

30 See in particular ECJ, *Lisa Jacqueline Grant v. South-West Trains Ltd*, judgement of 17 February 1998, case no. C-249/96, ECLI:EU:C:1998:63, paras 31-35 and ECJ, *D and Kingdom of Sweden v. Council of the European Union*, judgement of 31 May 2001, joined cases C-122/99 P and C-125/99 P, ECLI:EU:C:2001:304, para 34.

31 For more thorough discussions of *Coman*, see *inter alia*, with further references: Jean-Yves Carlier, 'Vers un ordre public européen des droits fondamentaux. L'exemple de la reconnaissance des mariages de personnes de même sexe dans l'arrêt *Coman*', RTDH 30 (2019), 203-227; Jacquelyn MacLennan and Angela Ward, 'The Constitutional Dimension of Case C-673/16 *Coman* on the Prohibition of Discrimination on the Basis of Sexual Orientation: The Role of Fundamental Rights in Interpreting EU Citizenship', Columbia Journal of European Law 26 (2020), 36-61; Jorrit J. Rijpma, 'You Gotta Let Love Move', Eu Const. L. Rev.15 (2019), 324-339; Jan Lukas Werner, 'Das Coman-Urteil des EuGH – Art. 21 Abs. 1 AEUV als Grundlage eines ordre public européen', ZEuP 27 (2019), 802-821.

32 ECJ, *V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'*, judgement of 14 December 2021, case no. C-490/20, ECLI:EU:C:2021:1008.

 DOI 10.17104/0044-2348-2026-1-261

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movement'[33] is a correct, but only very limited assessment of these judgements' importance. The Legal Service does not develop their significance for, *inter alia*, the great weight of party autonomy and mutual trust, the reach of Member State substantive family and civil status law versus that of free movement rights under EU law, fundamental rights protection and the room given to national identity and public policy as justification grounds for obstructions to the exercise of EU citizens' freedom of movement.[34] And while the Legal Service emphasises the importance of the ECJ's autonomous interpretation in *Coman*, it leaves unmentioned the autonomous interpretation which the ECJ adopted in *V. M. A.* as well as what its significance might be.[35]

5. An Inevitable Disappointment: The Legal Service's Narrow Approach Results in an Equally Narrow Conclusion

A common aspect of these four points of criticisms is that the Legal Service's Chapter on EU citizenship adopts in several regards an excessively narrow approach to its subject. Quite logically therefore, its conclusion is rather disappointing as well for those seeking a more complete insight into the significance and importance of EU citizenship and the Commission's contribution to it.

Nic Shuibhne recently described EU citizenship as 'an extraordinary, and ongoing, legal experiment […] a vector of European integration, collective personhood, and multi-layered identities that reflects the paradoxically inclusive and exclusive qualities of citizenship more generally'.[36] There is not much in the Chapter that would justify an equally enthusiastic assessment of the contribution of EU citizenship to 70 Years of EU Law. Rather, the Legal Service keeps away from drawing a similarly broad picture and consequently sticks to the specific perspective of (some aspects of) the right of free move-

33 Tomkin and Montaguti (n. 2), 106.

34 For more details, as well as further references, see *inter alia*: Johan Meeusen, 'Cross-Border Mobility of European Union Citizens and Continuity of Civil Status. Balancing National and Individual Identities in an Open European Society', Yearbook of Private International Law 22 (2020-2021), 1-33 (14-31); Silvia Pfeiff, *La portabilité du statut personnel dans l'espace européen* (Bruylant 2017) as well as the multiple contributions on 'Family Status, Identities and Private international Law' in Yearbook of Private International Law 25 (2023-2024), 105-274.

35 See for more details my comment on this judgement: <https://gedip-egpil.eu/fr/2022/functional-recognition-of-same-sex-parenthood-for-the-benefit-of-mobile-union-citizens-brief-comments-on-the-cjeus-pancharevo-judgment/>, last access 3 March 2026.

36 Nic Shuibhne, *EU Citizenship Law* (n. 15), 1.

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ment as interpreted by the ECJ. By way of conclusion, it points to the coherence of the Court's case law, which has enlarged the scope and expanded the autonomy of the free movement rights of third-country family members and also strengthened the autonomous free movement rights of EU citizen children.

The Legal Service's narrow approach thus results in an equally narrow conclusion. This will disappoint those who would have hoped for the Legal Service to place its findings against the horizon of a broader reflection on the position which EU citizenship occupies, or should occupy, in the Union's legal order. Isn't there more to say about EU citizenship?

III. There's More to EU Citizenship … Three Insights for an Alternative Assessment

In reaction to the disappointingly narrow approach by the Legal Service, I will propose, in the following pages, three insights which might be gained from an alternative look at some major recent developments regarding EU citizenship and which might complement or at least add some nuance to the Legal Service's view on this status. These three insights concern different aspects of the Legal Service's analysis. But they share the underlying idea that reducing EU citizenship to a catalogue of (free movement) rights which individuals can invoke against the Member States and which would therefore concern their private interests only, would underestimate this status' significance for the Union's legal order. In other words, there is more to EU citizenship than what the Legal Service exposes.

1. EU Citizenship Is More Than a Status Developed Through Preliminary References

The Legal Service's chapter on EU citizens almost entirely relies on the presentation of only a handful of preliminary rulings by the ECJ. Certainly, all cases presented are pertinent and serve as major stepping stones for the development of the Court's case law on this subject. As is observed in this special issue also with respect to other domains,[37] the Legal Service's empha-

37 See the criticism in this special issue by Christian Thönnes, 'Invisible Infringements: On the AFSJ's Under-Constitutionalisation', HJIL 86 (2026), 299-330 on the 'shortcomings' of the preliminary reference procedure in the area of freedom, security and justice.

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sis on the preliminary reference procedure does not necessarily capture all issues raised by EU citizenship.

It is true that the Court, mainly through preliminary rulings, has managed to gradually transform an initially rather vague notion into a concrete and very important legal concept.[38] Still, a complete picture of the status of EU citizenship in the 70 year development of EU law, specifically where the role of the Commission and its Legal Service is concerned, would require that attention be given to other cases, actions, and initiatives as well.

However, the Legal Service is remarkably reticent on the Commission's own contribution to the development of EU citizenship. Describing itself as 'a consistent and longstanding partner in the ongoing judicial dialogue on EU citizenship',[39] it appears to consider its own interventions in the preliminary reference procedure as the Commission's major contribution to that domain. But the role which the Commission has actually played in this field is far more varied and impactful.

Apart from its interventions in cases brought before the ECJ, in which it typically expresses a pro-integration interpretation of the citizenship rights involved, the Commission can also itself initiate judicial proceedings before the ECJ. The Legal Service's book rightly refers to the infringement action which the Commission can initiate on the basis of Article 258 TFEU as 'a key driver of the development of European Union law'.[40] Although this procedure has also been important for the actual enforcement of EU citizenship law and thus has contributed to its interpretation and development, this remains completely unnoticed in the Chapter. I regret this as, due to the discretion which it enjoys in this respect, the Commission's decision to initiate an Article 258 procedure provides an excellent indication of what aspects of EU citizenship it considers itself most important.

A look at recent examples of Commission action under this provision shows that, different from the specific freedom of movement angle from which the Legal Service examines EU citizenship, the Commission clearly holds the view that there is more to this status than (only) free movement

38 Koen Lenaerts, 'Union Citizenship and the Principle of Non-Discrimination on Grounds of Nationality' in: Nils Fenger, Karsten Hagel-Sørensen and Bo Vesterdorf (eds), Festskrift til Claus Gulmann (Thomson 2006), 289-309 (290).

39 Tomkin and Montaguti (n. 2), 96.

40 Karen Banks and Gregor von Rintelen, 'The Infringement Procedure: A Key Driver of the Development of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens*, (2nd edn, Publications Office of the European Union 2023), 296-310.

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and residence rights.[41] In *Commission v. Malta*, for instance, the Commission started infringement proceedings against Malta for reason of this Member State's 'transactional' nationality legislation which it considered to breach Articles 20 TFEU and 4(3) TEU.[42] In two other recent cases, *Commission v. Czech Republic* and *Commission v. Poland*, the Commission relied on Article 22 TFEU to challenge these Member States' restrictions on certain political rights of foreign EU citizens.[43]

Even apart from their precise subject-matter, the infringement actions by the Commission demonstrate that, contrary to what the Legal Service suggests, the development of EU citizenship is not only the result of action undertaken by EU citizens and their lawyers, but follows as well from institutional action against Member States which are unwilling to abide by the pertinent requirements of EU law. It is beyond doubt, therefore, that citizenship status under EU law does not only concern the private interests of the Member State nationals concerned, but inevitably also affects the interaction between the specific interests and concerns of Member States and the general interest of the Union which the European Commission must promote according to Article 17(1) TEU.

