

# Citizenship for Sale: Could and Should the EU Intervene?



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On 15 January 2014, the European Parliament will debate<sup>1</sup> the issue of ‘EU citizenship for sale’ as a ‘topical subject’ in its plenary. The Council and the Commission will both make statements on the issue, and the debate will be the culmination of a process whereby numerous parliamentarians from various political groups (ALDE, Verts/ALE, PPE – although not the S&D group of which the Maltese Labour Party currently in government is a member) have addressed questions to the Commission and the Council and expressed their concerns about the trend towards selling citizenship.

Can such critiques rely on European law or should the case be argued politically? And if the latter, is the Commission or the European Parliament the right institution to take the lead?

Dimitry Kochenov has made the point that there does not appear to be a case to argue that the decision by Malta to ‘sell’ its citizenship – whatever the price – raises an issue of EU law. It is well established that the conditions under which the Member States provide for the acquisition or loss of their citizenship are a matter to be decided by these states, provided that the rules put in place observe the requirements of EU law. The 1992 *Micheletti* judgment of the Court of Justice of the EU established that Member States must recognise the ‘EU part’ of a person’s dual citizenship, as to do otherwise would deprive that person of the benefit of the free movement rights. In its 2010 *Rottmann* decision, the Court acknowledged that decisions on the loss of citizenship, where these would entail the loss of EU citizenship and thus deprive the person concerned of their rights and duties under that status, should be subject to a test of proportionality. In *Rottmann*, Advocate General Maduro did suggest a broader basis in the norms of EU law for constraining the actions of the Member States. He referred specifically to the case of mass naturalisations of third country nationals by a Member State undertaken

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<sup>1</sup> European Parliament Resolution on the sale of EU citizenship, 2013/2995(RSP), available at <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2995%28RSP%29>

without consulting the other Member States. Maduro argued that such practices might entail a breach of the duty of loyal or sincere cooperation contained in Article 4(3) of the Treaty on European Union.<sup>2</sup> According to that provision ‘The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.’ But, as Kochenov notes, compared to the large numbers of Italian citizenships given out in Latin America to those demonstrating Italian ancestry, or indeed the effects of the external citizenship provisions of some of the newer Member States (e.g. Hungary in Serbia or Croatia in Bosnia and in many non-European countries where there are large Croatian diasporas such as in Australia), the effects of the Maltese provisions will be marginal in terms of numbers and thus have little impact on other Member States. The case for a legal obligation under the Treaties to moderate this type of national citizenship policy seems rather weak. It may be a mercantilist practice, but it is not arbitrary according to the norms of EU law.

So is that the end of it? Will the debate on 15 January be limited to the Commission rehearsing these legal points and pointing out its lack of competence in the matter, and MEPs wringing their hands about the ‘abuse of rights’ and the ‘lack of respect’<sup>3</sup> for other Member States which is said to be involved in the creation of new citizens by such means? And will objections to the actions of Malta (and potentially other Member States which have introduced variants of these schemes) have no more traction than objections to a Member State exploiting its own natural resources, or exporting things for profit that it is particularly good at making, even if these might have environmental costs (such as cheaply produced French nuclear power or large German cars)?

As the contributions to this Forum have shown, the proposal by Malta to sell citizenship is just one example of why and how (national) citizenships can be most effectively monetized precisely because those citizenships are more attractive to those who ‘invest’ (it does not matter whether by means of work, long residence and civic integration or by direct financial contribution to the national exchequer), because they confer the benefits of EU citizenship. EU citizenship thus connects the external and internal dimensions of citizenship and offers incentives to states to exploit citizenship (and associated rights such as residence or the right to work) as a tradable good in a market system.

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<sup>2</sup> Consolidated version of the Treaty on European Union, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>

<sup>3</sup> Parliamentary questions, 4 December 2013, Subject: EU citizenship for sale, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=OQ&reference=O-2013-000138&format=XML&language=EN>

If Malta's policy exploits EU citizenship in a way that does not conflict with EU law, should the European Parliament – as an institution rooted in the principle of representative democracy – not use the opportunity to reflect instead more deeply upon the meaning of (national and EU) citizenship in a compact between states such as the European Union?

In that context, a comparison of the position of the Commission and the Parliament can be instructive. The Commission – unlike the Parliament – can speak with one voice, and has been assigned executive and enforcement powers under the Treaties. So a standard argument based on the duty of Member States to comply with EU law involves trying to get the Commission to say something about a situation in a given Member State, perhaps as a precursor to doing something such as bringing an enforcement action. But time and again, the argument fails, precisely because the issue falls outside the scope of EU law.

The powers of the Commission to take such actions are often overestimated because observers have watched how it has dealt with accession states. However, the context of enlargement deceives us, because it is during that phase of pre-accession negotiations – and whilst states live in fear of being told they do not comply with the Copenhagen criteria in relation to democracy and fundamental rights – that the Commission can make pointed interventions in areas of national sovereignty, including citizenship. Changes to the citizenship regimes of many of the Western Balkan states can be attributed directly or indirectly to pressure from 'Europe'. Perhaps the most obvious example is that of Macedonia<sup>4</sup>, which changed its rules on acquisition of citizenship as one step towards a more consociational settlement involving the majority of ethnic Macedonians and the minority Albanian group. Similar effects via the implementation of national visa liberalisation roadmaps can be seen in Montenegro and Serbia. On the other hand, as the case of the controversial constitutional amendments in Hungary has shown, there is little the Commission can do to intervene in Member States, given the limitations of its current enforcement instruments<sup>5</sup>, however egregious would appear to be the effects of the amendments introduced upon the 'entitlement' of that particular state to be a full member of Europe's democratic community of states.

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<sup>4</sup> Spaskovska, L. (2011), *Macedonian Citizen: 'Former Yugoslav', Future European?*, CITSEE Study, available online at <http://www.citsee.eu/citsee-study/macedonian-citizen-%E2%80%98former-yugoslav%E2%80%99-future-european>

<sup>5</sup> *Ungarn – was tun? Folge 2: ein besonderes Vertragsverletzungsverfahren*, Verfassungsblog, available at <https://verfassungsblog.de/category/debates/ungarn-was-tun-folge-2-ein-besonderes-vertragsverletzungsverfahren/>

It is therefore not for the Commission to make the point that the creation of EU citizenship has indeed contributed to the hollowing out of national citizenship, not by taking away the prerogatives of national citizens (voting in national elections remains overwhelmingly reserved to national citizens only), but by incentivising its instrumentalisation for reasons of domestic gain (in Malta's case, a wish to improve the financial situation of a micro state buffeted by the effects of the Eurozone crisis).

But what about the European Parliament? As the democratically elected representative of the people(s) of the European Union and its Member States, and as a body elected on a franchise that deliberately goes beyond borders, the European Parliament can and indeed should take a careful look at the issues that the Maltese case raises. Yet it should do so not through a narrow focus on Malta, but rather through taking a sober look at the wider injustices and negative effects on democratic principles that may be highlighted by this newly identified dimension of the Fortress Europe construction (and how ironic it is, that Malta is also at the frontline of the *physical* Fortress Europe, as an island state located close to the southern shoreline of the Mediterranean sea).

'Intervention' is much too strong a word for whatever it is that the European Parliament could and should do on 15 January, when it debates the issue of EU citizenship for sale. But a first and wide-ranging reflection on some of the emerging consequences of EU citizenship for national democracies would at least be a start. 2013 was the year of the EU citizen. It did not do much to raise public awareness about EU citizenship and it ended with moves towards its commodification. Wouldn't it be appropriate for the European Parliament to start the new year with a real debate on the relation between national and EU citizenship?

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