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The EU citizenship and the Member States' own competence regulating the conditions of obtaining and forfeiting national citizenship

Abstract: The ability of a state to decide freely on the conditions of obtaining or forfeiting its national citizenship has always been perceived as a core element of sovereignty. Within the legal framework of the EU, the member states have remained competent to regulate the question of who qualifies as a national. However, taking into account that EU citizenship is founded on citizenships of the member states, it is incumbent on them to determine who is to be classified as an EU citizen and consequently, who can enjoy the accompanying rights. The purpose of this paper is to investigate the degree to which the member states' competence to regulate nationality matters has been affected by the introduction of EU citizenship.

Keywords: EU CITIZENSHIP, NATIONALITY, ACQUISITION OF CITIZENSHIP, FORFEITURE OF CITIZENSHIP, LOYAL COOPERATION, DIVISION OF COMPETENCES

Initial remarks

The activity of the European Union is based on the principle of delegated competences. This means that the EU, like any other international organization, holds only these competences which have been transferred to it by its member states in relevant treaties. All the competences that were not ceded to the Union remain in the hands of the member states. This principle has been authorized in Art 4 para 1 and Art. 5 para 2 of the Treaty on European Union (TUE).[1] It was also confirmed in the content of the Declaration dealing with separation of competences, which was at-

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[1] See the consolidated version of the Treaty on European Union of 7 February 1992, including changes introduced by the Treaty of Lisbon of 13 December 2007; *Journal of Laws of the EU* 326 of 26.10.2012, p. 18.

tached to the Final Document of the inter-governmental conference that accepted the Treaty of Lisbon.[2]

There is no doubt that the member states did not cede to the European Union the right to take decisions on matters connected with obtaining and forfeiting their national citizenships. Thus, this problem area remains the sole competence of the member states, while possessing independence in the sphere of regulations is treated as one of the determiners of the state's sovereignty. The fears raised occasionally of a possible interference on the part of the EU in the sphere in question were dispelled along with the acceptance of Declaration No. 2 on the Member State's Citizenship. The Declaration was attached to the Final Document of the inter-governmental conference which worked out the Maastricht Treaty, stating that "if the Treaty founding the European Commonwealth says about citizens of the Member States, the question of holding the citizenship of this or another Member State by the given individual is settled exclusively on the basis of the domestic law of the given Member State. These states can issue declarations informing who they consider, taking into account the goals of the Commonwealth, to be their citizens through declarations submitted to the Presidency and may, if the need arises, change the above-mentioned declarations." For instance, Great Britain had submitted such a declaration long before the country accepted the Maastricht Treaty.[3] Later on, the Court of Justice of the European Union, when passing its ruling in the case of *Kaur*, based it directly on the British declaration of 1982 and stated that the complainant could not be treated as a British citizen in order to establish the subjective scope of application of the founding treaties. At the same time, the Court accepted the fact that although, due to the historical conditions, there exist different categories of subjects holding the right to belong to the British Crown, it is the United Kingdom that decides who can be acknowledged to be a British citizen.[4]

[2] See: *ibidem*, p. 346: "The Conference underlines that in accordance with the system of division of competences between the Union and the Member States, in compliance with establishments of the Treaty on European Union, all the competences not assigned to the Union in treaties remain the responsibility of the Member States."

[3] It is possible to read in the British Declaration of 1982 that any time the founding treaties say about "nationals", "citizens of the member states and overseas territories" then with reference to the United Kingdom of Great Britain and Northern Ireland the following should be understood: a) British citizens; b) persons being British subjects according to Part IV of the Act on British citizenship of 1981, who hold the right of abode in the United Kingdom and for this reason are not subject to immigration control; and c) citizens of the British Overseas Territories, who have obtained the citizenship in connection with the relations with Gibraltar." (See: New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term "nationals", 31 December 1982; *Journal of Laws of EC* C 23 of 28.01.1983, p. 1).

[4] See the ruling of the Court of Justice of the EU of 20 February 2001 concerning case C-192/99 *The Queen vs. Secretary of State for the Home Department, ex parte: Manjit Kaur*, ECLI:EU:C:2001:106, pts 19-27.

Bearing the above in mind, one must admit the occurrence of quite an interesting situation in which the EU is in fact competent to decide on the scope of rights and obligations incumbent upon EU citizens, while the member states are competent to decide who will be the EU citizens and for how long they can enjoy this status The dependences formed in this way occasionally gave rise to tensions between the member states and the EU, especially when the latter put itself in the position to evaluate individual national regulations concerning citizenship. A good illustration of this is the negative reaction of the European Parliament towards the introduction of programs by Malta and some other EU member states, which facilitated acquisition of their citizenships in return for investments.[5] Thus, it is worth taking a closer look at the relations arising between EU citizenship and the freedom of acting on the part of the member states in the sphere of obtaining and losing national citizenship. In order to do this, in the first place it ought to be examined how the fact of membership of the EU can require the member states to accept any further limitations of their internal competences regarding the question of citizenship than those limitations which are present in traditional international law.

