3½ Myths about EU law on Citizenship for Sale

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The sale of national and European Union citizenship understandably remains highly controversial. It seems arbitrary, perhaps even abject, to grant nationality in exchange for a monetary investment, when most people must wait years and overcome considerable hurdles before they can naturalize. Moreover, citizenship by investment (CBI) is associated with money laundering, tax evasion, and other security risks. But does that make it illegal under EU law? As evidenced by three recent posts on the Verfassungsblog by Joseph H.H. Weiler, Merijn Chamon, and Lorin-Johannes Wagner, this question continues to divide EU law scholars. It is also a question that is still plagued by several myths about how EU law and, relatedly, international law, apply to CBI practices. This post discusses 3½ such myths.

Myth 1: *Nottebohm* is relevant to the resolution of *Commission v Malta*

The first, most serious misconception lies at the heart of *Commission v Malta*, the case brought by the Commission against Malta's CBI programme. According to the Commission, CBI breaches EU law when Member States award nationality to persons without a '"genuine link" or "genuine connection" to the country in question'. The Commission asserts that its view is consistent with a 'criterion used under public international law', namely the genuine link criterion established by the International Court of Justice (ICJ) in its 1955 *Nottebohm* judgment. In that judgment, the ICJ decided that states need not recognize someone's nationality if there is no *genuine connection* between that person and her country of nationality. The Commission not only refers to *Nottebohm* but relies exclusively on it: it is the only authority cited to support its argument that national citizenship should not be awarded absent a genuine link. Indeed, this is, seemingly, the central argument on which its case against Malta rests.

This seems like a risky strategy, especially as there is, as Audrey Mackling says,'strong consensus that *Nottebohm* was wrong then, and may be even more wrong now'. After all, the genuine link criterion risks rendering people stateless for the purposes of international as well as EU law. Imagine the possible consequences of accepting the criterion as a valid principle of EU law. Member States can then refuse to recognize someone's EU citizenship if they believe there is no genuine link to the person's Member State of nationality. This will create uncertainty among Member State nationals as to whether they can exercise their rights as EU citizens and, in particular, jeopardize the right to free movement.

Despite this, some find *Nottebohm* appealing. According to Wagner, *Commission v Malta* presents an opportunity for 'the potential revival of *Nottebohm*'. The case would offer an opportunity to 'reinvigorate a European debate about the genuine links that bind us' and 'will require the CJEU to 'decide whether *Nottebohm* will go down in European legal history quietly or come back with a vengeance'. Seeing the title of his post – 'Long Live *Nottebohm*' – Wagner would not be opposed to *Nottebohm* celebrating a comeback.

However, it is unlikely that it will. First, *Nottebohm* has been consistently rejected by the CJEU for at least three decades. Since the 1992 *Micheletti* judgment, it has been settled that Member States must recognize the nationality of those without a strong link to their state of nationality. The CJEU ruled that it is not allowed to 'restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality'. At no time has the CJEU shown any inclination to reverse its stance. On the contrary, it took the same view in *Garcia Avello* (para 28) and, more recently, *Lounes* (para 55). In other words, the comeback Wagner favours would require the CJEU to topple three decades of case law and thereby imperil EU citizens' freedom of movement.

Second, and more importantly, whether (one believes) *Nottebohm* is good law is irrelevant to the resolution of *Commission v Malta*. How can this be, one may think? The ICJ judgment is at the very core of the Commission's case against Malta. However, as I explain here in detail, the Commission's Legal Services seems to have overlooked that *Nottebohm* concerns merely the *recognition* of nationality, not its *acquisition*. The ICJ was very clear about this. Its verdict did not alter that 'it is for every sovereign state, to settle by its own legislation the rules relating to the acquisition of its nationality'. In other words, as *Commission v Malta* concerns the *acquisition* and not *recognition* of nationality, the case against Malta is not supported by *Nottebohm*. There is no criterion of public international law supporting the Commission's case, and it is therefore irrelevant for the verdict in *Commission v Malta* whether the CJEU will bring *Nottebohm* back to life.

