

# Journal of Contemporary European Research

Volume 12, Issue 1 (2016)

Research Article

## European Governance of Citizenship and Nationality

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### ***Citation***

Maas, W. (2016). 'European Governance of Citizenship and Nationality', *Journal of Contemporary European Research*. 12 (1), pp. 532-551.

First published at: [www.jcer.net](http://www.jcer.net)

## Abstract

The ability of a state to determine who its citizens are is a core element of sovereignty, yet even in this area coordination in the European Union has arisen as member states adjust their policies regarding citizenship acquisition and loss to take into account the European project. Furthermore, EU citizenship grants extensive rights that member states must respect, though the only way to become an EU citizen and acquire these rights remains through citizenship of a member state. This article sketches the development of EU citizenship from the 1950s to the present, mapping its evolution onto the phases of European governance utilised in this special issue. The search for closer coordination and common guidelines concerning citizenship flows from functional needs inevitably generated by superimposing a new supranational political community over existing national ones, resulting in shared governance within the framework of member state autonomy. Though welfare states and social systems in Europe remain national and jurisprudence safeguards the ability of member states to exclude individuals despite shared EU citizenship, legal judgments emphasise that member state competence concerning citizenship must be exercised in accordance with the Treaties and that member state decisions about naturalisation and denaturalisation are amenable to judicial review carried out in the light of EU law.

## Keywords

EU citizenship; Free movement; Rights; Multilevel citizenship; Governance

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Citizenship is a special case of European governance because of its location at the heart of state sovereignty. More than perhaps is true for any other policy area, states are reluctant to abdicate or transfer competence over the attribution of citizenship, because the competence to determine citizenship is the power to decide who is a member of the polity (Maas 2013a; Weber 1964). It is a classic tenet of international relations that states relinquish sovereignty to the extent they abrogate or infringe upon their power to determine nationality (Maas 2013b). Yet the development of supranational governance in the European Union is characterised by increased power sharing and coordination between the European and the national levels (see especially the contributions by Caviedes, Guth and Tömmel, this issue), and this is true also for citizenship. Over time, coordination on issues of citizenship acquisition and loss has arisen. Furthermore, European Union citizenship now grants extensive rights that member states must respect, but the only way to become an EU citizen and acquire these rights remains through citizenship of a member state. Policymaking regarding citizenship follows the general pattern by which European governance evolved to its current form in response to conflicts between the European and the national government levels (Tömmel 2016), despite the centrality of citizenship to state sovereignty. After tracing this process from its beginnings, the article next considers the constitutionalisation of EU citizenship after the Maastricht Treaty, focusing on court interpretation and member state responses. The article next analyses how governance in a multilevel system impacts questions of citizenship and nationality, illustrated with European debates about electoral rights, diplomatic and consular protection, naturalisation, denaturalisation, and the search for closer coordination and common guidelines. The final section reconsiders free movement within Europe as the central element of shared citizenship.

The key closing point is to query the limits of the principles of equality and non-discrimination and thereby to question the effectiveness of common European rights encapsulated in EU citizenship.

## CITIZENSHIP AND FREE MOVEMENT

In order to overcome deadlocks, European policymaking continuously oscillates between hierarchical and non-hierarchical modes of governance, often mixing the two, as the Union strives to create the procedural and institutional framework for balancing the diverging policy objectives of the European and the national government levels and to promote convergence among those of the member states (Tömmel 2016). The evolution and expansion of EU policymaking can be broken down into four phases. The first, in the 1950s and 1960s, was the attempt to implement at the European level direct forms of hierarchical intervention based on the traditional policy model of nation-states. Except for the customs union, a deregulatory exercise in 'negative' integration, this failed because of the hesitance of the European institutions to exercise their competences fully, combined with strong resistance from the member states against intervention from above. The relative ease of negative integration ('measures increasing market integration by eliminating national restraints on trade and distortions of competition' (Scharpf 2010: 91)) over positive integration ('common European policies to shape the conditions under which markets operate' (ibid.)) reflects a mode of governance in which national policy is severely restrained in its problem-solving capacity while European policy is constrained by the lack of intergovernmental agreement (ibid.). In a second phase beginning in the late 1960s, the Commission pushed for common norms and standards that were legally binding, but met enormous resistance from national governments and ended with only some fairly rudimentary principles (Tömmel 2016). In the 1970s and early 1980s, European legislation increasingly took the form of framework regulations or directives that defined only the objectives to be achieved, leaving implementation to the discretion of the member states.<sup>1</sup> In a third phase epitomised by the single market project of the Delors Commission, European authorities relied on market mechanisms for inducing policy innovation in the member states – the result was a mix of hierarchical and non-hierarchical governance modes, in which the single market and related policy areas (such as monetary union) were subject to clearly defined rules, while coordination of national policies was the preferred governance approach in new policy areas. In a fourth phase beginning in the mid-1990s, new procedures and institutional arrangements (such as the Open Method of Coordination) aimed at shared governance, with the member states retaining their autonomy. These new governance approaches sometimes even decentralised competences to national governments in policy areas that had earlier been the exclusive domain of European authorities (Tömmel 2016).