The bases of limiting the freedom of the EU member states in matters connected with regulating the institution of citizenship

The states' own competence to regulate issues connected with citizenship is not of the absolute character, since all the states are obliged to respect the binding norms of international law. As early as in 1923, the Permanent Court of International Justice decided that "in matters relating to citizenship, which – in principle – are not normalized by the international law, the right of states to avail themselves of the authority they hold can be restricted by obligations which these states contracted with other states […]."[6]

Contemporary restrictions on the possibility of free formation of the institution of citizenship by national legislation follow, if only, from international agreements that oblige to introduce principles and norms provided by these agreements into the system of internal law.[7] Such restrictions

[5] See the resolution of the European Parliament of 16 January 2014 concerning EU citizenship for sale (2013/2995(RSP)); *Journal of Laws of the EU* C 482 of 23 December 2016, p. 117-118.

[6] See the consultative opinion of the Permanent Court of International Justice of 7 February 1923 concerning *Dekrety o obywatelstwie wydane w Tunezji i Maroku* [The decrees on citizenship issued in Tunisia and Morocco], PCIJ Publ. Ser. B, no. 4, 1923, p. 24.

[7] E. Dynia, *Obywatelstwo w świetle prawa międzynarodowego* [Citizenship in the light of the international law], "Annales UMCS – Sectio G" 2000, vol. XLVII, p. 25.

may also result from the international customary law and from the generally recognized principles relating to citizenship.[8] Inasmuch as the term "generally recognized principles relating to citizenship" can raise certain interpretative doubts in this context, it is a fact that norms of the international law restrict the states' own competence both in matters concerning an individual's acquisition and forfeiture of citizenship. In the latter case, this consists in, among others, enumerative listing of premises which justify the decision of depriving the individual of citizenship, in the international agreement.[9] Irrespective of the above, the norms of the international law require that an individual should not be deprived of citizenship in an arbitrary way[10] as well as – apart from certain exclusions – in circumstances which would lead to statelessness.[11] On the other hand, contrary to the restrictions of states' own competences to regulate the premises behind forfeiture of citizenship, the premises of its acquisition are not subject to such a clear-cut control in the international legal system. In this context, it is pointed in the literature on the subject to, among others, the customary nature of the norm which prohibits extension of one state's citizenship over citizens of another state, or over populations inhabiting areas which this state does not hold sovereign power over (e.g. territories remaining under a military occupation).[12] At this point, it is worth mentioning the fact that the International Court of Justice, not deciding the compliance of the act on naturalization adopted by the authorities of Liechtenstein with the

[8] Compare Art. 1 of the Convention on certain issues concerning collision of citizenship acts of 12 April 1930 (*Journal of Acts* of 1937, no. 47, item 361) and Art. 3 para. 2 of the European Convention on Nationality of 6 November 1997 (European Treaty Series No. 166).

[9] Compare, e.g. Art. 7 of the European convention on citizenship, which allows parties to apply solely the bases of forfeiting citizenship mentioned in the Convention. These bases are the following: a) voluntary acquisition of citizenship of another country; b) acquisition of citizenship by means of fraud, supplying false information or misleading the relevant organs; c) voluntary service in foreign armed forces; d) conduct seriously harming the vital interests of the state; e) lack of real relation between the state and the citizen living abroad on the permanent basis; f) establishing the fact that – before the child's coming off age – the conditions provided in the national law, which led to obtaining citizenship, are no longer satisfied; g) adoption of a child if – in this way – the child acquires foreign citizenship of one or both adoptive parents.

[10] Compare Art. 15 para 2 of the Common Declaration on Human Rights, New York, 10 December 1948, http://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna_Deklaracja_Praw_Czlowieka.pdf (02.06.2019); Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary General,* 19 December 2013, UN Doc. A/HRC/25/28, pts 20-21.

[11] Compare Art. 8 of the Convention on restricting statelessness of 30 August 1961 (United Nations Treaty Series vol. 989); Council of Europe, *Recommendation No. R (99) 18 of the Committee of Ministers to member States on the avoidance and reduction of statelessness,* adopted on 15 September 1999 at the 679th meeting of the Ministers' Deputies, https://www.refworld.org/docid/510101e02.html (03.06.2019).

[12] See, e.g. W. Czapliński, *Międzynarodowe aspekty obywatelstwa* [International aspects of citizenship], Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1984, no. 3, p. 98. Similarly: H.E.H. Mosler, *The international society as a legal community, "Recueil des cours de l'Académie* de Droit International" 1974-IV, vol. 140, p. 130.

international law, recalled that "citizenship is a legal bond, at the foundation of which lies the fact of attachment, effectiveness of being and sentiments, as well as reciprocity of rights and duties. It [Citizenship] makes both a legal expression of the conviction that points to that the individual who was granted citizenship on the power of a legal act or in consequence of an act of authority, is actually more closely connected with the population of the state which confers the citizenship than with the population of another state."[13]

Beginning with the ruling passed in the case of *Micheletti*, the EU Court of Justice moved a step further and began to require the member states to take decisions in this respect, which should also be compliant with the requirements of the EU law. As it was emphasized, "on the ground of the international law, it is the responsibility of each member state, with the exception of the obligation to abide by the commonwealth law, to establish the conditions of granting and withdrawing the citizenship." The Court did not make it precise, though, which regulations of the EU law should be taken into consideration. It only stated that the member states cannot make acknowledgment of citizenship which was granted by another state dependent on fulfilment of additional conditions.[14]

At the moment the norms of the EU law do not formulate any concrete orders or prohibitions which would unite the member states in cases connected with granting citizenship or depriving individuals of one. Moreover, it is doubtful that the member states should decide to hand over to the European Union the competences to undertake actions in the matter under discussion.[15] It must be observed that in many cases it is very difficult to unambiguously admit that the given competence of a state is of the exclusive character, since there exist a series of domains in which the member states will be bound with certain norms and principles of the EU law (e.g. prohibition of discrimination, freedoms of the internal market), despite the fact that the very area of regulation itself remains within the sphere of their internal competences. In this context, one can point to such spheres as: property law, state ecclesiastical law, law on acts of marital status, geodetic and cartographic law, spatial management law, construction law, or to a considerable part of regulations of civil procedure.[16]

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[13] See the ruling of the International Court of Justice of 6 April 1955 concerning the case of *Nottebohm* (*Liechtenstein v. Guatemala*), ICJ Reports 1955, p. 23.