Myth 1½: Banning CBI violates the limits of EU Competence

Of course, the Commission can still argue that the CJEU should read a criterion of genuine link for the award of nationality into the Treaties, regardless of international law. Before discussing this argument, I want to discuss a second myth, found in the work of some who doubt the Commission has a case against Malta. Upon closer inspection, it turns out to be only half a myth, but we will get to this below.

The counterargument is that, as it is a national competence to set rules on the loss and acquisition of nationality, it is impermissible, i.e. *ultra vires*, for the CJEU to interfere with these rules. Contrary to what Chemon says, I do not believe this is Weiler's objection to the case against Malta (Weiler's criticism, as we shall see, is of another kind and explains why the competence counterargument is only ½ a misconception), but others have argued, indeed, that the Commission acted

ultra vires by launching its case. Chemon is right that this counterargument holds no water. It is settled that Member States must exercise their competences in accordance with EU law. The CJEU has taken the same position in its EU citizenship jurisprudence. It is a national competence to establish rules on the acquisition and loss of nationality, but that power must be exercised 'having due regard to EU law' (e.g., *Micheletti*, para 10). The Commission's case against Malta will not fail for lack of competence.

Myth 2½: The principle of genuine links is a logical extension of EU citizenship law

Of course, from the fact that there can be EU legal constraints in areas of national competence, it does not follow that such constraints exist. Does EU law require Member States to limit the award of nationality to persons with a genuine connection to their country and citizens? I have made the case previously that 'there is no precedent' in EU citizenship law for such an argument. However, Chemon wrote that '*Commission v. Malta* precisely presents the opportunity to set a precedent', given the CJEU's case law on the withdrawal of citizenship, such as *Rottmann* and *Tjebbes*. He even argues that it 'seems necessary to take this further step because Member States are required under EU law, following *Micheletti*, to accept that there *is* a genuine link between other Member States and their citizens'.

But as we saw above, this is not at all what the CJEU decided in *Micheletti*. Besides the fact that the dispute in *Micheletti* concerned the recognition and not acquisition of nationality, the CJEU held that it is not permissible to make the recognition of Member State nationality subject to a condition such as habitual residence or genuine link (paras 10-11). It did not say that Member States must accept that there *is* a genuine link between other Member States and their citizens. It only insisted on the recognition of nationality, even when Member States doubt the existence of a genuine link. One could also say that the only link that mattered for the CJEU in *Micheletti* was the status of nationality.

Moreover, to suggest that a genuine link requirement could be introduced as a logical extension of *Rottmann* and *Tjebbes* underestimates what a leap that would be. Existing EU case law on the loss and acquisition of Member State nationality has enthralled EU lawyers but changed almost nothing for those directly affected. The claimant in *Rottmann* nota bene still lost his nationality and became stateless after the national court ruling, a decision that was fully in line with the CJEU's verdict in the case. *Tjebbes* resulted in a minor change in national practice, but not an amendment of the rules on the loss of citizenship underlying that practice. So, to move from existing jurisprudence to a blanket ban on certain citizenship programmes would be a massive jurisdictional leap.

This would perhaps not be so problematic if that leap were consistent with the Treaties. Yet, taking a critical look at *Rottmann*, we should rather question established precedent than argue that the case leaves room for new precedent, i.e.,

the introduction of the genuine link principle. To see why, we need to return to the ½-myth on EU competence.

As we saw above, areas of national competence are not immune to EU legal constraints. Take the following examples from EU anti-discrimination law. The legal position of religious communities (*Egenberger*), the organization of the army (*Kreil*), and the regulation of civil status (*Maruko*) are all areas of national competence, but the CJEU has for all three areas held that they are subject to EU anti-discrimination law. The structure of the argument in such cases is always the same. A case involves a national competence on the one hand and a right conferred by EU law on the other, and when the two clash, EU law limits the exercise of the national competence. I do not question this case law; I find the logic unassailable.

