



Union Citizenship and National Identity. The Constitutional Conundrums raised by *Commission/Malta*

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SUMMARY: 1. Preliminary remarks. – 2. Brief considerations on the scope, nature and judicial use of Article 4(2) TEU. – 3. The creation of Union citizenship and the legacy of *Micheletti*. – 4. The distinctive features of the Maltese citizenship investment program and the identitarian nature of Union citizenship. – 5. The reasoning of the Grand Chamber and the decision to ignore the national identity clause. – 6. The argumentative (and conceptual) faults of the judgment. – 7. Final remarks on the ruling in a broader constitutional setting.

1. Preliminary remarks

The present contribution seeks to determine if and how the duty to respect the national identities of the Member States enshrined in Article 4(2) TEU can affect the scrutiny exercised by the Court of Justice of the

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European Union (ECJ) over domestic law on the granting of citizenship in light of the recent judgment *Commission/Malta*.¹

To that end, this work will be divided into six sections. Section 2 will briefly summarise the nature, scope and judicial use of the identity clause. Section 3 will then reconsider *Micheletti* with a view to pinpointing the legal frailties of this landmark decision, which widely informs the ruling of the Grand Chamber. After concisely recalling the facts of the case and the Opinion of Advocate General Collins, Section 4 will address the constitutional premise of the judgment, i.e. the identitarian nature of Union citizenship. Section 5 will subsequently dwell upon the reasoning of the Court and on the choice to ignore the defense of the Maltese government based on Article 4(2) TEU. Section 6, in turn, will delve into the arguments used by the Court to affirm its competence and find an infringement of Article 20 TFEU and Article 4(3) TEU. Finally, Section 7 will assess the reach of the judgment and its (main) constitutional implications.

2. Brief considerations on the scope, nature and judicial use of Article 4(2) TEU

According to Article 4(2) TEU, the Union respects the national identities of the Member States, «inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government». This implies that the EU institutions observe the essential State functions, like territorial integrity, public order and national security. In a sort of constitutional short-circuit, notwithstanding the rule affirmed in the first paragraph – i.e. that «competences not conferred upon the Union in the Treaties remain with the Member States» – the provision ends by recognising that «national security remains the sole responsibility of each Member State».

Over the years the Luxemburg judges clarified that, far from being a safeguard clause that prevents *sic et simpliciter* the application of EU

¹ Court of Justice, Judgment of 29 April 2025, Case C-181/23, *Commission/Malta*.

law,² the provision can act as a parameter of validity for secondary law³ and as a ground to justify a particular deference towards national specificities.⁴ In the former case, recourse to Article 4(2) TEU raises concerns in relation to the respect of the principles of equality and uniform application; in the latter case, the application of the identity clause risks impinging on the principles of sincere cooperation, primacy, and proportionality.

The ECJ also clarified that Article 4(2) TEU cannot be invoked to uphold national measures hampering the values enshrined in Article 2 TEU, nor the fundamental rights guaranteed pursuant to Article 6 TEU.⁵ The identity clause should operate as a leverage to accommodate supranational interests and national prerogatives without compromising their equality before the treaties, nor the principle of primacy.⁶ To that effect, it should be interpreted and applied in accordance with the principle of subsidiarity, leading the Court of Justice to abstain from impinging on matters of national competence, save in extreme cases. In other words, Article 4(2) TEU should serve as a limit (not to primacy, but) to functionalism whenever the issues at hand risks (unnecessarily) encroaching on the sovereign power of the Member States in the areas listed therein.⁷

Unfortunately, the Court of Justice follows a casuistic and rather opportunistic approach when quoting Article 4(2) TEU. Indeed, to date it failed to assign to the identity clause an autonomous function in the managing of constitutional conflicts. In practice, the use of Article 4(2)

² See e.g. Court of Justice, Judgment of 1 March 2012, Case C-393/10, *O'Brien*; Judgment of 18 December 2025, Case C-448/23, *Commission/Poland*.

³ See e.g. Court of Justice, Judgment of 17 July 2014, Joined Cases C-58/13 and C-59/13, *Torresi*; Judgment of 16 February 2022, Case C-156/21, *Hungary/Parliament and Council*, and Judgment of 16 February 2022, Case C-157/21, *Poland/Parliament and Council*.

⁴ See e.g. Court of Justice, Judgment of 24 May 2011, Case C-51/08, *Commission/Luxemburg*; Judgment of 26 February 2013, Case C-399/11, *Melloni*.