Furthermore, the Commission is also a political actor, which has contributed to the development of EU citizenship through various legislative and policy initiatives.

Of particular importance has been its initiative to propose a single legislative act 'with a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right',[44] which eventually led to the adoption by the European Parliament and the Council, of Directive 2004/38.[45] In its Chapter, the Legal Service refers to the ECJ's interpretation of the Directive, though without putting any spotlight on the latter specifically. Yet, more than twenty years on, this Directive has developed into a major piece of EU law which lays out

41 In the cases mentioned in footnotes 42 and 43, the ECJ rendered its judgement after the publication of the Legal Service's book but the Commission initiated the respective proceedings before that publication.

42 ECJ, *Commission v. Malta* (n. 16).

43 ECJ, *European Commission v. Czech Republic*, judgement of 19 November 2024, case no. C-808/21, ECLI:EU:C:2024:962, and ECJ, *European Commission v. Republic of Poland*, judgement of 19 November 2024, case no. C-814/21, ECLI:EU:C:2024:963.

44 Recital 4 of Directive 2004/38/EC.

45 See Nic Shuibhne, *EU Citizenship Law* (n. 15), 67-68, who observes with respect to the Commission's proposal for Directive 2004/38 that the Commission and the European Parliament specifically aimed at promoting the right to move and reside through the prism of EU citizenship.

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the essentials of cross-border, intra-Union freedom of movement for EU citizens, including the multiple derived rights flowing from it.

On a very different note, and although its scope is not limited to EU citizenship and it does not rest on a related legal basis either, the Commission's recent legislative initiative on parenthood can be mentioned here as well. With its proposal, the Commission attempts to translate the steadily growing series of judgements on cross-border status recognition for EU citizens into a regulation to be adopted by the Council on basis of Article 81 (3) TFEU.[46] Certainly, the Commission's 'Parenthood Proposal' is quite controversial and success is far from certain.[47] Yet, the initiative testifies to the role which the Commission can play to enhance legal certainty for mobile EU citizens, who wish to benefit in all respects from their free movement rights. Further, it is important to note that the Commission thus attempts to develop the so-called 'area of freedom, security and justice' – the field which grants the legal basis to its 'Parenthood Proposal' and which does not limit its scope to EU citizens – on the basis of the 'acquis' of the ECJ's judgements on status recognition for EU citizens. In other words, the (possible) adoption of the 'Parenthood Proposal' would to a large degree extend the rights which EU citizens currently enjoy on basis of Article 21 TFEU (intra-Union freedom of movement) to all those who, irrespective of their nationality, wish to maintain and ensure their parenthood status in a cross-border situation. Hence, the Commission strives at extending the ECJ's case-law on citizenship, at least in the sphere of cross-border parenthood,[48] into a more general recognition of free movement rights and status continuity as an important component of the Union's area of freedom, security and justice (see Article 3 (2) TEU).

46 Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM(2022) 695 final; the 'Parenthood Proposal').

47 See *inter alia* the critical reception of the 'Parenthood Proposal' by GEDIP ('Observations on the Proposal for a Council Regulation in matters of Parenthood', Milan meeting, 2023; <https://gedip-egpil.eu>, last acces 3 March 2026 and the Marburg Group, <https://www.marburg-group.de>, last access 3 March 2026.

48 With respect to the pros and cons of a further extension of this approach to other fields, see Johan Meeusen, 'Lessons Drawn from the Commission's Parenthood Proposal for Further EU Initiatives on Personal Identity and Status Continuity', Yearbook of Private International Law 25 (2023-2024), 169-215.

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2. EU Citizenship Is More Than a Rights Catalogue Accommodating Private Interests

The Legal Service's (implicit) characterisation of EU citizenship as a rights catalogue, with free movement rights as its core, corresponds to a familiar perspective in legal scholarship which interprets the evolution of EU citizenship as entailing, first and foremost, a rights-based approach.[49] The pertinent Treaty provisions, and in particular Articles 20-24 TFEU which list in a non-exhaustive way the rights which this Treaty grants to EU citizens, indeed point in such a direction. Yet, this is only part of the story. In that respect, I do not so much refer to possible duties imposed on EU citizens, which the TFEU does not concretise. Nevertheless, it is important to clarify that EU citizenship status cannot be reduced to a one-sided rights catalogue from which the nationals of the Member States can pick and choose the rights which they wish to enforce against the Member States without other interests being at stake. While EU citizenship obviously incorporates the private interests of the individuals concerned, this status also affects pertinent public interests.

The ECJ's many preliminary rulings in this domain, rendered after references by national courts which must decide on lawsuits filed by individuals who wish to enforce their rights under EU law, inevitably put the spotlight on EU citizenship as a source of rights under EU law for the nationals of the Member States. These rights, as conferred to the EU citizens by Articles 20-24 TFEU, today constitute a major component of the Union's legal order.

Initially, European integration mainly benefited those who were economically active within the common or internal market, as primary free movement rights were granted exclusively to these market actors. Through its introduction of the status of EU citizenship, which entailed free movement rights as well, the Maastricht Treaty extended the right to intra-EU mobility to all nationals of the Member States who were defined as EU citizens, irrespective of their economic activities.[50] Today, the free movement of persons not only constitutes a core ingredient of the internal market (Article 3(3) TEU), but also of the area of freedom, security and justice (Article 3(2) TEU). According to Article 20(2)(a) TFEU, EU citizens have the right to move and reside freely within the territory of the Member States, which is further detailed in Article 21 TFEU. This right is confirmed in identical terms, and even raised to the status of a fundamental right, in Article 45(1)

49 See e. g. Annette Schrauwen, 'Citizenship of the Union' in: Pieter Jan Kuijper et al. (eds.), The Law of the European Union (5th edn, Kluwer Law International 2018), 611-638 (617).

50 See (then) Articles 8 and 8 a of the Treaty establishing the European Community (1992).

 DOI 10.17104/0044-2348-2026-1-261

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Charter. Moreover, and systematically from the early *Martinez Sala* case onwards,[51] the ECJ has given true substance to EU citizenship through its large interpretation of the pertinent Treaty provisions – in particular Articles 18, 20 and 21 TFEU.[52]

It is with reason, therefore, that the subtitle of the Legal Service's book aptly refers to the EU as 'a Union for its citizens' and one can easily understand the book's focus on the citizens' rights, and the right of free movement specifically. In De Witte's colourful language, the free movement provisions operate as a type of trampoline which allows the EU citizens to escape limitations imposed by their Member States' laws in order to pursue their individual, cross-border aspirations.[53]

Yet, contrary to what the Chapter suggests, this is not all what there is to say on this status. It would be wrong indeed to ignore that EU citizenship has fundamentally transformed the nature and the impact of the Union's integration process as well and hence affects both private and public (Member State and EU) interests. The generalisation of free movement rights, to the benefit of the Member States' nationals, is very important and a gamechanger in itself. Further, and much more than is the case for the typical internal market cases, the reliance by the EU citizens on their non-discrimination and freedom of movement rights often concerns politically sensitive areas for which the Member States have typically maintained exclusive legislative competence. When EU citizens are successful in enforcing their rights on these domains, the impact of EU law increases significantly in the absence of any transfer of Member States' powers. In the Chapter, this important evolution comes to the fore only indirectly, through the Legal Service's presentation of the cases on issues of immigration policy and status and family law which the Legal Service highlights from the perspective of the rights of family members and children. It is only in the Chapter's brief final paragraph that the Legal Service, actually without really developing this, refers to the tension that characterises many of the cases brought before the ECJ and which therefore marks the underlying debate. The promotion of a citizen-friendly, pro-integration interpretation of the citizens' rights indeed is easily perceived by

51 ECJ, *Martínez Sala* (n. 6).

52 See however also van de Beeten's critical remarks (with further references), 'questioning the centrality of EU citizens within EU law' (n. 27).