[14] See the ruling of the EU Court of Justice of 7 July 1992 concerning case C-369/90 *Mario Vicente Micheletti et al. vs. Delegación del Gobierno en Cantabria,* ECLI:EU:C:1992:295, pt. 10.

[15] G.R. de Groot, *Towards a European nationality law,* "Electronic Journal of Comparative Law" 2004, vol. 8, no. 3, p. 12.

[16] For instance, P. Saganek, *Podział kompetencji pomiędzy Unię Europejską a państwa członkowskie oraz w ramach Unii Europejskiej* [Division of competences between the EU and the member states and within the EU], In: J. Barcz (ed.), *Zasady ustrojowe Unii Europejskiej,* Warszawa 2010, p. 75.

Thus it needs agreeing that when a given situation displays a link with the EU law, the member states cannot avail themselves of the competences they hold in a completely free manner. Execution of these competences is subject to limitations resulting from the EU law, while the institution of European citizenship seems to confirm this conviction.[17] In the case of *Garcia Avello*, the EU Court of Justice did not find the bases to acknowledge its lack of competences to assess the legality of refusal by the Belgian authorities to agree on a change of children's family names. This was so despite the fact that cases connected with regulation of conditions behind registration of names basically belong to the internal competence of the member states. Meanwhile, the Court acknowledged itself to be the right institution to evaluate the national law. It further stated that in the context of rules regulating the family name, the fact that the complainant's children hold EU citizenship grants them protection against discrimination on the ground of nationality.[18] In the subsequent ruling, the Court stated, on the other hand, that a EU citizen has the right to deduct the alimony paid to the ex-spouse who resides in another member state in which the maintenance is not taxable. For this reason the Court concluded the "even if at the current stage of the development of community law direct taxes are the competences of the member states, anyway they are obliged to execute these competences with respect for the community law, in particular provisions of the treaty, which concern granting each citizen the right of free movement [...] and, in consequence, to abstain from every manifestation of discrimination, overt or veiled, due to nationality."[19]

In its rulings, the EU Court of Justice repeatedly reminded that EU citizenship is expected to constitute the fundamental status which citizens of the member states are entitled to.[20] The introduction of European nationality was meant not only to confirm the membership of the new political community, but also to contribute to formation of common European identity, the European *demos*. This required strengthening the identification of individuals with the EU and creation of a sense of commonwealth between European societies.[21] Whatever progress has been made in achiev-

[17] Compare the opinion of Spokesman General for the EU Court of Justice, M. Poiares Madura, presented on 30 September 2009 in connection with case C-135/08 *Janko Rottmann v. Freistaat Bayern*, ECLI:EU:C:2009:588, pt. 20.

[18] See the ruling of the EU Court of Justice of 2 October 2003 concerning case C-148/02 *Carlos Garcia Avello v. the state of Belgium*, ECLI:EU:C:2003:539, pts 23-29.

[19] See the ruling of the EU Court of Justice of 12 July 2005 concerning case C-403/03 *Egon Schempp v. Finanzamt München V,* ECLI:EU:C:2005:446, pt. 19.

[20] See, e.g. the ruling of the EU Court of Justice of 8 March 2011 concerning case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm),* ECLI:EU:C:2011:124, pt. 41; and the ruling on 8 May 2018 concerning case C-82/16 *K.A. et al. v. Belgische Staat*, ECLI:EU:C:2018:308, pt. 47.

[21] M. Gniadzik, *Ewolucja statusu obywateli Unii wobec państwa przyjmującego i państwa pochodzenia w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej* [The evolution of

ing the aforementioned goals, it needs emphasizing that their accomplishment demands that the EU should continuously adjust its activity to the changing political environment[22] An inseparable element of the process is identification of new challenges and threats which the given legislative or administrative practices of the member states pose to the status of the EU citizen. The challenges and threats were revealed by the EU Court of Justice in the rulings mentioned earlier in connection with registering family names and direct taxation. The very fact itself of the member states holding internal competences with reference to the domains in question has not been accepted by the EU Court to offer "a screen" permitting individual states to separate from the obligation to respect the rights granted to European citizens.

Bearing in mind the above is inasmuch important as to realize that while taking a decision on granting or depriving an individual of citizenship, a member state either opens to the person the possibility of availing himself/herself of protection and rights resulting from the EU law or bereaves the individual of these privileges. Each such decision therefore exerts a significant influence on both the personal situation of the individual as well as commitments of the other member states. It is on this basis that the EU and individual member states have the right to expect the relevant policies of the member states' authorities to be compliant with the primary obligations which they took upon themselves. The foundation behind such expectations and – simultaneously – a factor in restricting the states' freedom of action while defining the conditions of obtaining and forfeiting the national citizenship is thus the treaty-based principle of a loyal and sincere cooperation. In its positive aspect the principle in question obliges the member states, among others, to apply all possible and appropriate means to ensure that commitments resulting from the treaties or acts of derivative laws are executed. On the other hand, in the negative dimension, it imposes the duty on the states to refrain from taking such steps and means that could threaten the realization of the EU's goals.[23]

Making reference, in this place, to the principle of a loyal and sincere cooperation finds its sound justification under several considerations Firstly, by realizing the accepted goals contained in the treaties and running particular policies, the EU must rely on actions undertaken by individual member states. Secondly, taking into account the fact that the resourc-

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the status of EU citizens towards the host state and the state of origin in the light of the jurisdiction of the EU Court of Justice], Warszawa 2018, p. 3.