⁵ On the relationship between these provisions, see L. S. ROSSI, 2, 4, 6 (TUE)...l'interpretazione dell'"Identity clause" alla luce dei valori fondamentali dell'UE, in *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, pp. 859-870.

⁶ G. DI FEDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, in *EPL*, Vol. 25, No. 3, 2019, pp. 347-380.

⁷ *Ivi*, p. 377.

TEU is often unsubstantiated: on the one side, the scope of the provision appears to go beyond what is included in the text; on the other side, the precise role of the pertinent duty is elusive. In this regard, it is perhaps useful to recall that cultural and linguistic specificities mentioned in Article 3(3) TEU and Article 22 CFR were considered to be protected under Article 4(2) TEU⁸ and that the identity clause is often treated as a public order derogation, most notably when it comes to the indirect review of domestic law via the preliminary reference mechanism.

That being said, in last few years it is possible to observe a decrease in the number of references made by Constitutional Courts concerning elements potentially covered by the identity clause,⁹ and an increase in the use of the national/constitutional identity in defensive terms, both in the context of proceedings under Article 267 TFEU and in infringement actions under Article 258 TFEU, particularly when it comes to the independence of the judiciary, the rule of law and effective judicial protection,¹⁰ as well as in cases relating to the fight against terrorism,¹¹ telecommunications,¹² armed forces¹³ and, as in the case under consideration, the status of Union citizenship.¹⁴

⁸ Court of Justice, Judgment of 12 May 2011, Case C-391/09, *Runevič-Vardyn*; Judgment of 16 April 2013, Case C-202/11, *Las*; Judgment of 7 September 2022, Case C-391/20, *Cilevičs*.

⁹ In this respect, suffice it to mention that between 2011 and 2020 the Court of Justice decided cases like *O'Brien* (reference from the UK Supreme Court) *Gauweiler* and *Weiss* (Court of Justice, Judgment of 16 June 2015, Case C-62/14, *Gauweiler*, and Judgment of 11 December 2018, Case C-493/17, *Weiss*, references from the German Constitutional Tribunal), *M.A.S. and M.B.* (Court of Justice, Judgment of 5 December 2017, Case C-42/17, *M.A.S. and M.B.*, reference from the Italian Constitutional Court), *Coman* (Court of Justice, Judgment of 5 June 2018, Case C-673/16, *Coman*, reference from the Romanian Constitutional Court), but nothing after *Cilevičs*.

¹⁰ See e.g. Court of Justice, Judgment of 15 July 2021, Case C-791/19, *Commission/Poland*; Judgment of 20 April 2021, Case C-896/19, *Repubblika*, and most recently *Commission/Poland*, cit.

¹¹ Court of Justice, Judgment of 6 October 2020, Joined Cases C-511/18, C-512/18 and C-520/18, *Quadrature du Net*.

¹² Court of Justice, Judgment of 6 October 2020, Case C-623/17, *Privacy International*.

¹³ Court of Justice, Judgment of 15 July 2021, Case C-742/19, *Ministrstvo za obrambo*.

¹⁴ See also Court of Justice, Judgment of 14 December 2021, Case C-490/20, *Pancharevo*.

3. *The creation of Union citizenship and the legacy of Micheletti*

European Union citizenship was established by the 1992 Maastricht Treaty on the basis of a proposal by the Spanish government. Every national of a Member State enjoyed the rights attached thereto, namely: the right to move and reside freely within the territory of the Member States; the right to vote and stand for election in municipal and European Parliament elections in the Member State of residence, other than the Member State of origin; the right to diplomatic protection in a third country where the Member State of origin is not represented; the right to petition the European Parliament and to refer matters to the European Ombudsman.

The constitutional significance of the change introduced by the Maastricht Treaty did not escape the attention of the representatives of the Member States. Indeed, Declaration No. 2 specifies that: «[...] the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned». Furthermore, it provides that Member States may «declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary». In addition, to overcome the perplexities of Denmark towards the creation of Union citizenship the Heads of State and Government – meeting within the European Council in Edinburgh in December 1992 – declared that: «[T]he question of whether a person has citizenship of a Member State is determined exclusively in accordance with the national law of the Member State concerned».