53 Floris de Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law', CML Rev. 50 (2013), 1545-1578 (1554-1555). On basis of her analysis of the ECJ's internal market and EU citizenship case-law, Spaventa developed an even broader interpretation of the ECJ's role as a guarantor of individual rights, 'protecting the citizen *qua citizen*, rather than simply *qua mover*' against national regulations (Eleanor Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non-)Economic European Constitution', CML Rev. 41 (2004), 743-773 (774 and 772-773)).

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the Member States as an attempt to maximise, if not overstretch, the Union's powers. According to the Legal Service however, it is apparent from the cases examined in its Chapter that the ECJ has striven to ensure that national competences are limited only to the extent necessary to safeguard the effectiveness of the rights conferred directly on EU citizens by the Treaties.[54]

This last sentence essentially rephrases the classic consideration, as affirmed by the ECJ in many judgements, that its interpretation of EU law, *in casu* the Treaty provisions with respect to citizenship rights, does not encroach upon the Member States' remaining competences, but only affects the way this competence is exercised in order to avoid a violation of EU law.[55] Yet, such considerations often beg the question, to say the least. The extent of the effects attributed to EU citizenship rights, and their impact on the Member States' remaining competences, is a major issue which goes to the core of the debate on (the limits of) European integration. Insofar as EU citizenship is concerned, this debate is often extremely sensitive because of the nature of the Member States' competences (possibly) affected. This obviously is the case for migration and integration, which is a hot topic in today's political debate that also concerns the free movement rights in the Union and its Member States. But this is true as well for other issues. Where the ECJ's recent, much discussed case-law on the interaction between EU citizenship and the Member States' legislation on nationality or on personal and family status is concerned, a vital concern is where to draw the line between the policy margin left to the Member States and the uniformising impact of EU law. While this tension runs as a familiar red thread through 70 Years of EU Law, this debate has been particularly sharp with respect to fields as nationality and family law which together with tax and social security law are among those which affect most the core of remaining Member State sovereignty and which are more and more affected by the ECJ's case-law on citizenship rights. Although the Legal Service discusses pertinent ECJ judgements, such as *Coman* and *V. M. A.* which provoke much debated questions on (the compulsory recognition of) same-sex marriage and same-sex parenthood,[56] it is particularly disappointing that it confines itself to a mere confirmation of the Court's classic consideration, without further substantiation nor references to the ongoing (academic and political) discussions on these issues.

The crucial question is where the ECJ finds the balance between the exercise of mobile EU citizens' rights and the protection of Member State interests. Certainly, an approach such as that of the Legal Service which

54 Tomkin and Montaguti (n. 2), 114.
55 See e. g. ECJ, *Coman* (n. 28), paras 37-38; ECJ, *V. M. A.* (n. 32), para. 52.
56 See *infra* for more details on these cases.

 DOI 10.17104/0044-2348-2026-1-261

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mainly understands EU citizenship as a one-sided rights catalogue which implements the citizens' private interests and mostly ignores the possible impact of countervailing public interests, cannot convince.

Already many years ago, AG Szpunar characterised EU citizenship, and in particular the freedom of movement which it implies, as an essential part of a European identity.[57] Article 45 Charter has even 'upgraded' the EU citizens' free movement right to the status of a fundamental right, and has meanwhile been prominently relied upon by the ECJ in a case on an EU citizen's status recognition.[58] Hence, EU free movement law grants particular weight to the private interests involved, although they are not without either counterbalance or limitation. This is not only the case for the rights of market actors, who are encouraged to profit from the Union's economic integration process, but applies more generally to all mobile EU citizens, and all the more so where these citizens' fundamental rights, such as those laid down in Articles 7 or 24 Charter for instance, are involved as well.[59]

Let us take another look, against that background, to some of the cases examined by the Legal Service.

Referring specifically to the Court's autonomous interpretation of the concept of 'spouse', the Legal Service gives ample attention to the famous *Coman* case, on the recognition in Romania of a Romanian-American same-sex marriage concluded in Belgium, which it calls a milestone in the Court's case law regarding family members.[60] In its chapter on EU citizen children, the Legal Service gives specific attention as well to *Garcia Avello*, *Grunkin and Paul* and *V. M.A*. In all those cases, the ECJ sided with the EU citizens involved, who relied on their free movement or non-discrimination rights under EU law against reticent Member States which initially refused to disapply their national legislation. More recently, after the publication of the Commission's book, the ECJ confirmed and even strengthened its interpretation of the mobile EU citizens' rights in the *Mirin* and *Wojewoda Mazowiecki* cases on the recognition of a change of first name and gender identity and of a same-sex marriage respectively.[61] Although the Legal Service does

57 Opinions of AG Szpunar in *Sean Ambrose McCarthy and Others v. Secretary of State for the Home Department*, C-202/13; ECLI:EU:C:2014:345, para. 40 and in *Alfredo Rendón Marín v. Administración del Estado and Secretary of State for the Home Department v. CS*, C-165/14 and C-304/14; ECLI:EU:C:2016:75, para. 108.

58 ECJ, *Mirin* (n. 25), paras 58, 68 and 71.

59 See, specifically with regard to the EU citizens' freedom of movement as opposed to the protection of the Member States' national identities: Meeusen, 'Cross-Border Mobility' (n. 34), 20-23.

60 Tomkin and Montaguti (n. 2), 101.

61 ECJ, *Mirin* (n. 25), para. 71; ECJ, *Jakub Cupriak-Trojan and Mateusz Trojan v. Wojewoda Mazowiecki*, judgement of 25 November 2025, case no. C-713/23, ECLI:EU:C:2025:917.

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not emphasise this in so many words, these judgements characterise status continuity in cross-border cases as an important component of effective EU citizenship. In its recent judgement in *Wojewoda Mazowiecki*, the ECJ explicitly considered in that sense that the effectiveness [*effet utile*] of the rights which EU citizens derive from Article 21(1) TFEU requires them to have the certainty of status recognition (*in casu*, to be able to pursue in their Member State of origin the family life that they have created or strengthened in the host Member State, in particular by virtue of their marriage).[62]

At the same time, these cases also confirm that the free movement rights of EU citizens are not necessarily limitless, or at least must not be taken for granted. In *Coman* and *V. M. A.*, for example, as well as recently in *Wojewoda Mazowiecki*, the ECJ respectively rejected the reliance by Romania, Bulgaria, and Poland on Article 4(2) TEU (respect for national identity) and public policy as justification grounds for the refusal of the recognition of a status unknown in their respective legal system. The ECJ minimised the impact of such recognition on the respective host States, particularly because it did not require them to provide in their national law for same-sex marriage or parenthood and was confined to the obligation to guarantee such recognition for the purpose of enabling the EU citizens concerned to exercise the rights they enjoy under EU law.[63] But while the Legal Service heavily relies on *Coman* and *V. M. A.* to make its point on the Court's interpretation of the free movement rights of EU citizens, it does not in any way refer to these national identity concerns or the Court's precise response in both judgements to the Member States' explicit reliance on Article 4(2) TEU. And while it does mention the unsuccessful reliance by Bulgaria on public policy as a justification ground in *V. M. A.*, it does so only very swiftly and without any further elaboration of this argument.[64]

Freedom of movement obviously concerns in the first place the private interests of the EU citizens involved. Yet, the Treaties explicitly recognise the pertinent Member States' interests as well, e. g. in the provisions on duly respecting and valuing diversity. Article 3(3) TEU obliges the Union to respect 'its rich cultural and linguistic diversity' which is echoed with respect to cultural diversity in Article 167(4) TFEU. Article 4(2) TEU obliges the Union to respect the Member States' 'national identities, inherent in their fundamental structures, political and constitutional […]'. According to Article 22 Charter, the EU 'shall respect cultural, religious and linguistic diver-

62 ECJ, *Wojewoda Mazowiecki* (n. 61), para 46.

63 ECJ, *Coman* (n. 28), paras 43-46; ECJ, *V. M. A.* (n. 32), paras 54-57; *Wojewoda Mazowiecki* (n. 61), paras 58-62.

64 Tomkin and Montaguti (n. 2), 107.

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sity'. The Charter's preamble refers to the Union's respect for the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.

The questions raised in that respect do not merely involve the rather classic juxtaposition, well-known from the EU's internal market law, of free movement rights and legitimate Member State interests but essentially concern a much more fundamental issue: How much room does EU law leave to the Member States to fully model their societies according to their political and societal choices in a delicate field such as status and family law?[65] The cases on status recognition thus testify of the potentially far-reaching effects of EU citizenship, and the free movement rights specifically, but also of the balance, if any, which is struck in that respect by the ECJ.