[22] The European Commission drew attention to this in its report concerning EU citizenship entitled "Strengthening Citizens' Rights in a Union of Democratic Change" (Luxemburg 2017).

[23] Compare Art. 4 para 3 of the Treaty on the European Union. Also, an extensive discussion on the principle can be found in M. Klamert, *The principle of loyalty in EU law,* Oxford 2014.

es and instruments at the disposal of the member states are much greater than those which the EU holds, the former can – on different occasions – "torpedo" the treaty-based targets intentionally or unintentionally. Thirdly, in the case there is a lack of particular or complementary regulations, it is the principle of a loyal and sincere cooperation that determines the bases of relationships between the EU and the member states. Fourthly, the principle in question is so general and – at the same time – flexible as to impose commitments of both the substantial and procedural character on the states.[24] Fifthly, the obligation to respect the principle of a loyal and sincere cooperation by the member states is not dependent on whether and what kind of competences the EU holds in the given domain. The capacity to regulate a particular matter can remain, even wholly, the responsibility of the member states (like in the case of acquiring and losing citizenship), yet – despite everything – the states will be bound by the content of the principle in question.[25]

Autonomy of the EU member states in defining the conditions of obtaining national citizenship

The question of the scope of influence by the institution of EU citizenship on the entitlements of the member states to define the principles of national citizenship, in reality, is brought down to the need for establishing whether the EU member states are legally obliged to treat citizenship as a peculiar type of liaison linking it with the individual, or whether the existence of such a bond is not an indispensable condition to grant citizenship to the individual. In the passus of the ruling of 1955, in the case of *Nottebohm*, the International Court of Justice pointed to the "fact of attachment", "the effectivity of being and feelings", and "the reciprocity of rights and duties" which are connected with holding citizenship.[26] How-

[24] J.T. Lang, *Developments, issues and new remedies – The duties of national authorities and courts under article 10 of the EC Treaty,* "Fordham International Law Journal" 2003, vol. 27, no. 6, p. 1904-1906.

[25] Compare the ruling of the EU Court of Justice of 2 June 2005 concerning case C-266/03 *Commission of European Communities v. the Great Duchy of Luxemburg,* ECLI:EU:C:2005:341, pt. 58; as well as the ruling of 14 July 2005 concerning case C-433/03 *Commission of European Communities v. the Federal Republic of Germany,* ECLI:EU:C:2005:462, pt. 64.

[26] The facts of this case are well known, still let us remind that it concerned Friedrich Nottebohm, a German citizen, who arrived in Guatemala in 1905, where he settled and began his business activity. At the beginning of 1939, he went to see his brother living in Liechtenstein and, in October, that is after the outbreak of WW2, he turned to the authorities of this state with the request to be naturalized. On 20 October 1939, Nottebohm was granted the citizenship of Liechtenstein. Then he returned to Guatemala and continued his activity of a businessman. In 1941, Guatemala declared war on Germans and Nottebohm – as a German citizen – was detained in 1943, deported to the United States and interned there. Additionally, the authorities of Guate-

ever, the above-mentioned sentence, provoked different opinions in the doctrine: critics' major reproach was that the Court was not able to give a single example within the case law, which would support the thesis of the necessity of existence of a real bond between the individual and the state as the condition to obtain citizenship.[27] It was also pointed then to the subsequent settlements by international courts and arbitration tribunals, in which the judges departed from the requirement of the so-called effective nationality and did not accept this construction as either a general principle of international law or as a lasting element of the common law.[28] The Spokesman General for the EU Court of Justice, while presenting the opinion in the case of *Micheletti*, stated even that the postulate of effective nationality stems from the long-forgotten "romantic epoch" of international relations.[29]

Nevertheless, the standpoint presented by the critics of the settlement in the case of *Nottebohm* seems to overlook a few vital factors. Internal regulations of the decisive majority (if not all) of states in the modern world require that the individual submitting a request for being granted citizenship should be connected with reasonably stable relationships with the state whose nationality is applied for. This was recalled, among others, in the provisions of the European Convention on Nationality of 1997. The Convention obliges the parties, while deciding on granting or retaining their citizenship in the case of succession, to be directed in particular by "the real and effective relationship of the interested person with the given state."[30]

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mala confiscated his whole property. The subsequent proceedings before the International Court of Justice were initiated by Liechtenstein, the authorities of which demanded restitution for the lawless actions taken against their citizen. In turn, Guatemala presented arguments that the authorities of Liechtenstein did not have the right to raise claims on the international arena, which were based on performing diplomatic care, since between Nottebohm and the Duchy of Liechtenstein there had not arisen a real citizen's bond. In the opinion of the defendant, Nottebohm had submitted his request for naturalization solely with the aim to exchange the status of a citizen of a country waging a war, that is Germany, for that of a neutral state and in this way avoid consequences of holding German citizenship before his return to Guatemala. The International Court of Justice, in its ruling, stated that the claims raised by Liechtenstein, founded on executing the diplomatic care, did not meet the justification of international law, since a real bond between Nottebohm and the state whose citizenship he had acquired in consequence of naturalization had not ensued. See more on the actual circumstances of the case in ICJ Reports 1955, op. cit., p. 13-16.

