

# Kluwer International Tax Blog

## The Contents of Highlights & Insights on European Taxation

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### Highlights & Insights on European Taxation

Please find below a selection of articles published this month (May 2025) in [Highlights & Insights on European Taxation](#), plus one freely accessible article.

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## FREE ARTICLE

– ***Commission v Malta (C-181/23)***. Maltese investor citizenship scheme is contrary to EU law. Court of Justice

(comments by **Edwin Thomas**) (*H&I* 2025/151)

This procedure concerned an action based on [Article 258](#) of the Treaty on the Functioning of the European Union (hereafter: TFEU) brought by the European Commission concerning Malta's failure to comply with the right of free citizenship under [Article 20](#) TFEU.

In previous procedures where the European Commission initiated proceedings against a Member State under [Article 258](#) TFEU, alleging that free citizenship had been violated, the following issues were involved:

- To deny Union citizens who do not have Polish nationality but reside in Poland the right to be members of a political party (CJ 19 November 2024, C-814/21 *European Commission v Republic of Poland*, [ECLI:EU:C:2024:963](#)),
- And the same case with regard to the *Czech Republic* (C-808/21, [ECLI:EU:C:2024:962](#)): violation of free citizenship;
- The refusal by the Netherlands to grant the benefit of reduced student travel fares prior to the acquisition of a permanent right of residence to persons other than employees or self-employed persons, or persons who have retained this status, and their family members: No violation of the

free citizenship and/or Directive 2004/38 (CJ 2 June 2016, C-233/14 *European Commission v Kingdom of the Netherlands*, [ECLI:EU:C:2016:396](#));

- Austria: By reserving the benefit of reduced transport fares in principle exclusively to students whose parents receive Austrian child benefits, Austria has acted contrary to free citizenship (CJ 4 October 2012, C-75/11 *European Commission v Republic of Austria*, [ECLI:EU:C:2012:605](#)).

Therefore: Procedures in which the European Commission states that a Member State has not complied with free citizenship are (still) quite rare.

*When does the free citizenship apply?*

According to the latter judgment, free citizenship – referred to by the CJ as citizenship of the Union – is included in [Articles 18, 20 and 21 TFEU](#) and [Article 24](#) of Directive 2004/38. This free citizenship is restricted to the territory of the EU Member States: the European Economic Area, a treaty between Norway, Iceland and Liechtenstein, lacks a free citizenship.

Citizenship is a type of ‘residual freedom’. This freedom is first addressed if a natural person is not economically active (such as students or pensioners) and (therefore) cannot rely on the free movement of workers ([Article 45 TFEU](#)), the free movement of establishment ([Article 49 TFEU](#)), the free movement ([Article 56 TFEU](#)) of services or the free movement of capital ([Article 63 TFEU](#)).

*The meaning of Article 4, third paragraph, of the Union Treaty*

A novelty in this ‘non-compliance with free citizenship’ procedure concerns the application of the principle of sincere cooperation and mutual trust in the sense of the third paragraph of Article 4, third paragraph of the Treaty on European Union.

The CJ’s line of reasoning is as follows:

- When establishing criteria for the acquisition of a particular nationality, an EU Member State has broad discretion, provided that these criteria are exercised in compliance with EU law (paragraph 98);
- The exercise of the Member States’ power to determine the conditions for the grant of their nationality is therefore – like their power to determine the conditions for the loss of nationality – not unlimited (paragraph 95);
- The nationality relationship of a Member State is based on the special bond of solidarity and loyalty between that State and its nationals, as well as on the reciprocity of rights and obligations (paragraph 96)
- However, a Member State apparently disregards the requirement of this special bond of solidarity and loyalty if a particular nationality is granted in exchange for pre-determined payments or investments (paragraph 99), referred to by the CJ as ‘marketisation’ (paragraph 100).

I characterize this principle of mutual trust and loyal cooperation as follows: If a Member State in principle has an exclusive competence – this exclusive competence applies to nationality, but also, for example, to direct taxes – a Member State may not exercise this exclusive competence in a manner that is not customary or uncommon for countries or that is not customary in international traffic between countries.

Rules for the acquisition and loss of nationality can – also within the EU – differ greatly from

Member State to Member State, for example in the area under which conditions a (Member) State permits dual nationality. It is customary internationally that a natural person who did not acquire a particular nationality at birth can still acquire this nationality after having legally resided in the country of his desired nationality for a number of years before he or she must undergo a naturalization procedure.

It is in any case not customary internationally that a natural person can acquire a nationality by simply paying a sum of money.

*Conclusion and the consequences of this judgment for tax law*

This procedure shows that EU Member States can also be convicted for a form of bad faith or abuse in establishing criteria in a policy area in which they have exclusive competence, such as nationality or direct taxes.

We will now have to wait for the first procedure in which a taxpayer claims that a national tax arrangement in the area of taxation is not internationally accepted or internationally not customary or uncommon, as a result of which it could possibly be stated that this Member State has acted contrary to the principle of mutual trust and sincere cooperation in Article 4, paragraph 3, of the EU Treaty.

*Edwin Thomas*

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