The impact of this evolution in European decision-making and policymaking processes on citizenship has in the first analysis been limited, because citizenship acquisition and loss is explicitly identified in the treaties as a matter of exclusive member state competence. At first sight, it thus makes no sense to speak of European governance of citizenship, because citizenship remains an area reserved to member state competence, unlike almost all other policy areas. Whereas most policy areas have at least some European dimension, decisions on the attribution or withdrawal of member state nationality at first sight admit no role for European governance because these decisions are carried out solely by the member states, with no input from European institutions. This situation also appeared unchanged by the introduction of EU citizenship into the treaties at Maastricht, because the only way to acquire EU citizenship is through citizenship of a member state, and the Amsterdam Treaty explicitly added that '[c]itizenship of the Union shall complement and not replace national citizenship'.<sup>2</sup> Indeed, subsequent efforts to give EU citizenship an independent status have so far failed to be adopted in the treaties. Thus, for example, the first comprehensive draft of the 2003 constitutional treaty specified that each EU citizen 'enjoys dual citizenship, national citizenship and European citizenship; and is free to use either, as he or she chooses; with the rights and duties

attaching to each', but this was dropped in subsequent drafts because of the objections of some of the larger member states (Maas 2007: 85). Some have argued that the Lisbon Treaty's new formulation (replacing the Amsterdam Treaty's 'complement and not replace' phrasing with a new formulation that now specifies that 'Citizenship of the Union shall be additional to national citizenship') is meaningful, intentional, and far from cosmetic (Waele 2010: 322). Yet it remains far from certain that changing the description of EU citizenship from complementary to additional has had any impact on its legal status.

Member states have always asserted their monopoly on defining who is a citizen for the purposes of EU law. For example, already in the postwar origins of European integration in the Paris (1951) and Rome (1957) Treaties, West Germany declared that '[a]ll Germans as defined in the Basic Law for the Federal Republic of Germany shall be considered nationals of the Federal Republic of Germany' and thus covered under Community law in areas of Community competence.<sup>3</sup> This meant that the benefits of Community law extended to individuals residing in East Germany, but not corporations and other entities which would otherwise be considered legal persons (Bleckmann 1978). Similarly, upon joining the Community, the United Kingdom attached a declaration to its 1972 Accession Treaty, updated in 1982 following revisions to its nationality legislation, specifying that British citizens, British subjects with the right of abode in the UK, and British Dependent Territories citizens with a connection to Gibraltar all qualified as UK citizens for the purposes of Community law (United Kingdom 1983). The ECJ specified in the *Kaur* case that this declaration was an 'instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty *ratione personae*', thus confirming the UK's authority to determine by itself who should be considered a British citizen for EU purposes (Case C-192/99 *Kaur* [2001] para 24). More broadly, the European Court had established in the *Micheletti* case that, under international law, 'it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality' (Case C-369/90 *Micheletti* [1992] para 10).

The qualification that member states could lay down the conditions for acquiring or losing nationality only while 'having due regard to Community law' appeared to open up a role for European institutions. Indeed, during the Maastricht negotiations, the European Parliament resolved that the 'Union may establish certain uniform conditions governing the acquisition or loss of the citizenship of the Member States, by virtue of the procedures laid down for the revision of the Treaty' (European Parliament 1991). But the member states did not take up this idea, and at the Edinburgh Summit following the Maastricht Treaty (discussed below), the member states attached a declaration that 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the nationality law of the Member State concerned' (Maas 2014a: 415).