[27] See, e.g. J. Kunz, *The Nottebohm judgment,* "American Journal of International Law" 1960, vol. 54, no. 3, p. 553.

[28] See P.J. Spiro, *Nottebohm and 'genuine link': Anatomy of a jurisprudential illusion,* "Investment Migration Working Papers" IMC-RP 2019, no. 1, p. 12-16.

[29] See the opinion of Spokesman General for the EU Court of Justice, Tesauro, presented on 30 January 1992 concerning case C-369/90 *Mario Vicente Micheletti et al. v. Delegación del Gobierno en Cantabria,* ECLI:EU:C:1992:47, pt. 5.

[30] Compare Art. 18 para 2 (a) of the European Convention on Nationality (Strasbourg, 6 November 1997, European Treaty Series No. 166). In the explanatory report attached to the Convention, making direct reference to the establishments of the International Court of Justice in

The real relationship between the individual and the state is simultaneously a factor which, in certain situations, causes persons even formally not holding citizenship of the country they live in to be able to make use of the same legal protection as regular citizens of this state. This concerns, among others, the right of entry to "one's own country". According to the Human Rights Committee, the beneficiaries of this right are not only citizens, but any person "who, due to their particular relations or the status held in the given state, cannot be treated as someone completely alien."[31] The liaisons formed with the state of residence justify also the protection against deportation which a foreigner could be subject to as a result of the weight of the committed crime. In the case of *Beldjoudi against France*, the European Court of Human Rights decided that the legal situation of the complainant who held Algerian citizenship, did not differ in its essence from that of a regular French citizen. Mohand Beldjoudi was born in France and for some time even held French citizenship. Then, he forfeited the citizenship, yet regularly kept trying to regain it. He lived on the territory of France for almost forty years. He was educated in this country and got married to a French citizen. The only connection between the complainant and Algeria was the fact that he held Algerian citizenship.[32]

Thus, it will not be with exaggeration to state that if the real bond with the state of residence can make the foundation of granting the individual *quasi*-citizen's rights, obtaining full citizen's rights should require not a lower level of the individual's integration with the social life of the given state. This is confirmed on the level of the EU by the reaction to the introduction by some member states of the so-called citizenship-for-investors programs. The characteristic feature of the programs is a departure from the requirement of the real liaison with the state as the condition to acquire citizenship. Instead, a foreigner, by making certain capital investments, investments in real property, or in government bonds, is able to make use of the simplified and accelerated procedure of naturalization. Applicants can acquire the citizenship of such states as: Malta, Cyprus or Bulgaria, despite the fact that they never actually resided on their territories on a regular basis and over a longer period of time. Generally, the internal rules of the above-mentioned states do not formulate other premis-

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the case of *Nottebohm*, it was noted that the formulation "real and effective relationship" must be understood as "significant connection between the interested person and the state", see: Explanatory Report to the European Convention on Nationality, 6 November 1997, *ibidem*, pt. 113.

[31] Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)*, adopted at the sixty-seventh session of the Human Rights Committee, on 2 November 1999, Doc. CCPR/21/Rev.1/Add.9, pt. 20.

[32] See the ruling of the EU Court of Human Rights of 26 March 1992 concerning the case of *Beldjoudi v. France*, complaint no. 12083/86, pt. 77.

es, either, satisfying of which could testify to the wish to create a liaison between the person applying for citizenship and the given state.[33]

When the above-mentioned solutions appeared in the EU, they were accompanied by – as it can be rightly expected – a lot of criticism. In its resolution under the title "EU citizenship for sale", the European Parliament expressed its deep concern over the fact that the practice of granting citizenship by some member states does not take into account the requirement of a real bond which should connect the citizen with the state. It was stressed that programs of direct or indirect sale of national citizenship – and in consequence also EU citizenship – stand in apparent contradiction with the very essence of European citizenship. It was appealed, in particular to Malta, but also to the other states which had accepted similar regulations, to adapt their rules to the requirements of the international law and the values on which the EU rests.[34] Moreover, Vice-President of the European Commission, Viviane Reding, drew attention of the member states to the fact that they are obliged to use their competences to confer citizenship in the spirit of solidarity and with full awareness of all consequences that result from this act. At the same time, she appealed for adopting such regulations in individual member state's national law that would permit to confer citizenship exclusively to persons who are connected with the given member state by a genuine and effective relationship.[35]

The significance that is attached in the EU to the necessity of a proper liaison between the individual and the state that grants its citizenship to the former, finds its justification in the influence of the act of naturalization on the remaining states' commitments, which are contained in the Treaty. These states cannot restrict the rights granted to citizens of the other member states in an unjustified manner and – the more so – question the circumstances and ways of obtaining their citizenships.[36] Hence the very

[33] The European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Investor citizenship and residence schemes in the European Union"*, Brussels, 23.01.2019, Doc. COM (2019) 12 final, pt. 2.3.