The Union's obligation to respect the national identity of the Member States has steadily gained more attention since the introduction of Article 4 (2) by the Treaty of Lisbon. The precise significance and reach of this obligation has not only been the subject of much doctrinal debate,[66] but has also been explicitly discussed before the ECJ. And whereas national identity concerns were relied upon unsuccessfully in *Coman*, *V. M. A.* and *Wojewoda Mazowiecki* (*supra*), the ECJ has been more receptive to it in other cases. One cannot but regret that the Legal Service does not refer to these other cases, in spite of their great pertinence for the understanding of EU citizenship rights.

In *Sayn-Wittgenstein*, the ECJ held that Article 21 TFEU does not preclude the authorities of a Member State from refusing to recognise all the elements of the surname of a national of that State, as determined in another Member State – in which that national resides – at the time of her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility not permitted under the first Member State's constitutional law, provided that those authorities' measures are justified on public policy grounds. With respect to that justification, the ECJ referred to Article 20 Charter (principle of equal treatment)[67] and Article 4(2) TEU (respect for the national identities of the Member States, which according to the ECJ includes the status of the State as a Republic).[68] In *Runevič-Vardyn*,

65 A similar debate concerns the interaction between EU law and the Member States' immigration law and policies. Due to space restrictions, however, my analysis is limited to status and family law.

66 See e. g., with further references, the many contributions in the special issue of European Public Law 27 (2021), no. 3, 411-628, edited by Diane Fromage and Bruno de Witte, on national constitutional identity.

67 Charter of Fundamental Rights of the European Union.

68 ECJ, *Sayn-Wittgenstein* (n. 25), paras 81-95.

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the ECJ held that Article 21 TFEU did not preclude the refusal by the Lithuanian authorities of the amendment according to the Polish spelling rules of a Lithuanian woman's names on the birth and marriage certificates and of the diacritical marks of her Polish husband's forenames on the marriage certificate. As regards the refusal to amend the marriage certificate in order that the joint surname of husband and wife be entered uniformly and in accordance with the Polish spelling rules, the ECJ left it to the national court to decide whether this was liable to cause serious inconvenience, in which case it would be a restriction on the freedoms conferred by Article 21 TFEU. Referring to Articles 3(3) and 4(2) TEU and Articles 7 and 22 Charter, the ECJ held that Lithuania's concern for the protection of its official national language constitutes a legitimate objective capable of justifying free movement restrictions, subject however to the requirement of proportionality.[69] The ECJ left it to the national court to decide whether the refusal to amend the civil status certificates reflected a fair balance between the spouses' right to respect for their private and family life and the legitimate protection by Lithuania of its official national language and its traditions.[70]

In *Bogendorff von Wolffersdorff*, the ECJ held that Article 21 TFEU does not oblige a Member State to recognise the name of one of its citizens who also holds the nationality of another Member State in which he has acquired that name which he has chosen freely and which contains a number of tokens of nobility, which are not accepted by the law of the first Member State, provided that it is established that the refusal of recognition is justified on public policy grounds, i. e., it is appropriate and necessary to ensure compliance with the principle that all citizens of that Member State are equal before the law. With respect to this justification ground, the ECJ explicitly characterised Germany's constitutional choice to abolish privileges and inequalities and to prohibit the bearing of titles of nobility as an element of its national identity in the sense of Article 4(2) TEU.[71]

As these last cases make clear, the reliance on EU citizenship rights to ensure cross-border status recognition typically affects those domains for which the Member States have not only retained competence – personal status and family law – but typically also adopt legislation which has a public order or even constitutional character and is considered to express important societal values. Such cases therefore concern very sensitive conflicts between the private interests of mobile EU citizens, inspired by deeply held aspira-

69 This judgement of the ECJ's Second Chamber has been confirmed on this point more recently by the ECJ's Grand Chamber in *Boriss Cilevičs and Others*, judgement of 7 September 2022, case no. C-391/20, ECLI:EU:C:2022:638, paras 65-87.

70 ECJ, *Runevič-Vardyn* (n. 25), paras 66-94.

71 ECJ, *Bogendorff von Wolffersdorff* (n. 25), paras 61-84.

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tions relating to their personal or family status, and the public interests of Member States, which these typically consider particularly affected when their own nationals (and people closely connected with them) are involved. Member States have therefore often tried to characterise their justifications of restricting free movement as considerations of a public policy character, which have also been linked to the need to protect their national or constitutional identity or fundamental, constitutional values or principles.[72]

The ECJ has in that context specifically referred to Article 4(2) TEU, though not very consistently. Most often, this provision has been mentioned as an additional, though not strictly necessary argument which lends additional strength to the justification relied upon, mostly public policy.[73] When the proportionality of a restrictive Member State measure is examined, such reference can help to tip the balance in favour of that Member State's interest.[74] Public policy constitutes in its own right a justification ground which allows Member States to protect their public interests or (constitutional) values. The ECJ accepts in that regard, though subject to the proportionality principle,[75] a certain degree of Member State diversity, also on basis of their moral or cultural views.[76] It has repeatedly considered that the

72 See e. g. the justification arguments mentioned in ECJ, *Sayn-Wittgenstein* (n. 25), paras 73-79; ECJ, *Runevič-Vardyn* (n. 25), para. 84; ECJ, *Bogendorff von Wolffersdorff* (n. 25), paras 61-63; ECJ, *Coman* (n. 28), para. 42; ECJ, *V. M. A.* (n. 32), para. 53; *Wojewoda Mazowiecki* (n. 61), para. 57.

73 ECJ, *Sayn-Wittgenstein* (n. 25), paras 89-94; ECJ, *Runevič-Vardyn* (n. 25), paras 85-87; ECJ, *Bogendorff von Wolffersdorff* (n. 25), paras 64-66. See in this respect also Matteo Bonelli, 'National Identity and European Integration Beyond "Limited Fields"', European Public Law 27 (2021), 537-558 (556) ('national identity could serve to broaden the scope of existing derogations and other means to protect diversity, expanding it to areas that might not be otherwise covered by other standard derogations') and François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way', European Public Law 27 (2021), 571-596 (582-583). In *Coman* ((n. 28), paras 43-46), *V. M. A.* ((n. 32), paras 54-57) and *Wojewoda Mazowiecki* ((n. 61), paras 58-62), the ECJ appeared somewhat more willing to consider respect for a Member State's national identity a separate justification ground at the same level as public policy, though without really further developing this nor eventually accepting such claim.

74 See Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty', CML Rev. 48 (2011), 1417-1454 (1441-1443) and Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy', Fordham Int'l L. J., 36 (2013), 1302-1371 (1330-1331). See in particular ECJ, *Sayn-Wittgenstein* (n. 25), paras 92-94.

75 See on the substantive and, specifically, procedural tests of proportionality for the interaction between EU law and Member State law which expresses particular moral, ethical of cultural values: de Witte (n. 53), 1565-1577.

76 See e. g. ECJ, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, judgement of 14 October 2004, case no. C-36/02, ECLI:EU:C:2004:614, para. 37; ECJ, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, judgement of 14 February 2008, case no. C-244/06, ECLI:EU:C:2008:85, para. 44.

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specific circumstances which justify recourse to public policy may vary from one Member State to another and from one era to another and that the national authorities must be allowed a margin of discretion within the limits imposed by the Treaty.[77]

Overviewing the totality of the ECJ's case law in this domain, and taking into account the variety of interests and concerns which are at play, it appears that especially in those areas for which the Member States have retained the legislative competence, such as family and status law, the ECJ is more open to the Member States' reliance on countervailing public interests. This is especially the case for the respect due to their national identity, and the diversity which this entails.[78] This is no general rule, however. It appears to be the case particularly, in line with the dynamic character of the national identity,[79] where the situation is, to a certain extent, reversed, meaning that the Member State's objectives are considered not only compatible with EU law, but even to be aimed at the observance of a general principle of EU law or a fundamental right.[80]

The ECJ's judgement in *Sayn-Wittgenstein* is very explicit about this. There, the ECJ, when examining the public policy justification invoked by Austria to justify its constitutional choice to abolish titles of nobility, refers to equal treatment as a general principle of EU law which is also enshrined in Article 20 Charter and adds that, in accordance with Article 4(2) TEU, the EU is to respect the national identities of its Member States, which include the status of the State as a Republic.[81] As a next step, the ECJ itself then decided that Austria thus acted in accordance with the principle of proportionality.[82]

The ECJ's reasoning in *Bogendorff von Wolffersdorff* goes in the same sense. Although the ECJ leaves it for the referring court to make a concrete proportionality analysis, it insists that the principle of equal treatment is compatible with EU law, in which respect it again refers to Article 20 Charter, and connects Germany's concern for the principle of equality before the law of all German citizens and its constitutional choice to abolish privi-

77 See e. g. ECJ, *Omega* (n. 76), para. 31 and ECJ, *Dynamic Medien* (n. 76), para. 44, as well as, with respect to the cases examined, ECJ, *Sayn-Wittgenstein* (n. 25), para. 87 and ECJ, *Bogendorff von Wolffersdorff* (n. 25), para. 68.