At first glance, the argumentative structure in *Rottmann* and *Tjebbes* seems the same. There was a conflict between the national competence in the field of nationality on the one hand and the rights EU law confers on EU citizens on the other, which the CJEU settled in favour of the latter. However, whereas the exercise of national competence in the abovementioned anti-discrimination cases was inconsistent with EU (non-discrimination) law, the exercise of the power to lay down the rules on the loss and acquisition of nationality in *Rottmann* and *Tjebbes* was not. To the contrary, although a decision to withdraw the nationality of a Member State may lead to the loss of EU citizenship, this is a result that is consistent with, and indeed expressly required by, EU law – by the derivative nature of EU citizenship and its conditionality on Member State nationality (as I explain here in more detail).

This might explain why the CJEU tried to justify its interference with the national competence in nationality matters by saying that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States'. However, as Weiler convincingly shows, this statement has always been incompatible with the Treaties' text, legislative history, and teleology. This, I believe, is his objection to the case law: not that the CJEU has imposed legal constraints in an area of national competence, but that it never offered a sound justification for imposing them.

Perhaps it is true, as Chamon argues, that 'the ship of the fundamental status of EU citizenship has already sailed', but this is no reason to let the ship sail lightyears further. The CJEU's intrusions in the field of nationality have so far been very modest. The Treaties do not allow it to go any further.

Myth 3½: CBI is unique

The final myth is that CBI uniquely awards Member State nationality absent a genuine link. This, in any case, is the impression one gets reading the Commission documents on CBI. They read as if a decision was made to challenge the legality of CBI, after which a legal argument was constructed to justify that decision, during which the principle of genuine link was found as the most promising principle to challenge it. This is unfortunate for two reasons.

First, it fails to address the full ramifications of the claim that nationality cannot be awarded absent a genuine link. CBI is not unique in awarding nationality to persons who have no genuine link to the country. Remedial citizenship, Olympic citizenship, and discretionary naturalization are all forms of citizenship acquisition that most likely violate the principle of genuine links. Are these forms as problematic as CBI? Maybe not, but the principle of genuine link would not discriminate between them; it would prohibit them all (as I explain here). It would be politically and constitutionally problematic if this were the accidental knock-on effect of the Commission's fight against CBI.

Second, the Commission's choices have led to a skewed debate about the future of EU citizenship. I agree with Wagner that we need 'a European debate about the genuine links that bind us', but this debate should not revolve almost entirely around CBI. Instead, as I have argued, we need 'a more holistic debate on the relationship between national and EU citizenship, which does not focus on specific cases and problems, but tries to provide a consistent normative vision of citizenship within the EU'. Currently, the Commission lacks a clear normative vision, as it is mostly interested in the exclusion from Union citizenship. A healthy debate would also, and perhaps more so, address the wrongful exclusion of many from Union citizenship. Because while some can get EU citizenship without a genuine link to the state awarding citizenship, many more cannot obtain the status despite having a genuine connection to their state of residence. Unfortunately, the Commission seems to care less about the excluded.

Should EU citizenship be for sale?

Should people be able to obtain EU citizenship in exchange for a monetary investment? Perhaps not, but is CBI a more arbitrary way to acquire nationality than many other forms of naturalization? That is not clear either. What does seem clear, however, or at least is something that different sides of the debate should be able to agree on, is that naturalization practices should not lead to money laundering, tax evasion, and other security risks. It might therefore be wiser for the Commission to invest its energy in finding ways to combat the possible negative side effects of such practices. Not only because Member States are more likely to agree to legislation that rules out these effects than to harmonize the conditions for loss and acquisition of nationality, but also because the EU has a well-defined competence to adopt rules to combat these effects.