Notwithstanding the (minor) amendments occurred over the years with the Amsterdam Treaty and the Lisbon Treaty, the confirmation of Declaration No 2 testifies to the persistent will of the Member States to maintain responsibility for the granting of citizenship. But to fully appreciate the ruling in *Commission/Malta* it is also important to insist on the ground-breaking judgment handed down in the *Micheletti* case,¹⁵ pre-dating the entry into force of the Maastricht Treaty. Here the

¹⁵ Court of Justice, Judgment of 7 July 1992, Case C-369/90, *Micheletti*.

national court asked whether Article 52 TEC (now Article 49 TFEU) allows a Member State «to deny the holder of dual nationality, where one nationality has been conferred by a Member State and the other by a non-member country, the right to exercise freedom of establishment merely because the non-member country was the place of his habitual residence, his last residence or his actual residence».¹⁶

As it may be remembered, Mr. Micheletti held dual citizenship, Argentinian (by virtue of the *ius soli*) and Italian (by virtue of the *ius sanguinis*), and was denied the right of establishment as a dentist in Spain. Indeed, pursuant to Article 9 of the Spanish civil code where a person has dual nationality, that corresponding to the last or actual place of residence prevailed.

Relying on *Auer*, AG Tesauro considered that «for the purposes of the application of Article 52, it is unnecessary for either to prevail, nor can residence be construed as an additional connecting factor for those purposes».¹⁷ If cases of dual citizenship were left to the Member States alone, «there would be discrimination between different categories of nationals [...] to the detriment of a fundamental freedom guaranteed by the Treaty».¹⁸

The Court of Justice agreed and held that it is not permissible for the legislation of a Member State to restrict the effects of the grant of citizenship of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.¹⁹

Interestingly, what is now quoted as a leading case was at the time not well received by legal scholarship. One of the first reactions to the decision came from Hans d'Oliveira, who in a note published in the *Common Market Law Review* immediately stressed the importance of the *obiter dictum* «*having due regard to Community law*», which altered the relevance of conferral in judicial practice. In a similar vein, David Ruzié criticised the Court of Justice for discarding the international rule – i.e. Article 1 of the Hague Convention on certain

¹⁶ Opinion of AG Tesauro, delivered on 30 January 1992, Case C-369/90, *Micheletti*, point 1.

¹⁷ *Ivi*, point 5.

¹⁸ *Ivi*, point 6.

¹⁹ *Micheletti*, cit., para. 10.

questions relating to the conflict of laws of 1930 – under which Member States retain competence to recognise citizenship and for claiming the power to determine what nationality prevails in case of dual citizenship on the basis of effectiveness when one of the two nationalities is that of a third country.²⁰ Denis Simon went even further advocating that the theological interpretation offered by the Court in *Micheletti* exceeds the «threshold of tolerance» of the Member States.²¹ In his view, the objective of ensuring free movement of nationals of the Member States, and the importance of the right of establishment under Community law cannot prevail over the effectiveness (i.e. genuine link) of citizenship under international law.

With this in mind, it is time to turn our attention to the judgment laid down by the Grand Chamber of the Court of Justice in *Commission/Malta*, which represents the logical development of *Micheletti*.

4. *The distinctive features of the Maltese citizenship investment program and the identitarian nature of Union citizenship*

Commission/Malta represents the first time that the Luxembourg judges are called upon to rule on the compatibility with EU law of a national piece of legislation on the conferral (not on the loss) of Union citizenship. More precisely, the Commission challenged the Maltese 2020 citizenship program, pursuant to which citizenship was granted vis à vis specific investments and donations without any (real) residence requirement.

In his Opinion, Advocate General Collins acknowledged that in the EU context the statal prerogative over citizenship was claimed in Declaration No 2 and the Edinburgh decision and did not hesitate to conclude that Article 9 TEU and Article 20(1) TFEU do not allow the institutions of the Union, or other Member States, to impose conditions

²⁰ D. RUZIE, *Nationalité, effectivité et droit communautaire*, in *Revue Générale de Droit International Public*, 1993, pp. 107-120, p. 107.