78 Bonelli (n. 73), 556.

79 Christian Walter and Markus Vordermayer, 'Verfassungsidentität als Instrument richterlicher Selbstbeschränkung in transnationalen Integrationsprozessen', Jahrbuch des öffentlichen Rechts der Gegenwart 63 (2015), 129-166 (164-165).

80 See Nic Shuibhne, *EU Citizenship Law* (n. 15), 513.

81 ECJ, *Sayn-Wittgenstein* (n. 25), paras 89-92.

82 ECJ, *Sayn-Wittgenstein* (n. 25), para. 93.

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leges and inequalities and to prohibit the bearing of titles of nobility to public policy and the application of Article 4(2) TEU.[83]

In *Runevič-Vardyn* the ECJ considers, before confirming that the requirement of Article 4(2) TEU includes the protection of a State's official national language, that according to the fourth subparagraph of Article 3(3) TEU and Article 22 Charter, the Union must respect its rich cultural and linguistic diversity.[84] In this case, the ECJ left it to the referring court to make a proportionality analysis, instructing it to examine the 'fair balance between the interests in issue, that is to say, on the one hand, the right of the applicants in the main proceedings to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official national language and its traditions'.[85]

But if all those concerns and interests are affected by EU citizens' free movement and non-discrimination rights, and come to the fore especially where their interaction with the Member States' status and family law is concerned, the question remains why the Legal Service in its Chapter almost completely ignores this debate, although it mentions and examines a series of pertinent ECJ judgements?

Legal scholarship has suggested that the EU institutions specifically push the development of free movement law (and so can be expected as well to emphasise it in public communication, such as the Legal Service's book) because freedom of movement is so symbolically significant for the idea of a unified Europe as it was conceived by the founders of European integration.[86] In other words, 70 Years of EU Law should, according to that view, logically focus on the abolition of restrictions, rather than on the remaining obstacles for free movement or the other concerns and interests which are at play. Nevertheless, the Legal Service's relative silence on this point, which almost resembles an attempt to sidestep the still ongoing debate on the possible limits to EU citizens' free movement rights, is bizarre. It inevitably results in a Chapter which only gives very partial insight in the concept of EU citizenship and what is at stake when the ECJ interprets the rights

83 ECJ, *Bogendorff von Wolffersdorff* (n. 25), paras 64-78.

84 ECJ, *Runevič-Vardyn* (n. 25), para. 86.

85 ECJ, *Runevič-Vardyn* (n. 25), para. 91. In a more recent case, the ECJ even considered that Member States 'enjoy broad discretion' to determine the measures it takes to achieve the objectives of their policy of protecting the official language 'since such a policy constitutes a manifestation of national identity for the purposes of Article 4(2) TEU', but gave quite detailed instructions to the referring court as to the proportionality requirement (ECJ, *Cilevičs* (n. 69), paras 83-87).

86 Ségolène Barbou des Places, 'Is Free Movement (Law) Fully Emancipated from Migration (Law)?' in: Niamh Nic Shuibhne (ed.), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (Oxford University Press 2023), 6-38 (34).

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involved. In particular, it sketches a quite one-sided picture of the entailing free movement rights.

To conclude, it must be admitted that, approached from the Legal Service's perspective, the Chapter's title adequately portrays EU citizenship as a status that in very practical terms comes 'to the service' of Member State nationals and their families when they pursue their claims before national courts.[87] However, there are more nuances and dimensions to the ECJ's case law in this domain, as the Court clearly does not consider the EU citizens' rights and the private interests involved limitless, as the Treaty provisions would not allow it to do anyway.

3. EU Citizenship Is More Than a Status Expressing the Bond of Nationality

A third lacuna in the Legal Service's approach to the development of EU citizenship is that, while it refers to the interaction between EU citizenship rights and the exercise of national competences and hence the relationship between these citizens and (their) Member States, it fails to examine the relationship between EU citizens and the EU itself. Admittedly, the latter has come to the fore more explicitly only in the ECJ's most recent case law, which grants more significance to EU citizenship than its reliance on, and expression of, a bond of nationality. As the Commission has been significantly involved in these cases, not only through its interventions before the Court but more importantly also through the introduction of infringement proceedings on basis of Article 258 TFEU well before the publication of its book on 70 Years of EU Law, the complete absence of this subject in the book is quite disappointing. Fundamental questions of a truly constitutional character, on the nature of the relationship between EU citizenship, which is acquired exclusively through the application of Member State nationality law, and the EU, to which EU citizenship hence appears at first sight to be only indirectly linked, remain missing. Further, one cannot but regret that the Legal Service, once more, fails to engage with legal scholarship in this respect.

As is well known, the EU Treaties define the nationality of a Member State as the sole access to the status of EU citizen. According to Articles 9 TEU and 20 TFEU, every national of a Member State shall be a citizen of the Union. As the Treaties have not granted any competence in the field of

87 Tomkin and Montaguti (n. 2), 96.

 DOI 10.17104/0044-2348-2026-1-261

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nationality to the EU, the Member States have retained exclusive competence on this subject. According to its very nature as an essential bond between a State and the members of its polity, nationality must even be considered to pertain to the core of remaining Member State sovereignty. As Declaration No. 2 on nationality of a Member State, annexed to the TEU, as well as the European Council's 'Edinburgh Decision'[88] confirm, the question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.

In line with this reference to the exclusive competence of the Member States, the Treaties do not hold any further provisions on the acquisition or loss of Member State nationality or EU citizenship. Still, it is well-established case law of the ECJ, in accordance with its approach in other domains as well, that Member States, when exercising their powers in the sphere of nationality, must have due regard to EU law.[89] This is the case where a loss of EU citizenship as a result of a loss of Member State nationality is concerned,[90] but also where the acquisition of EU citizenship, through the acquisition of a Member State's nationality, is concerned.

This last issue has recently been at the centre of the debate, due to the Commission's infringement action against the Republic of Malta in the famous 'golden passports' case. The Commission claimed that through its legislation which offers naturalisation in the absence of a genuine link of the applicants with the country in exchange for payments or investments, this Member State failed to fulfil its obligations under Articles 20 TFEU and 4(3) TEU. For our purposes, it is very interesting to juxtapose the Commission's plea in this case with the eventual judgement by the ECJ. While the ECJ indeed declared that Malta had failed to fulfil its obligations under the Treaty provisions invoked by the Commission, it based this on other arguments than invoked by the Commission.[91]

The Commission emphasised the shared concept of nationality of a Member State as 'the expression of a genuine link between a Member State and its nationals' and that 'the special relationship of solidarity and good faith between a Member State and its nationals and also the reciprocity of rights and duties form the bedrock of the bond of nationality'.[92] The absence of a 'genuine link' runs through the Commission's pleas as its essential reason for considering the Maltese nationality legislation in breach of Union law, *inter*

88 Denmark and the Treaty on European Union, OJ 1992 C 348/1.

89 See for example, with further references, ECJ, *Rottman* (n. 16), para. 45.

90 See the ECJ judgements in *Rottman* (n. 16), *Tjebbes* (n. 16), *Wiener Landesregierung* (n. 16), *X v Udlændinge- og Integrationsministeriet* (n. 16) and *Stadt Duisburg* (n. 16).