That formulation disappointed those who had been hoping for an independent status for EU citizenship. As far back as its 1975 report *Towards European Citizenship* (European Commission 1975), the Commission had noted that the

Community does not at present have jurisdiction over the rights of persons, with the exception of economic and social rights, and that European citizenship, which does not exist at present, will take the first step towards becoming a reality only with the election of the European Parliament on the basis of universal suffrage and the implementation of point 11 concerning special rights

a reference to the 1974 agreement of the member state leaders to 'study the conditions and the timing under which the citizens of the nine Member States could be given special rights as members of the Community'.<sup>4</sup>

Furthermore, there had long been suggestions that naturalisation policies should be harmonised. For example, a 1985 European Parliament resolution on a common migration policy, besides advocating giving citizens of other member states the right to vote in local and European elections, also suggested that member states should reorganise their naturalisation policies: 'In order to permit the integration of migrants, [the European Parliament] asks that measures to assist the naturalization of migrants who opt for naturalization on a voluntary basis should be implemented by national legislation' (European Parliament 1985: 467).<sup>5</sup> Indeed, in legal circles the dominant view was that free movement legislation would ultimately mean concurrent jurisdiction over nationality; one author wrote that 'the free movement of persons implies that Member States should not be left entirely free unilaterally to define their nationality for Community law purposes' (Evans 1991: 190). Despite the fact that the *Micheletti* case specified that member states must exhibit 'due regard to Community law' (Case C-369/90 *Micheletti* [1992] para 10) in their policies regarding citizenship acquisition and loss, it is difficult to find practical limitations on member state competence in the area of nationality.

### MAASTRICHT'S CONSTITUTIONALISATION OF EU CITIZENSHIP

European law as interpreted by the European Court in Luxembourg is correctly identified as 'one of the main motors of governance in Europe' (Cichowski 2007: 242), which explains why inserting the concept of 'Union citizenship' into the treaties is so important. Without the concept of 'citizenship' in the treaties, the Court needed to rely on other concepts such as the aim of promoting the free movement of persons; the insertion of 'citizenship' meant the Court could invoke a new and firmer basis for promoting the 'ever closer union among the peoples of Europe' promised since the 1957 Treaty and the 'broader and deeper community' promised in the 1951 Treaty (Maas 2005). Following years of inconclusive efforts to translate lofty rhetoric into concrete rights – from postwar discussions of common citizenship through proposals such as that to introduce 'a European citizenship, which would be in addition to the citizenship which the inhabitants of our countries now possess' (Italian Prime Minister Giulio Andreotti at the First Summit Conference of the Enlarged Community in October 1972, discussed in Maas (2007: 31)) – the Maastricht Treaty finally achieved what many leaders had long advocated. The European Parliament had made several recommendations concerning citizenship in its 1984 Draft Treaty establishing the European Union (DTEU), which announced that:

citizens of the Member States shall *ipso facto* be citizens of the Union. Citizenship of the Union shall be dependent upon citizenship of a Member State; it may not be independently acquired or forfeited. Citizens of the Union shall take part in the political life of the Union in the forms laid down by the Treaty, enjoy the rights granted to them by the legal system of the Union and be subject to its laws (DTEU Article 3)

but this idea was not included in the 1985 Single European Act, which made little reference to citizenship.

The Maastricht Treaty declared that 'Citizenship of the Union is hereby established', that '[e]very person holding the nationality of a Member State shall be a citizen of the Union', and that EU citizenship included a range of rights: the right to move and reside freely within EU territory, the right to vote and to stand as a candidate in municipal and European elections in the member state of residence, the right to protection by the diplomatic or consular authorities of any member state, the right to petition the European Parliament, and the right to apply to a new European Ombudsman (article 8 of the Treaty, discussed in Maas (2007)).

Given the lack of significant new rights, the reception among scholars was initially tepid. One 1995 textbook concluded that ‘Union citizenship is best seen as a *sui generis* status entitling a Member State national to enjoy, qua Union citizen, certain rights and obligations in certain areas covered by the EC Treaty’ (Handoll 1995: 310). Others suggested that EU citizenship was simply a ‘cynical public relations exercise’, ‘fancy words on a piece of paper’, and ‘nearly exclusively a symbolic plaything without substantive content’ (Guild 1996: 30; Jessurun d’Oliveira 1995: 82; Weiler 1998: 13 respectively). However, as in many other policy fields, functional needs over time place limits on national sovereignty; in this case, the free movement rights at the core of EU citizenship limit member states’ exclusive competence over citizenship law. Legal scholars now recognise that, if

there is one lesson to be learnt from Union citizenship, it is that the law develops, and if there is a second lesson it is that the underlying logic of Union citizenship is what largely determines the path of that development (Davies 2011: 8).