[34] See: The Resolution of the European Parliament of 16 January 2014, p. 117-118. See also: The Resolution of the European Parliament of 15 November 2017 on the rule of law in Malta (2017/2935(RSP)), *Journal of Laws of the EU* C 356 of 4.10.2018, p. 32 and of 12 February 2019 on application of the resolutions of the Treaty, concerning EU citizenship (2018/2111 (INI)), Doc. P8_TA-PROV (2019) 0076, pt. 34.

[35] See: Speech by Vice-President of the European Commission, EU Justice Commissioner, V. Reding: *Citizenship must not be up for sale,* 15 January 2014, Speech/14/18; https://europa.eu/rapid/press-release_SPEECH-14-18_en.htm (03.06.2019).

[36] See the ruling of the EU Court of Justice of 7 July 1992 concerning case C-369/90 *Mario Vicente Micheletti*..., pt. 10 and the ruling of 19 October 2004 concerning case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department,* ECLI:EU:C:2004:639, pts 36-38.

limited possibilities which they possess to prevent and counteract situations where, e.g. a foreigner, not being able to acquire citizenship or the right of stay in the chosen member state, will obtain citizenship of another member state and – now as a EU citizen – will be able to carry out his/her assumed primary goals.[37] The latter are not always connected with justified reasons to use the right to move and stay within the EU, since a person acquiring EU citizenship may strive to achieve aims which are against the law. In the Report on the programs of citizenship for investors, the European Commission perceived numerous areas covered with international cooperation, in which the risk of abuse is very clear.[38] An effective realization of treaty-based goals, on the other hand, rests on a high level of trust of the member states in their own legal systems. At the foundation of this trust lies the conviction that the other member states will grant their citizenship while being directed by the accepted principles and values.

The autonomy of the member states in establishing the premises and principles behind forfeiture of citizenship

The membership of the EU requires that not only regulating the conditions of obtaining national citizenship, but also determining premises and conditions of forfeiting it should be carried out with paying respect to the EU law.[39] In the case of *Rottmann*, the Court decided that "it is obvious that the situation of an EU citizen whom, like the complainant appearing before the national court, annulling of the decision to grant citizenship, issued by the authorities of a member state, concerns, i.e. one resulting in that following the forfeiture of citizenship of the member state of origin, this citizen can be deprived also of the status guaranteed by Art 17 EC [presently Art. 20 of the Treaty of the Functioning of the EU (TFEU)] and the rights related to it, belongs – in view of its character and effects – to the scope of the Union's law."[40]

The above-presented case concerned an Austrian citizen who – as a result of naturalization – acquired German citizenship. According to Austrian law, in consequence of obtaining citizenship of another state, the per-

[37] D. Kochenov, *'Ius tractum' of many faces: European citizenship and the difficult relationship between status and rights,* "Columbia Journal of European Law" 2009, vol. 15, no. 2, p. 183.

[38] The problem is discussed more extensively in: The European Commission, *Report of the Commission on…*, pt. 4.

[39] S. Hall, *Loss of Union citizenship in breach of fundamental rights,* "European Law Review" 1996, vol. 21, no. 2, p. 129-143.

[40] Judgment of the Court (Grand Chamber) of 2 March 2010. *Janko Rottman v Freistaat Bayern*. ECLI:EU:C:2010:104,.

son in question forfeits Austrian citizenship. This was so in the case of the complainant appearing before the national court. In the course of the proceedings of acquiring the citizenship, Janko Rottmann concealed the fact before the German authorities that in his country, in Austria, there were proceedings in a criminal case against him in progress and that the relevant regional court issued a domestic arrest warrant to apprehend him. Upon finding out about those facts, it was decided to annul the decision of conferring German citizenship to the complainant, with retroactive effect. It was said in the justification that the acquisition of the citizenship had been successful upon employment of a stratagem, through concealing relevant information impacting the content of the decision. Not accepting that settlement of his case, the complainant applied for repeal of the decision on withdrawal of German citizenship. He claimed that the said decision made him stateless, which – in consequence – also caused him to lose EU citizenship and the rights that are related to it. In this situation, the Federal Administrative Court in Austria wanted to learn whether it is contrary to European Union law for a member state to withdraw from a citizen of the Union the nationality of that state acquired by naturalization and obtained by deception inasmuch as that withdrawal deprives the person concerned of the status of citizen of the Union. [41]

In passing its judgment the EU Court of Justice observed at the very beginning that each state "has the right to protect the particular attitude towards solidarity and loyalty between this state and its citizens, as well as the reciprocity of rights and duties which lie at the foundation of the liaison of citizenship."[42] They admitted thus, in an implied manner, that as the existence of a real bond with a state makes the condition of granting citizenship to the individual, then disappearance of such a bond, or actually not forming of one (as it happened in the case under discussion) can make the basis of depriving a person of citizenship. This, however, does not exempt the national court from the obligation to check whether the decision of depriving a person of citizenship respects the principle of proportionality. It gives rise to the necessity of taking into account the consequences which the said decision causes to the interested person and the members of his/her family with reference to the possibilities of using the rights which EU citizens are entitled to. Bearing the circumstances of the analyzed case in mind, the EU Court of Justice called primarily to examine "whether the loss of citizenship is justified with reference to the seriousness of the offence committed by the person, the time which elapsed between the issuance of the decision on conferring citizenship and that of

[41] *Ibidem*, pts 22-35.