91 ECJ, *Commission v. Malta* (n. 16).

92 ECJ, *Commission v. Malta* (n. 16), para. 50.

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alia because it jeopardises the mutual trust that, according to the Commission, underpins EU citizenship.[93] Its emphasis on such 'genuine link' and its exchange of arguments with the Republic of Malta in this case put the accent on the relationship that must exist between a Member State and its nationals.[94] The Commission considers this requirement the premise for the mutual trust that must exist between the Member States, and which it links to the obligation of mutual recognition that according to the Commission can be deduced from the ECJ's judgement in *Micheletti*.[95]

In its judgement, however, the ECJ does not refer, at least not explicitly,[96] to such a 'genuine link'. Still, it does emphasise the ties that must exist between a Member State and its nationals, deducing from its settled case law that 'the bedrock of the bond of nationality of a Member State is formed by the special relationship of solidarity and good faith' between the Member State and its nationals.[97] It adds that in accordance with Article 20(1) TFEU, this special relationship forms the basis of the rights and obligations reserved to EU citizens by the Treaties,[98] and links this to the principle of mutual trust.[99]

A novel, and for our purposes very pertinent aspect of the *Commission v. Malta* judgement is that the ECJ goes further than the emphasis on the ties that must exist between a Member State and its nationals.[100] Of course, EU citizenship cannot be untied from the Member States' nationality laws. As the ECJ considered in *Préfet du Gers (I)*, the authors of the Treaties established through Articles 9 TEU and 20 TFEU 'an inseparable and exclusive link between possession of the nationality of a Member State and not only

93 See, apart from many other paragraphs referring to the requirement of a 'genuine link', ECJ, *Commission v. Malta* (n. 16), para. 53.

94 See however, for a more thorough understanding and contextualisation of the genuine link requirement, the study by Luke Dimitrios Spieker and Ferdinand Weber, 'Bonds Without Belonging? The Genuine Link in International, Union and Nationality Law', YBEL 43 (2024), 56-94.

95 ECJ, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, judgement of 7 July 1992, case no. C-369/90, ECLI:EU:C:1992:295.

96 See Peter Hilpold, 'Unionsbürgerschaft in der EU-Werteunion: Malta wird Staatsbürgerschaftshandel untersagt', EuZW 36 (2025), 757-762 (759-761); Stefan Kadelbach, 'Der Erzherzog wird geprüft – Anmerkung zum Urteil des EuGH v. 29.4.2025, Rs. C-181/23 – Kommission/Malta ("Goldene Pässe")', EuR 60 (2025), 533-549 (541-542); Luke Dimitrios Spieker and Ferdinand Weber, 'Commission v. Malta (C-181/23): a "Miracle" of Union Citizenship?', E. L. Rev. 50 (2025), 487-501 (490-491).

97 ECJ, *Commission v. Malta* (n. 16), para. 96.

98 ECJ, *Commission v. Malta* (n. 16), para. 97.

99 ECJ, *Commission v. Malta* (n. 16), para. 101.

100 See Anastasia Iliopoulou-Penot, 'La citoyenneté de l'Union "telle qu'elle découle des traités". Brèves réflexions sur l'arrêt Commission/Malte (citoyenneté par investissement)', Revue des Droits et Libertés Fondamentaux (2025) chron. 48.

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the acquisition, but also the retention, of the status of citizen of the Union'.[101] Still, the ECJ's considerations in *Commission v. Malta* appear to put the spotlight rather on the relationship between the citizens and the Union itself, partly following up on the Commission's arguments in this case.

According to the Commission, EU citizenship has 'a strong civic component'.[102] The Commission further referred to 'the centrality of Union citizens in what is not only an economic Union but also a political Union'.[103] This understanding of EU citizenship is elevated to a higher level by the ECJ itself, when it not only insists on the importance of EU citizenship, but also emphasises its direct and important link with the Union's integration process. According to the Court, the provisions on EU citizenship are among the fundamental provisions of the Treaties and contribute to the implementation of the process of integration that is, as confirmed earlier in its famous Opinion 2/13,[104] the *raison d'être* of the European Union itself and thus form an integral part of its constitutional framework.[105] The ECJ considers EU citizenship 'one of the principal concrete expressions of the solidarity which forms the very basis of the process of integration […] and which is an integral part of the identity of the European Union as a specific legal system, accepted by the Member States on a basis of reciprocity'.[106] According to the ECJ, 'Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States as regards the fact that none of them is to exercise that power in a way that is manifestly incompatible with the very nature of Union citizenship'.[107]

The ECJ's interpretation in *Commission v. Malta* has been translated in terms of the development of EU citizenship from a liberal to a Republican,[108] or from a 'thin' to a 'thicker' approach to citizenship, based on the understanding of status, rights, and identity as the three main elements associated with citizenship.[109] The ECJ radically reinforces the status of EU citizenship and grants it a particular, substantive content. While the Commission's in-

101 ECJ, *Préfet du Gers (I)* (n. 17), para. 48.

102 ECJ, *Commission v. Malta* (n. 16), para. 43.

103 ECJ, *Commission v. Malta* (n. 16), para. 48.

104 ECJ, Opinion 2/13 of 18 December 2014, *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, para. 172.

105 ECJ, *Commission v. Malta* (n. 16), para. 91.

106 ECJ, *Commission v. Malta* (n. 16), para. 93.

107 ECJ, *Commission v. Malta* (n. 16), para. 95.

108 Spieker and Weber (n. 96), 496.

109 Guillermo Arranz Sánchez, 'Is EU Citizenship for Sale – or for Keeps? A Critical Analysis of the CJEU's Golden Visa Ruling', <https://esthinktank.com/2025/07/02/is-eu-citizenship-for-sale-or-for-keeps-a-critical-analysis-of-the-cjeus-golden-visa-ruling/>, last access 3 March 2026.

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fringement action related to the commercialisation of the granting of the Maltese nationality, and hence the access to EU citizenship, the ECJ's judgement has a much wider resonance. EU citizenship is no longer a status which is only indirectly linked to the EU legal order through the nationality legislation of the Member States, but it is a concept that gives flesh to the principle of solidarity – a principle which actually has since long been associated with EU citizenship[110] – and is directly based on Article 2 TEU.[111] Hence, it must necessarily be considered an integral part of the very identity of the European Union as a common legal order.[112]

The significance of the *Commission v. Malta* judgement hence stretches much further than the Court's condemnation of the commodification of the granting of a Member State's nationality. The conditions for access to EU citizenship of course occupy a central position in the Court's judgement, but must be placed in the broader perspective of the relationship between the Member States and the EU. They contribute to the essence of European integration itself. It indeed appears that the ECJ's judgement in *Commission v. Malta* gives a strong impetus to the transformation from the EU into a true European polity, of which a truly European citizenship is a necessary component. As De Falco aptly summarised these different aspects of the ECJ's judgement in this case: it confirms that EU citizenship is more than a mere legal consequence of national citizenship, it is (also) a status that binds individuals to the Union polity and cannot be commodified.[113]

While legal scholarship still recently referred to a future evolution 'that eventually places the individual at the core of the Union as a genuine polity of its citizens',[114] *Commission v. Malta* may already be a watershed case in that respect. The ECJ essentially confirms that EU citizens are considered to form a European, value-based polity and it is in order to give substance to the latter that it considers EU law to impose particular requirements as to the

110 See Lenaerts, 'Union Citizenship' (n. 38), 290.

111 For the characterisation of, *inter alia*, the standard of solidarity as a legal principle, see Armin von Bogdandy, *The Emergence of European Society Through Public Law* (Oxford University Press 2024), 88-90.

112 See ECJ, *Hungary v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97, paras 127 and 232 and *Republic of Poland v. European Parliament and Council of the European Union*, judgement of 16 February 2022, case no. 157/21, paras 145 and 264. See for a further analysis of the 'identity' of the EU legal order, Maciej Krogel, 'Is It Enough to Say 'Common Values' When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order', HJIL 86 (2026), 225-244.

113 Emanuela De Falco, 'The End of Citizenship for Sale? A Legal Turning Point in Commission v. Malta (C-181/23)', <https://eulawlive.com/op-ed-the-end-of-citizenship-for-sale-a-legal-turning-point-in-commission-v-malta-c-181-23/>, last access 3 March 2026.