Similarly, political scientists now argue that ‘citizenship rights have had an astonishing career from being a rather meaningless Treaty addition to being a central tenet of EU law’ – and that prohibiting restrictions on free movement, coupled with the injunction against nationality-based discrimination, has ‘led to a significant broadening of rights of EU citizens, and resulting difficulties of member states to restrict social benefits, and increasingly even of shaping their national citizenship law’ (Schmidt 2011: 20, 21).

An analysis based on European rights is necessarily formalistic, because it is about hierarchical or regulatory governance: EU law determining what member states can and cannot do. Yet beyond the formal adaptation of member state policies there is also the ‘governance of governance’ approach, in which member states themselves adapt their policies, influenced by developments at European level. One example of European integration shaping national citizenship is the *Chen* case. As part of the Good Friday Agreement, a 1999 amendment to the Irish constitution specified that Irish citizenship was the ‘birthright of every person born in the island of Ireland’, including Northern Ireland.<sup>6</sup> Following legal advice and seeking to evade China’s ‘one-child policy’, Man Lavette Chen, a wealthy Chinese businesswoman working in the UK for a firm owned by her husband, travelled to Belfast to give birth to her daughter, Kunqian Catherine Zhu, following which she sought a UK residence permit on the basis of the baby’s EU (Irish) citizenship (Kochenov and Lindeboom 2016). Though the baby’s Irish citizenship was never in question, UK authorities initially refused to extend a residence permit and the case was referred to the European Court. The Advocate General in the case explained that when a future parent decides that the future child’s welfare

requires the acquisition of Community nationality in order to allow him to enjoy the rights associated with that status, and in particular the right of establishment under Article 18 EC, there is nothing ‘abusive’ about taking action, in compliance with the law, to ensure that the child, when born, satisfies the conditions for acquiring the nationality of a Member State’ (Case C-200/02 *Chen and Zhu* [2004] Opinion of Advocate General Tizzano, para 120).

He continued that the ‘fact is that the problem, if problem there be, lies in the criterion used by the Irish legislation for granting nationality, the *ius soli*, which lends itself to the emergence of situations like the one at issue in this case’ (ibid, para 124), and that Irish nationality law could have included further conditions to avoid *ius soli*, but ‘there is no such additional condition in Irish legislation, or in any event no such condition was applicable to Catherine’ (ibid, para 125).

The *Chen* case was still undecided when the Irish government proposed the Twenty-Seventh Amendment of the Constitution of Ireland in March 2004 to remedy what the Justice Minister called an ‘abuse of citizenship, by which it is conferred on persons with no tangible link to the nation or the State whether of parentage, upbringing or of long-term residence’; this ‘devalues the concept of

citizenship' because any child born on the island of Ireland is entitled to Irish citizenship and, as 'an Irish citizen, the person is also an EU citizen with all the rights of free movement and other treaty rights that go with that status'.<sup>7</sup> The amendment proposed to specify that a baby born in Ireland 'who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality'. Despite parliamentary opposition, the government proceeded to put the amendment to referendum, which passed on 11 June 2004 – the same day as EU and local elections – with a turnout of almost 60 per cent and a majority of 79 per cent of valid votes in favour of the amendment.<sup>8</sup> By the time the *Chen* case was decided in October, then, the Irish 'loophole' had closed.<sup>9</sup> *Chen* reaffirmed the *Micheletti* formulation:

Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality and it is not permissible for a Member State to restrict the effects of the grant of the nationality 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 (Case C-200/02 *Zhu and Chen* [2004] para 37).<sup>10</sup>

Member states could not question other member states' decisions about nationality (in this case baby Catherine's Irish citizenship by virtue of her birth in Belfast). This underscored the desirability of coordinated governance.

## COORDINATED GOVERNANCE OF CITIZENSHIP

Increased cross-border migration and family formation leads to functional needs for basing access to citizenship rights on residence rather than nationality. These functional needs are independent of any appeal to the 'European idea'; instead, they reflect coordination difficulties inevitably generated by superimposing a new supranational political community over existing national ones.<sup>11</sup> There has been sporadic political support for increasing the role of EU institutions in the governance of citizenship. For example, as discussed above, even before the Maastricht Treaty was passed, the European Parliament passed a resolution stating that '[t]he Union may establish certain uniform conditions governing the acquisition or loss of the citizenship of the Member States, by virtue of the procedures laid down for the revision of the Treaty' (European Parliament 1991). Despite the rejection of a greater EU role in determining citizenship in the Maastricht and Amsterdam Treaties, coordination is necessary, as illustrated below with the examples of electoral rights, diplomatic and consular protection, naturalisation, and denaturalisation.