²¹ D. SIMON, *L'interprétation judiciaire des traités d'organisations internationales*, Paris, 1981, p. 759.

on the recognition of citizenship of another Member State.²² Although Member States could choose to transfer to the Union the power to determine the conditions for acquiring and losing European citizenship, they chose not to do so.²³

The Court of Justice, in turn, affirmed its competence. The Luxembourg judges opined that, independently of the principle of conferral and Declaration No. 2 attached to the Maastricht Treaty (as well as the Edinburgh decision), Member States must undertake not to exercise that competence «in a way that is manifestly incompatible with the very nature of Union citizenship».²⁴ Insofar as it amounts to a procedure of a transactional nature, the Maltese citizenship investment program disregards the essential nature of the relationship of solidarity and good faith between the Member State and its nationals, built on reciprocity of rights and obligations, and undermines «the mutual trust on which Union citizenship is based, in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU».²⁵

The Grand Chamber derived this federal-type of limitation on national competences from the fact that Union citizenship is based on the common values contained in Article 2 TEU. It represents one of the main manifestations of solidarity, which is at the very heart of the European integration process and constitutes «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».²⁶ This choice is in line

²² Opinion of AG Collins, delivered on 4 October 2024, Case C-181/23, *Commission/Malta*, point 47. For an in-depth, critical analysis of the Opinion see further S. COUTTS, *On Mutual Recognition and the Possibilities of a “Single European Polity”: The Opinion of AG Collins in Case C-181/23 Commission v Malta*, in *EP*, Vol. 9, No. 2, 2024, pp. 818-829.

²³ Opinion of AG Collins, delivered on 4 October 2024, cit., point 44. In particular, «Declaration No 2 [...] reflects the view of the Member States that their respective conceptions of nationality touch on the very essence of their sovereignty and national identity, which they do not intend to pool» (*ivi*, point 45).

²⁴ *Commission/Malta*, cit., para. 95.

²⁵ *Ivi*, para. 99. Most notably, citizenship granted in exchange for predetermined payments or investments and the 2020 program was «publicly presented [...] as a naturalisation programme offering primarily the advantages deriving from Union citizenship, in particular the right to move and reside freely in other Member States» (*ivi*, para. 120).

²⁶ *Ivi*, para. 93 (emphasis added), quoting *Costa/Enel perhaps* to highlight the constitutional breath of the judgment. As poignantly noted by Hanneke van Eijken

with the well-known stream of decisions *Micheletti*, *Grzelczyk* and Opinion 2/13 insofar as it confirms that Union citizenship has (already) become the fundamental status of the nationals of the Member States.²⁷

The rights reserved to Union citizens under Article 20(1) TFEU cannot be separated from a bond of solidarity and good faith with the Member State of origin without hampering mutual trust and mutual recognition (of decisions on nationality in other Member States).²⁸ In this respect, the 2020 Maltese citizenship program is ultimately believed capable of compromising the achievement of one of the objectives of the Union set out in Article 3(2) TEU: the creation and maintenance of an area without internal borders.²⁹ This is precisely where the duty of sincere cooperation comes into play to prevent Member States from selling their citizenship.³⁰

5. The reasoning of the Grand Chamber and the decision to ignore the national identity clause

With the creation of Union citizenship, Article F of the Maastricht Treaty, the forerunner of Article 4(2) TEU, posited the need to respect the national identities of the Member States. The identity clause was reconsidered by the IGC that led to the Amsterdam Treaty and

«the question is no longer whether the national measure is proportionate in light of an individual's circumstances, but whether the national system as a whole contains a manifest error— for example, by creating Union citizens without any substantive connection or integration requirement» (H. VAN EIJKEN *Nationality, Union Citizenship and Constitutional Values after Commission v Malta*, in *ECLR*, 2026, pp. 1-18, p. 11).

²⁷ In Opinion 2/13, the Court maintained, *inter alia*, that Article 9 TEU and Articles 20, 21, 22, 23 and 24 TFEU «are among the fundamental provisions of the Treaties which, being part of the specific structure of the Union, are structured so as to contribute to the implementation of the integration process which is the *raison d'être* of the Union itself and thus form an integral part of its constitutional framework» (Court of Justice, 14 December 2014, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para. 91).

²⁸ Most notably, according to the judges in Luxembourg, the bond of citizenship lies in the «special relationship of solidarity and good faith» between a Member State and its nationals, as well as in «the reciprocity of rights and duties» (*Commission/Malta*, cit., para. 96).

²⁹ *Ivi*, paras 84 and 85.