114 Wagner (n. 8), 314.

 DOI 10.17104/0044-2348-2026-1-261

https://doi.org/10.17104/0044-2348-2026-1-261 https://www.inlibra.com/de/agb - Open Access -

ties which justify access to the citizenship status.[115] Contrary to what has been asserted in academic doctrine, the ECJ's interpretation, although not uncontroversial, does not appear to imply any European 'power-grab' as regards such access.[116] Certainly, it has nothing to do with any step towards some 'United States of Europe'[117] or 'a European nation'.[118] Neither does it imply a loosening of the ties between the Member States and their nationals, who (also) remain members of their respective national civic polities. As Dani wrote earlier, the national political communities 'are joined together in a collective transnational political undertaking'[119] to which Article 2 grants a 'societal' character defined by a set of values.

In this special issue, von Bogdandy refers to this additional societal layer in terms of 'a social totality whose political institutions are those of the European Union and all Member States'.[120] Internally, i. e. for its citizens, the Union thus constitutes 'a new kind of polity', as Hoeksma writes, but looked at from an external perspective the EU obviously remains an international organisation as well.[121] In his Opinion in *Commission v. Malta*, AG Collins also confirmed that a 'single polity' results from the creation of EU citizenship, although he disconnected this from any obligations for the Member States regarding access to this status.[122]

It is true of course that, as a result of the ECJ's judgement in this case, the Member States' formerly exclusive determination of access to EU citizenship, through their nationality legislation, has been significantly nuanced. As the Court indicates, the exercise by the Member States of their power to lay down the conditions for granting their nationality has consequences for the functioning of the European Union as a common legal order.[123] Hence, the ECJ appears to be driven by the desired *outcome*: in order to substantiate the common legal order that the EU aspires to become, there must also be some common understanding of who its citizens are. Therefore, EU citizenship

115 Iliopoulou-Penot (n. 100).

116 See Dimitry Kochenov, 'Never Mind the Law, Again: Commission v. Malta (C-181/23)', <https://eulawlive.com/op-ed-never-mind-the-law-again-commission-v-malta-c-181-23/>, last access 3 March 2026

117 Jaap Hoeksma, 'Moral high Ground and legal Analysis: on Commission v. Malta (C-181/23)', <https://eulawlive.com/op-ed-moral-high-ground-and-legal-analysis-on-commission-v-malta-c-181-23/>, last access 3 March 2026

118 von Bogdandy, 'Republican Thrust' (n. 10).

119 See Marco Dani, 'The Subjectification of the Citizen in European Public Law' in: Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds.), *Constructing the Person in EU Law* (Hart Publishing 2016), 55-88 (71).

120 von Bogdandy, 'Republican Thrust' (n. 10).

121 Hoeksma (n. 117).

122 Opinion of AG Collins in *Commission v. Malta* (n. 16), para. 40.

123 ECJ, *Commission v. Malta* (n. 16), para. 89.

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must be considered a necessary component for defining a particular European polity or, in broader terms which are inspired by Article 2 TEU, the European society. This polity is not so much the consequence of the political rights which EU citizens enjoy on basis of Article 22 TFEU or the right to diplomatic or consular protection granted by Article 23 TFEU, let alone of their free movement rights. Rather, the reverse is true: they enjoy those various rights because they are EU citizens, and through them the EU of which they are considered citizens, constitutes a civic polity.[124]

This interpretation rests on a very different concept of citizenship than that, referred to by Van de Beeten in his contribution to this special issue, of a status which in practice would only benefit certain elitist groups and leave out the majority of Europeans.[125] Understanding EU citizenship as a status which necessarily implies civic participation in a European polity is a far stretch from its interpretation as a status which is focused on cross-border mobility within 27 Member States, as the Legal Service appears to do in its Chapter. Such interpretation (and development) of EU citizenship may not only be incorrect and incomplete, but even endangering social cohesion.[126] As von Bogdandy affirms in his contribution to this special issue, the European polity (which he calls 'a republican Europe') 'is not just for people who take planes'.[127]

This citizenship concept has already been developed, or at least referred to, in earlier cases, to which the Commission has largely contributed or at least has been involved with to some extent. This makes the Legal Service's narrow approach, and its emphasis on EU citizenship as a catalogue of free movement rights which focuses on the relationship between the citizens and the Member States, all the more surprising.

Take the famous *Rottmann* case, for instance, in which AG Poiares Maduro already in 2009 referred to EU citizenship as 'a legal and political concept independent of that of nationality' and linked it to the construction of 'a new form of civic and political allegiance on a European scale'.[128] The

124 See in a similar sense Jules Lepoutre, 'La citoyenneté n'a pas de prix', RTDE 61 (2025), 395-412 (412) and Etienne Pataut, 'Selling Citizenship – A Challenge for Europe. A Commentary on the CJEU's Decision in *Commission v. Malta*, Yearbook of Private International Law 26 (2024-2025), 201-217 (217).

125 See van de Beeten (n. 27).

126 See Gareth Davies, 'How Citizenship Divides: The New Legal Class of Transnational Europeans', European Papers 4 (2019), 675-694 (693) (but see also Loïc Azoulai's indignant reaction to Davies' contribution – Loïc Azoulai, 'On Dubious Parallels: The Transnational Europeans and the Jews. A Note on Gareth Davies' *Article*', European Papers 5 (2020), 279-282- and the subsequent response to Azoulai by Davies in European Papers 5 (2020), 283-286).

127 von Bogdandy, 'Republican Thrust' (n. 10).

128 Opinion of AG Poiares Maduro in *Rottmann* (n. 16), para. 23.

 DOI 10.17104/0044-2348-2026-1-261

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AG even emphasised this particular political character of EU citizenship to contrast it with its conceptualisation as merely 'a body of rights which, in themselves, could be granted even to those who do not possess it'[129] – a notion which appears to be underlying to a certain extent the Legal Service's Chapter (see *supra* III. 2.).

More recently, at the end of 2021, the Commission launched infringement proceedings against Poland and the Czech Republic for denying foreign EU citizens who reside in those two States the right to become a member of a political party or political movement, which would constitute a breach of Article 22 TFEU. The ECJ ruled that both Member States had failed to fulfil their obligations under that provision. It did so by referring, as it did in earlier judgements as well,[130] to Article 2 TEU according to which, the principles of democracy and equality are values on which the EU is founded, and which, therefore, are an integral part of the very identity of the EU as a common legal order.[131] The ECJ further explains that it is apparent from the case law of the European Court of Human Rights that the right to freedom of association is one of the essential foundations of a democratic and pluralist society, in that it allows citizens to act collectively in areas of common interest and, in so doing, to contribute to the proper functioning of public life.[132] This means, not only, that the functioning of the EU is founded on representative democracy, as is mentioned in Article 10(1) TEU,[133] and that Article 22 contributes to the integration of the EU citizens in the society of the host Member State.[134] Equally important is that the ECJ confirms the direct involvement of EU citizens in a European society and the public life it entails. The reference by the ECJ to Article 2 is most pertinent in that respect, as this provision explicitly refers to 'a society', which legal scholarship has earlier interpreted as, indeed, a *European* society[135] and which Article 2 characterises as necessarily democratic.

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129 Opinion of AG Poiares Maduro in *Rottmann* (n. 16), para. 23.

130 ECJ, *Patrick Grégor Puppinck and Others v. European Commission*, judgement of 19 December 2019, case no. C-418/18 P, EU:C:2019:1113, para. 64, and ECJ, *Criminal proceedings against Oriol Junqueras Vies*, judgement of 19 December 2019, case no. C-502/19, EU:C:2019:1115, para. 63.

131 ECJ, *Commission v. Czech Republic* (n. 43), paras 114 and 159-162; ECJ, *Commission v. Poland* (n. 43), paras 112 and 156-159.

132 ECJ, *Commission v. Czech Republic* (n. 43), para. 119; ECJ, *Commission v. Poland* (n. 43), para. 117.

133 ECJ, *Commission v. Czech Republic* (n. 43), para. 121; ECJ, *Commission v. Poland* (n. 43), para. 119.

134 ECJ, *Commission v. Czech Republic* (n. 43), paras 125-126; ECJ, *Commission v. Poland* (n. 43), paras 123-124.

135 See in particular von Bogdandy, *Emergence* (n. 111), 3 et seq, as well as his contribution to this special issue (n. 10).