[42] *Ibidem*, pt. 51.

issuing the decision on withdrawing it, as well as the possibility of restoring to the interested individual the citizenship of the state of his/her origin."[43]

The second possibility of assessing the degree of autonomy of the EU member states, as regards taking decisions on forfeiture of citizenship by the individual, appeared in the case of *Tjebbes et al. v. Minister van Buitenlandse Zaken*. That case concerned four women, citizens of Holland, who had their permanent abode in different third states and simultaneously held their citizenships. Because the validity of their Dutch passports expired, each of the complainants applied to the relevant Dutch consulate to have a new document issued. All the applications were rejected, though. The refusal to issue new passports was justified with that in the light of the national law, the complainants had lost their Dutch citizenship, since for at least ten years uninterruptedly they resided outside the Netherlands. The national law provides that the course of the 10-year term is broken when the interested party lives on the territory of Holland or of another EU member state for the minimum of one year during that time, or when during the analogous period they obtain the certificate of holding Dutch citizenship, the identity card or the passport. The complainants did not fulfil any of the conditions within the allotted period. Deciding the appeals against the judgements which were not favorable to them as passed by the District Court in the Hague, the Dutch Council of State had doubts whether it was possible to examine the compliance of the national regulation with the principle of proportionality, which provides for the *ex lege* loss of citizenship of a member state and in what way such an examination is to be conducted eventually.[44]

Deciding the case, the EU Court of Justice was of the opinion that the member states have the right to treat citizenship as an expression of a real relation of the individual and the state and pin the loss of citizenship on the disappearance of such a liaison. It acknowledged the solution adopted in the national law to be justified as the habitual residence of nationals of the Kingdom of the Netherlands, for an uninterrupted period of 10 years, outside that member state and outside the territories to which the EU treaties apply, may be regarded as an indication that there is no such link. It was observed, at the same time, that the complainants had had the chance of breaking the course of the term through performing relatively simple actions which would indicate that they wanted to retain Dutch citizenship.[45] Nevertheless, making reference to the earlier settlement in the case of *Rottmann*, the Court reminded of the fact that when depriving

[43] *Ibidem*, pts 55-56.

[44] See the ruling of the Court of 12 March 2019 concerning case C-221/17 *M.G. Tjebbes, G.J.M. Koopman, E. Saleh Abady, L. Duboux v. Minister van Buitenlandse Zaken*, ECLI:EU:C:2019:189, pts 13-26.

[45] *Ibidem*, pts 35-38.

of citizenship of a member state is connected with losing the status of an EU citizen, relevant organs are obliged to consider the consequences which the interested person and members of his/her family may bear as a result of losing the citizenship. Depriving the individual of citizenship will be incompliant with the principle of proportionality if "the national regulations do not permit at any moment to make an individual assessment of consequences" of the decision taken. The consequences cannot be hypothetical, though, and have to take into account the right to respect family life and the best interest of the child, which are guaranteed in the EU Charter of Fundamental Rights. In the first case, the national court should examine if depriving the complainants of citizenship will not cause them to experience "special difficulty in going to the Netherlands or another member state with the aim to maintain real and regular relations with members of their families, carry on their professional activity there, or take measures necessary to carry out such an activity." The other of the indicated premises requires, in turn, considering whether automatic depriving a child of citizenship, tied to the forfeiture of citizenship by either of the parents and motivated with the will to protect the uniformity of citizenship within the family, lies in the best interest of the minor in the given case.[46]

On the ground of EU law, the principle of proportionality rises to the rank of one of the main criteria which allow evaluating the compliance of the member states' decisions on depriving the individual of citizenship with law.[47] The Court of Justice simultaneously pointed to a series of factors which should facilitate making such an assessment. They include, among others, the weight of the crime, which can result in forfeiture of citizenship, the length of time of holding citizenship of the given state, the possibility of regaining the citizenship held earlier, the impact of forfeiting the citizenship on personal and family life and – in relevant cases – also effects of such a decision on protection of the best interest of children. It needs observing, however, that in none of the above-presented cases, did the Court attempt to independently assess the proportionality of the decision on depriving the complainants of citizenship from the point of view of the proposed criteria. They accepted that it is the responsibility of the national court to conduct relevant examination. This, in turn – as indicated in the doctrine – may give rise to a state of legal uncertainty in EU citizens and lead to differing evaluations of similar situations by courts in individual member states.[48] In this context, it is worth mentioning the fact that German Federal Administrative Court, upon having received the re-

[46] *Ibidem*, pts 44-48.

[47] C. Vlieks, *'Tjebbes and Others v. Minister van Buitenlandse Zaken': A next step in European Union case law on nationality matters?,* "Tilburg Law Review" 2019, vol. 24, no. 2, p. 143-144.

[48] H. van Eijken, *European citizenship and the competence of member states to grant and to withdraw the nationality of their nationals,* "Merkourios-Utrecht Journal of International and Eu-

ply to their question of preliminary ruling in the case of *Rottmann*, finally did not state that depriving the complainant of citizenship which had been obtained by means of fraud should violate the principle of proportionality. The Court acknowledged the argument that it did not cause particularly burdensome consequences to his family or professional life to be convincing. After all, the complainant had retained the right to stay on the territory of Germany, was able to leave the territory at any moment and then return. It was also reminded that Janko Rottmann, after forfeiting his German citizenship, could apply for regaining Austrian citizenship, yet he did not avail himself of this possibility.[49]