³⁰ *Ivi*, para. 99. See further, in this *Journal*, the contribution by Federico Casolari.

subsequently by the Giscard d’Estaing Convention that elaborated the (never adopted) Constitutional Treaty (CT). In this context, the competent Working Group reflected on the inclusion of elements like language and citizenship, but these aspects were later displaced elsewhere in the treaties or discarded *tout court*. The Lisbon Treaty, on its part, confirmed the identity clause as it resulted from Article I-5 CT and also specified that Union citizenship is additional to national citizenship, as opposed to complementary.

In *Commission/Malta* the ECJ ignored the argument put forward by the Maltese government based on Article 4(2) TEU: «it is true that Member State competence on the acquisition of nationality of those States must be exercised with due respect to EU law, in the fields of EU competence, but without undermining the duty to protect the national identity of the Member States».³¹ The defendant Member State did not openly challenge the *Micheletti* formula; rather, it suggested that the power to confer nationality should be distinguished from situations that entail deprivation of the rights and duties attached to Union citizenship. Since the granting of citizenship «is attached closely to the conception and the development of a Member State’s national identity»,³² the duty set out in Article 4(2) TEU posits that «it is only where a Member State’s naturalisation policy amounts in a general and systematic way to a serious breach of the values and objectives of the European Union, as defined in EU law, that that policy is contrary to EU law».³³

The argument seems to be (correctly) based on subsidiarity more than on proportionality. As extensively argued elsewhere, the wording and constitutional positioning of the identity clause postulate a reversed balancing exercise where the former principle «intervenes to lower the intensity of the conflict and impose on the Union a particular self-restraint in the name and for the sake of effectiveness – as to do otherwise would most probably trigger the activation of the national counter-limits».³⁴ Thus, in situations caught by Article 4(2) TEU the pertinent national specificities should succumb only inasmuch as the

³¹ *Ivi*, para. 63.

³² *Ivi*, para. 65.

³³ *Ivi*, para. 66.

³⁴ G. DI FEDERICO, *op. cit.*, p. 369.

domestic measure at hand or rule is blatantly and grossly in breach of EU law.

The EU judges do not specifically address the standard proposed by the Maltese government, but they do make a reference to the fact that Malta *manifestly* disregards the special relationship of solidarity and good faith justifying the recognition of rights resulting from Union citizenship.³⁵ Yet no reference is made to the identity clause in the findings of the judgment, which is truly a missed opportunity: on the one side, whether the granting of citizenship actually falls within the scope of Article 4(2) TEU is still uncertain; on the other hand, the true role of the identity clause in the solution of constitutional conflicts remains unclear.

6. *The argumentative (and conceptual) faults of the judgment*

Lamentably, the reasoning developed by the Court of Justice to find a violation of Article 20 TFEU and Article 4(3) TEU sits at odds with the constitutional breath of the ruling. On closer examination, three main weaknesses can be singled out.

First, the assessment of the naturalisation procedure under the 2020 program is surprising. Even in the absence of data on the number of rejected applications, the Kirchberg judges claim that the transactional nature of the operation can be inferred from the automatic character of the granting of citizenship in return for the investments made. In their view, the checks carried out in individual cases are limited to ensuring the public security and national security of Malta, as well as its international reputation.³⁶ However, such controls could also be viewed as adequate measures to ensure that some kind of bond of solidarity and good faith does exist and that the individual is (thus) worthy of Maltese citizenship.

On the other hand, the Court of Justice notes that the checks relate to the situation of the person concerned before and during the five years following the date of naturalisation, but not beyond.³⁷ Still, the

³⁵ *Commission/Malta*, cit., para. 101.

³⁶ *Ivi*, paras 113 and 114.

³⁷ *Ivi*, para. 118.

possibility of an indefinite control appears hardly compatible with the State-citizen relationship, and in any event disproportionate.

According to the ECJ, the absence of a requirement of genuine residence would be equally relevant in determining the real purpose of the 2020 program.³⁸ Nevertheless, the EU judges do not clarify how the obligation of continuous residence contributes to establishing the bond of solidarity and good faith required to comply with Articles 20(1) TFEU and 4(3) TEU. Quite ironically, the residence requirement was absent in *Micheletti*.

Second, the apparent contradiction in the Court's reasoning concerning the applicable judicial standard is striking. After rejecting the criterion of a «*serious breach* of the values and objectives of the European Union, in a *general and systematic manner*» proposed by the Maltese government as a criterion for reviewing the exercise of national competences in matters of nationality because it is not «supported by the Treaties or the case-law of the Court»,³⁹ the Luxembourg judges state that Member States must not exercise such competence «in a way that is *manifestly incompatible* with the very nature of Union citizenship».⁴⁰ Although the two judicial standards cannot be fully equated, they both rely on a *de minimis* rule, albeit one whose contours remain uncertain.