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Although Article 22 TFEU belongs to the TFEU's part on EU citizenship and has been drafted primarily as a non-discrimination provision, its interpretation by the ECJ in the two cases mentioned turns it into an essential component of European society, which hence has a democratic identity.[136] This connection between EU citizenship and the democratic character of European society finds its basis in the Treaties itself, and not only in the specific content of Article 22 TFEU. Article 9 TEU, the core provision on the definition of EU citizenship, is the first provision in the TEU's Title on 'democratic principles'; Article 10 TEU further details the Union's democratic character, and recognises the citizens' prominent role in that respect. The Treaties hence base the democratic character of the EU (partly) on the existence of EU citizenship and the rights pertaining to it.[137]

As has been mentioned in the previous paragraphs, this major upgrading of the concept of EU citizenship is necessarily linked to the upgrading of the EU and its definition as a polity in itself. Possibly, the ECJ will take a further step in that direction in the still pending *Commission v. Hungary* case in which the Commission claims as a self-standing plea that this Member State has breached Article 2 TEU.[138] In her Opinion of 5 June 2025, AG Ćapeta considered that this provision 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. In her view, it expresses a vision of what '*a good society*' is 'in the EU constitution': '*a constitutional democracy that respects human rights*', which 'represents the *very identity* of the European Union'.[139] This Opinion thus rests on a substantive understanding of a European society of a particular nature which is essentially characterised by the values mentioned in Article 2.[140] The latter provision indeed mentions that the values upon which the Union is founded are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

136 Nora Vissers, 'Join the (Political) Party: the CJEU's Emerging Role as a Guardian of Democracy in Cases C-808/21 and C-814/21', Maastricht J. Eur. & Comp. L. 32 (2025), 613-627 (627).

137 See von Bogdandy, *Emergence* (n. 111), 137-138.

138 ECJ, *European Commission v. Hungary (Valeurs de l'Union)*, case no. C-769/22.

139 Opinion of AG Ćapeta in *Commission v. Hungary* (n. 138), paras 155-158 (italics used by the AG).

140 See the Legal Service's characterisation of the two sentences of Article 2 TEU as a single corpus of values of the EU: Friedrich Erlbacher and Katarzyna Herrmann, 'Fundamental values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens*, (2nd edn, Publications Office of the European Union 2023), 34-57 (38).

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In *Commission v. Malta*, the ECJ specifically pointed to Article 2 as well and considered EU citizenship to be based on the common values contained in Article 2, with a particular reference to solidarity, and on the mutual trust between the Member States.[141] This way, the ECJ has drawn a sharp line between those who are EU citizens and all 'others',[142] not so much by the requirements imposed on the Member States' nationality legislation but even more so by its substantive approach to EU citizenship which is essentially connected to the values of Article 2 (and solidarity in particular) and to mutual trust. These foundations for EU citizenship are of vital importance for the EU. The ECJ considers that these values define the very identity of the EU as a common legal order (*supra*), and interprets mutual trust as a principle which specifically characterises the relations between the Member States and therefore cannot as such be transposed to relations between the Union and a non-Member State.[143] There can be no doubt therefore that EU citizens truly belong to the European society to which Article 2 TEU refers, described by AG Ćapeta as the 'good society' which the Member States wish to create together within the framework of the EU.[144] But if both that society and EU citizenship are fundamentally based on the values of Article 2 TEU, and the latter moreover also rests on mutual trust, isn't there a risk that EU citizenship eventually turns into an exclusionary status which reflects a sharp divide made by the EU between 'us', citizens, and 'them', the others?[145]

No such conclusion can be drawn however from the ECJ's interpretation of EU citizenship and the conditions upon which acquisition of this status must rest. According to the ECJ, the special relationship between each Member State and its nationals also forms the basis of the rights and obligations reserved to EU citizens by the Treaties.[146] A red line has been drawn only where commercialisation is at stake.[147] Within those marginal contours, the Member States retain the competence and the responsibility to define access to EU citizenship, thus concretising that 'special relationship of solidarity and good faith' in their own way in order to grant that status to those whom they consider fit to become members of that particular European

141 ECJ, *Commission v. Malta* (n. 16), paras 93 and 95.

142 See Ruairi O'Neill, 'A Stitch in Time? Mutual Trust as the EU's Fix-All in Case C-181/23 *Commission v. Malta*', European Papers 10 (2025), 463-487 (471).

143 ECJ, Opinion 1/17 of 30 April 2019, *EU-Canada CET Agreement*, ECLI:EU:C:2019:341, para. 129; ECJ, *Alchaster I*, judgement of 29 July 2024, case no. C-202/24, ECLI:EU:C:2024:649, paras 55-71.

144 Opinion of AG Ćapeta in *Commission v. Hungary* (n. 138), para. 157.

145 See Anja Bossow, 'What Is Citizenship For?', Verfassungsblog, 6 May 2025, https://verfassungsblog.de/what-is-citizenship-for/.

146 ECJ, *Commission v. Malta* (n. 16), para. 97.

147 Hilpold (n. 96), 762; Kadelbach (n. 96), 547; Spieker and Weber (n. 96), 496.

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polity.[148] Of course, as with any group, a division between, *in casu*, citizens and non-citizens is inevitable. But, according to the ECJ, the Member States continue to enjoy 'a broad discretion in the choice of the criteria to be applied'.[149] As Spieker and Weber have explained, this means that it is up to the Member States to define the European commitment needed, which can be expressed in many forms from residence in a Member State to particular achievements.[150] In other words, the Member States, by granting their nationality under these conditions, signal the existence of a particular bond both with them and the EU which is characterised by solidarity and good faith, and which hence serves, first and foremost, an inclusionary purpose.[151] It is a fortunate paradox that, while nationality remains the essential criterion to become an EU citizen, the EU aspires to become an ever-closer, post-national polity integrating those who, on basis of a diversity of reasons determined by its Member States, can be expected to be committed to the values expressed in Article 2 and to the elaboration on their basis of a common, European society.[152]

Of course, it's complicated, as Nic Shuibhne warns us: the bottom line remains that EU citizenship aims to foster attachment to the EU as a supranational polity, but exclusively through a Member State's nationality.[153] But then, can there be a better example of the 'mutually reinforcing relationship' which is said to characterise the European Union's multilevel system of governance?[154]

IV. Conclusion

In the fourth Chapter of its book on *70 Years of EU Law*, the Legal Service characterises EU citizenship as a status 'in the service of EU citizens' which to a large extent has been developed by the ECJ through preliminary rulings strengthening these citizens' free movement rights. Yet, as Lenaerts and Gutiérrez-Fons wrote some time ago, EU citizenship is not only about rights and courts but must be connected with the governance of the EU in order to

148 See Merijn Chamon, 'Commission v Malta (C-181/23) and the Trilemma of EU Citizenship', E. L. Rev. 50 (2025), 475-486 (484).

149 ECJ, *Commission v. Malta* (n. 16), para. 98.

150 Spieker and Weber (n. 96), 496.

151 See in that respect Bossow (n. 145).

152 See also Chamon (n. 148), 485-486.

153 Nic Shuibhne, *EU Citizenship Law* (n. 15), 1.

154 See in this respect, explaining EU democracy, Koen Lenaerts and José A. Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in: Dimitry Kochenov (ed.), EU Citizenship and Federalism (Cambridge University Press 2017), 751-781 (756).

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fully deploy its potential.[155] To a large extent, however, this perspective is absent from the Legal Service's approach.

Let there be no doubt that the Commission has greatly contributed to the development of EU citizenship, much more actually than can be deduced from the Legal Service's Chapter.

The Chapter examines EU citizenship from a very narrow perspective, which is limited to the ECJ's interpretation of some aspects of the right to freedom of movement and hence appears to approach EU citizenship essentially as a catalogue of rights which these citizens can invoke and enforce against the Member States. But, as I have attempted to make clear through an alternative assessment based on three insights, there's so much more to EU citizenship!

The lack of a broader view on the many dimensions of EU citizenship is unfortunate, all the more so because the Commission's book – whose subtitle prominently refers to the Union's citizens – does not contain any other chapter that is specifically devoted to EU citizenship as a status. Undoubtedly, size limitations compelled the Legal Service to make choices and the Chapter could not have been expected to provide a full overview of the nature and characteristics of EU citizenship and all (legal) consequences which this concept entails. Nevertheless, its analysis would have benefited from a broader approach to this status, which has developed, in the first place as a result of the efforts of the EU legislature, the Commission and the ECJ, often in interaction with critical legal scholarship, into a vital component of the identity of the European Union.

155 Lenaerts and Gutiérrez-Fons (n. 154), 753.

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