### *Electoral Rights*

A hallmark of democratic citizenship is the right to participate in politics, both passively (helping to select officeholders, for example through the right to vote) and actively (participating in governing by running for or actually serving in political office). Since the introduction of EU citizenship into the treaties at Maastricht, EU citizens have the right to vote and run for office at the municipal and European level regardless of their state of residence. This motivated several member states to change their legislation regarding elections. In France, for example, the introduction of EU citizenship prompted several changes to the constitution to permit voting by EU citizens who were not citizens of France, and voting rights proved contentious. Alain Juppé, secretary general of the Gaullist RPR party (later foreign minister, then Prime Minister) said it was 'completely out of the question to give foreigners the possibility of having municipal councillors, who could then endorse a candidate for the presidency, elect senators or become mayor' (Davidson 1992). Much of this

concern was addressed by the later clarification that a member state may stipulate that the office of elected head of the executive body of a local government unit (such as mayor) can be held only by its own nationals; thus, France does not permit mayors who are not citizens of France, although several other member states do (European Council 1994). The Commission works ‘in close cooperation with the Member States in order to monitor the correct transposition and implementation’ of EU electoral rights, and provides regular updates about its efforts.<sup>12</sup> Similarly, the Commission also monitors the implementation of electoral rights for European Parliament elections and regularly issues recommendations to the member states.<sup>13</sup>

For municipal and European elections, there are thus clear European rules, which member states must apply equally to all EU citizens, without distinction between their ‘own’ citizens and those of other member states. Even in the area of national elections, however, there are pressures for adapting national legislation. Thus the Commission has highlighted how citizens of certain member states lose the right to vote in national elections if they reside abroad for a certain period of time, including when they reside elsewhere in the EU; this means ‘these citizens are not able to participate in any national elections, whether in the home Member State or in the Member State of residence’ (European Commission 2014a). While it is for member states alone to decide on their internal electoral rules, the Commission notes that ‘national policies which lead to disenfranchising citizens may be considered as limiting the enjoyment of rights attached to EU citizenship, such as the right to move and reside freely within the EU’, and comes with several proposals to address such disenfranchisement, including enfranchisement in the country of residence (ibid). This kind of ‘soft harmonisation’ does not constitute specifically top-down governance (because EU institutions lack jurisdiction in this area) but it does reflect pressures for increased coordination in an area key to citizenship. Public opinion surveys also reveal that Europeans support extending electoral rights to citizens of other EU member states in national elections – not simply local and EU elections – which would add democratic legitimacy to EU citizenship (Eurostat 2013; Gerhards, Lengfeld and Schubert 2015; Welge 2014).

### ***Diplomatic and Consular Protection***

Alongside electoral rights, EU citizenship also gives citizens of the member states reciprocal access to consular and diplomatic protection while travelling outside the EU. In 2015, the member states adopted a new Directive on consular protection for European citizens living or travelling outside the EU, which is due to be transposed into national laws and regulations by 2018; the Directive provides that EU member states’ embassies or consulates shall provide consular protection to unrepresented citizens on the same conditions as their own nationals (European Council 2015). Yet the transposition will likely face several barriers, including the proliferation of agreements between certain member states and third countries, such as the agreement between Portugal and Brazil or that between the United Kingdom and Canada for sharing consular facilities and duties (Blockmans and Carrera 2012). Curiously, diplomatic and consular rights have been relatively little studied. One review notes that consular affairs are ‘sensitive at national political level’ and ‘of great importance for the relationship (and the reputational image) of a State vis-à-vis its citizens’ (Wouters, Duquet and Meuwissen 2014: 576), yet ‘the specific content of the ‘right to consular protection’ is unclear and results in a diverging and ad hoc implementation of this Union citizens’ right by Member States’ (ibid.). The political dynamic appears to be one in which the Commission and the European Parliament favour a more prominent role for EU actors, while most member states and the European External Action Service (the EU’s diplomatic service, which is responsible for EU delegations worldwide) prefers consular protection to be provided by member state representatives rather than EU delegations. Common consular services thus remain undeveloped. Despite provisions in the 2015 Directive for a role for EU delegations in providing consular protection to EU citizens, the



emphasis is on horizontal rather than vertical transfer of competence: from one member state to another, rather than to EU authorities. This can thus be seen as part of the fourth phase of EU governance discussed above: shared governance, with the member states retaining their autonomy.