Finally, the reference made to *Commission/Belgium*⁴¹ and *Lawrie-Blum*,⁴² as well as to *Alevizos*,⁴³ *Rottmann*⁴⁴ and *Stadt Duisburg*⁴⁵ as «settled case-law of the Court» from which it follows that «the bedrock of the bond of nationality of a Member State is formed by the special relationship of solidarity and good faith between that State and its nationals and the reciprocity of rights and duties»,⁴⁶ is puzzling. The first three precedents concern the derogation relating to public service

³⁸ *Ivi*, para. 108.

³⁹ *Ivi*, para. 45, emphasis added.

⁴⁰ *Ivi*, para. 95, emphasis added.

⁴¹ Court of Justice, Judgment of 17 December 1980, Case 149/79, *Commission/Belgium*, para. 10.

⁴² Court of Justice, Judgment of 3 July 1986, Case 66/85, *Lawrie-Blum*, para. 27.

⁴³ Court of Justice, Judgment of 26 April 2007, Case C-392/05, *Alevizos*, para. 70.

⁴⁴ Court of Justice, Judgment of 2 March 2010, Case C-135/08, *Rottmann*, para. 51.

⁴⁵ Court of Justice, Judgment of 5 April 2024, Joined Cases C-684/22 to C-686/22, *Stadt Duisburg*, para. 37.

⁴⁶ *Commission/Malta*, cit., para. 96.

under Article 45(4) TFEU, where the bond in question served to justify a particularly restrictive interpretation of the notion of «participation in the exercise of public authority». The other precedents concern situations involving (not the granting of citizenship but) the loss of nationality without any evident connection with the case at hand. To be sure, whereas in *Rottmann* the Court recognised that to protect such a relationship of solidarity and good faith, a Member State may invoke public policy to justify the withdrawal of naturalization obtained by fraud, in *Stadt Duisburg* it held that, in the event of voluntary acquisition of the nationality of a third country, the nationality of the Member State may be lost automatically, even if this entails being deprived of the rights attached to Union citizenship.⁴⁷

7. Final remarks on the ruling in a broader constitutional setting

The use of the *Micheletti* formula in *Commission/Malta* is functional to effectiveness, coherence and further integration, but is troubling, especially in light of the argumentative weaknesses indicated above.⁴⁸ When assessing the scope of the *Micheletti* judgment, Denis Simon lucidly observed that the Court tried to compensate for the lack of political will on the part of the Member States in the realisation of the objectives of the European integration process.⁴⁹ Here again, the Luxembourg judges seem to neglect the principle affirmed in Articles 4(1) and 5(1) TEU.

The ruling is problematic, firstly, because it overlooks the limits imposed by the principle of conferral, read jointly with Declaration No 2.⁵⁰ In an article published in the *Common Market Law Review* dating

⁴⁷ For an exhaustive review of the pertinent case law of the Court of Justice on Union citizenship the reader is referred to the contribution by Adelina Adinolfi in this *Journal*.

⁴⁸ The precedent is cited at para. 81 of the judgment. In relation to Union citizenship rights, this approach has also been followed in Court of Justice, Judgment of 19 November 2024, Case C-808/21, *Commission/Czech Republic*, and Judgment of 19 November 2024, Case C-814/21, *Commission/Poland*, on political parties. See further, in this *Journal*, the contribution by Carlo Tovo.

⁴⁹ D. SIMON, *op. cit.*, p. 765.

⁵⁰ This notwithstanding the fact that the latter has already been recognised by the Court of Justice as an interpretative criterion for determining the scope *ratione personae* of

back to 1995 Closa did signal that the respect for Community law mentioned in *Micheletti* could lead the Court to limit the exclusive competence of the Member States in the recognition of national citizenship in the presence of an abuse,⁵¹ which is exactly what occurred in *Commission/Malta* (despite the Opinion of AG Collins). As convincingly argued by Thomas Horsley, the ECJ does not feel bound by the very limits it imposes on the legislator; it effectively «derives from its statements on the autonomy of the EU legal order an exclusive competence to determine the scope [...] of Union law».⁵²

The judgment is problematic, secondly, because the principle of sincere cooperation intervenes, together with the *Micheletti* precedent, to bring the situation within the realm of EU law and at the same time acts as a benchmark to justify the violation of Article 20 TFEU, which is silent on the possibility to grant citizenship in the context of a transactional procedure.⁵³ Reliance on Article 4(3) TEU to determine the violation of EU primary and secondary law is nothing new (particularly in infringement proceedings), but in this instance the provision seems to operate in combination with Article 2 TEU, a central building block of the concept of European identity, and of Union citizenship. The exact ties between these articles, nevertheless, are rather opaque.