The case law of the EU Court of Justice leaves unanswered several vital questions connected with the scope of autonomy of the member states in the area under discussion. Departing from the assumption that EU citizenship is to constitute the fundamental status granted to nationals of the member states and there is a perceivably steady tendency towards strengthening this status, it would be necessary to establish if the norms of the EU law do not secure greater protection against statelessness than classic international law. As a matter of fact, it is an undisputable thing that in the decisive majority of cases, depriving the individual of citizenship of a member state will result in statelessness. As regards the case of *Tjebbes*, the Court of Justice did not have an opportunity to take their stand relating to the problem, since all the complainants held double citizenship and the loss of the Dutch one did not cause them to become stateless people. The situation looked different in the case of *Rottmann*, where the complainant due to having been deprived of – first – Austrian and then – German citizenship, did stay stateless. In his case, though, there indeed arose the possibility of making a relevant evaluation, still the Court did not avail itself of this opportunity and based the settlement on the norms of international law. The judges noticed that both the Convention on Restricting Statelessness of 1961 and the European Convention on Citizenship of 1997, which Austria is a party of, admit depriving individuals of citizenship even if in the effect of this the person becomes stateless in the situation where the citizenship was acquired by means of fraud.[50] The problem here is that obtaining German citizenship by the complainant turned out legally ineffective and despite this, he did not regain Austrian citizenship held before. In this situation, it would be worth considering if the obliga-

ropean Law" 2010, vol. 27, no. 72, p. 69; M. van den Brink, *Bold, but without justification? Tjebbes,* "European Papers" 2019, vol. 4, no. 1, p. 413.

[49] The ruling of the Federal Administrative Court of 11 November 2010 - BVerwG 5 C 12.10; ECLI:DE:BVerwG:2010:111110U5C12.10.0, pts 31-35.

[50] See the ruling of the EU Court of Justice of 2 March 2010 concerning case C-135/08 *Janko Rottmann…*, pt. 52.

tion of a loyal and sincere cooperation, which is so readily addressed to the EU member states, does not require the states to effect a certain minimal coordination of the rules relating to the sphere of conditions of forfeiture of citizenship.[51] The goal of this coordination would be ensuring that the decision on depriving individuals of EU citizenship is automatically subject to revoking in cases when acquisition of citizenship of another state proves ineffective in the end and the premise behind the forfeiture of the citizenship is to be obtaining citizenship of another state.

Final remarks

The review made in this study allows noticing an unquestionable influence of the institution of EU citizenship on the freedom of the member states to determine the conditions and the premises of acquiring and forfeiting national citizenship. Thus, it is more and more often that not only actions of states which, in an unjustified way, limit the rights granted to EU citizens, but also those which making use of these rights depend on, become a subject of legal international evaluation. Ulli Jessurun d'Oliveira has correctly observed that such interconections may contribute to a symptomatic reversion of the dependence between national citizenship and European citizenship.[52] Since the latter is in play, when a member state grants or deprives an individual of its citizenship, this circumstance cannot be ignored while formulating the content of national regulations on citizenship. This happens despite the fact that in line with provisions contained in the treaties, it is EU citizenship which is dependent on national citizenship and – in consequence – it could seem devoid of a real impact on the conditions behind its acquisition or forfeiture.

The range of influence of the institution of EU citizenship on national rules concerning nationality is not too extensive for the time being for one to be able to speak of considerable restriction of the member states' own competences. The EU, with all certainty, does not hold the rights, and will rather not acquire them quickly, to harmonize the legal regulations of the member states in the area being discussed. The framework of the EU's functioning does not leave any doubts that in the accepted and applied legislative solutions, these states cannot depart from the principle saying that citizenship, as a legal institution, externalizes the existence of sufficiently stable and lasting relations with the individual. It is only such, but as it

[51] K. Hailbronner, *Nationality in public international law and European law,* http://eudo-citizenship.eu/docs/chapter1_Hailbronner.pdf , pt. 1.6.2. (04.06.2019).

[52] U.J. d'Oliveira, *Court of Justice of the European Union: Decision of 2 March 2010, case C-315/08 'Janko Rottmann v. Freistaat Bayern'. Case Note 1: Decoupling nationality and Union citizenship?*, "European Constitutional Law Review" 2011, vol. 7, no. 1, p. 147.

turns out in practice – fairly often not as much – a requirement that finds its justification in placing EU citizens in the direct center of integrative processes and makes both a premise and an effect of their current position.

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OBYWATELSTWO UE A KOMPETENCJA WŁASNA PAŃSTW CZŁONKOWSKICH DO REGULOWANIA WARUNKÓW NABYCIA I UTRATY OBYWATELSTWA KRAJOWEGO

Streszczenie: Zdolność państw do podejmowania samodzielnych decyzji w przedmiocie nabycia i utraty obywatelstwa krajowego zawsze była uważana za nieodzowny element suwerenności państwowej. Na gruncie prawa UE, państwa członkowskie zachowują te uprawnienia. Biorąc natomiast pod uwagę, że obywatelstwo UE zostało oparte na obywatelstwie krajowym, to państwa członkowskie są w istocie władne określać, jakie osoby uzyskają status obywatela UE i związane z tym statusem uprawnienia. Celem niniejszego opracowania jest próba ustalenia, w jakim stopniu ustanowienie obywatelstwa UE wpłynęło na kompetencję państw członkowskich do decydowania o sprawach związanych z obywatelstwem krajowym.

Słowa kluczowe: OBYWATELSTWO UE, OBYWATELSTWO KRAJOWE, NABYCIE, UTRATA, LOJALNA WSPÓŁPRACA, PODZIAŁ KOMPETENCJI