The decision is problematic, thirdly and most importantly for present purposes, because it refuses to engage with the defense based on Article 4(2) TEU. On the one side, the Court does not clarify whether citizenship is covered by the identity clause. Although the granting of citizenship is not explicitly mentioned, it can be assumed to fall within the essential State functions and in any case – as noticed above – the ECJ does not feel constrained by the text of the provision. That being said, it could also be argued that national identity cannot be invoked when economic interests come into play. Unfortunately, this remains a

the rules on European citizenship (Court of Justice, Judgment of 5 September 2023, Case C-689/21, *Udlændinge- og Integrationsministeriet*, para. 27).

⁵¹ C. CLOSA, *Citizenship of the Union and nationality of Member States*, in *CMLR*, Vol. 32, No. 2, 1995, pp. 487-518.

⁵² T. HORSLEY, *The Court of Justice of the European Union as an institutional actor*, Cambridge, 2018, p. 117.

⁵³ In this regard, also see the contribution by Siniša Rodin, in this *Journal*.

purely speculative claim given the silence of the Court. On the other side, the Court confirms its reluctance to engage with the role of the identity clause in the solution of constitutional conflicts. Even admitting that the Maltese citizenship program can be reviewed in light of EU law, Article 4(2) TEU should act as a legal tool to defuse escalations and avoid the activation of the counter-limits doctrine. As suggested, the provision is capable of expressing all its potential only if read in light of the principle of subsidiarity: the duty to respect national identities requires a more deferent approach towards the autonomy of the Member States when it comes to the granting of citizenship. In this sense, it is submitted that the use of an obiter dictum to signal the possible negative effects of choices operated at the domestic level would have sufficed to guide the domestic legislator without impinging on statal competences.

To conclude, it will possibly take time – and other “hard cases” – to shed light on the precise constitutional implications of *Commission/Malta*; at least in less extreme situations it is respectfully submitted that, where appropriate, Article 4(2) TEU should be used and applied so as to avoid that the noble objective of forging a European identity through Union citizenship turns into a trojan horse undermining the (federal) integration process in the years to come.

ABSTRACT (ITA)

La sentenza *Commissione/Malta*, pronunciata dalla Grande Camera della Corte di giustizia nell'aprile 2025, solleva rilevanti questioni costituzionali concernenti il rapporto tra cittadinanza dell'Unione e identità nazionale degli Stati membri. Il contributo analizza le implicazioni della pronuncia alla luce dell'art. 4, par. 2, TUE. Dopo aver ricostruito la portata e l'impiego giurisprudenziale della clausola dell'identità nazionale e aver riesaminato l'eredità della sentenza *Micheletti*, il lavoro esamina il ragionamento della Corte con particolare riguardo al ricorso agli artt. 20 TFUE e 4, par. 3, TUE, nonché alla scelta di non confrontarsi con la difesa di Malta fondata sull'identità nazionale. Infine, vengono valutate le implicazioni costituzionali della decisione per il bilanciamento tra integrazione europea, principio di attribuzione e autonomia degli Stati membri in materia di cittadinanza.

ABSTRACT (ENG)

The judgment in *Commission/Malta*, delivered by the Grand Chamber of the Court of Justice in April 2025, raises fundamental constitutional questions concerning the relationship between Union citizenship and the national identity of the Member States. This contribution examines the implications of the ruling from the perspective of Article 4(2) TEU. After outlining the scope and judicial use of the identity clause and reconsidering the legacy of *Micheletti*, it analyses the Court's reasoning with particular regard to its reliance on Articles 20 TFEU and 4(3) TEU and its decision not to address Malta's defence based on national identity. The article concludes by assessing the constitutional implications of the judgment for the balance between European integration, the principle of conferral and Member States' competence in nationality matters.