### ***Governance of Naturalisation: Investor Citizenship***

Moves towards shared European governance of nationality acquisition can be seen in the response to the government of Malta's announcement that it would give citizenship to non-citizens who donated money to Malta.<sup>14</sup> This was far from the first investor citizenship scheme within the EU. Similar schemes in France, the Netherlands, and the UK required a 'genuine link' (demonstrated by periods of residence) before naturalisation, but those in Austria, Bulgaria, Cyprus and Ireland had no residence requirement.<sup>15</sup> The original Maltese plan also had no residence requirement, and the concession to market Maltese citizenship was put to tender and awarded to a private company, Henley & Partners ('The Global Leaders in Residence and Citizenship Planning'<sup>16</sup>), under the supervision of a new government agency, Identity Malta (Malta 2013). The plan was controversial, domestically (the opposition party proposed significant amendments, though it had itself initiated the process when in government), amongst the academic community (most contributors to a scholarly symposium on selling citizenship (Shachar and Bauböck 2014) focused on negative aspects of such sales), and at the European level.

EU Justice Commissioner, Viviane Reding, blasted the programme in January 2014, preceding and during a debate in the European Parliament, saying that 'Citizenship must not be up for sale'; she added that

Member States should use their prerogatives to award citizenship in the spirit of sincere cooperation with the other Member States, as stipulated by the EU Treaties. In compliance with the criterion used under public international law, Member States should only award citizenship to persons where there is a 'genuine link' or 'genuine connection' to the country in question (European Parliament 2014a: intervention by Viviane Reding).

The next day, the European Parliament resolution specified that 'outright sale of EU citizenship undermines the mutual trust upon which the Union is built'; Parliament acknowledged that citizenship remains for member states to decide but called on member states 'to be careful when exercising their competences in this area and to take possible side-effects into account' (European Parliament 2014b). The resolution further asked the Commission to assess citizenship schemes in light of European values and EU law, find ways to prevent such schemes from undermining EU values, and develop 'guidelines for access to EU citizenship via national schemes' (ibid.). Parliament further called 'on the Member States that have adopted national schemes which allow the direct or indirect sale of EU citizenship to third-country nationals to bring them into line with the EU's values' (ibid.). Even the representative of the Council at the EP debate stated that although EU citizenship depends on member state citizenship, 'it also has an autonomous character stemming from the character of the European legal order. This means that the competence of Member States to enact laws concerning national citizenship has to be exercised in accordance with the Treaties'. The Council representative underlined that the member states 'must have sufficient trust in each other to recognise mutually different national provisions governing naturalisation' (European Parliament 2014a: intervention by Dimitrios Kourkoulas).

Two weeks after the EP debate and resolution, representatives of Malta met with Commission officials and announced revisions to the programme (Dali 2014). The press release about the meeting specified that Malta's representatives 'presented their intentions' and 'informed' the

Commission, concluding that the Commission ‘welcomed the announced amendments concerning the residence requirement – done in good faith and in a spirit of sincere cooperation and both parties express satisfaction about the understanding reached on this issue’ (European Commission 2014b). The meeting is presented as a unilateral discussion, with the Commission simply receiving information from Malta. Malta’s Prime Minister crowed that it was made amply clear during the meeting that ‘citizenship was a competent matter of the member state’ and called on the leader of the opposition to withdraw the judicial protest and the motion tabled in parliament to repeal the investor scheme.<sup>17</sup>

The Commission’s follow-up report concluded that ‘naturalisation decisions taken by one Member State are not neutral with regard to other Member States and to the EU as a whole’ and that ‘Member States should, when awarding citizenship, ensure that there is a ‘genuine link’ or ‘genuine connection’ between the applicant and the country or its citizens’ (European Commission 2014c). Some argue that this idea means that European and international legal principles are ‘transcending the national realms of competence and affecting nation-states’ discretionary power in the field of citizenship’ (Carrera 2014: 408). To the extent this is true, EU citizenship will indeed start to displace member state citizenship as the ‘fundamental status’ of nationals of the member states, as discussed in the section on ‘ever closer union’ below. Curiously, however, no other member state that was already doing what Malta was simply planning to do – selling citizenship without requiring residence – has (as of this writing) had its investor citizenship regime investigated by the Commission. Although the Commission noted that it was ‘analysing Investor schemes in other Member States in order to see if any further action is required’ (European Commission 2014c), no further action has yet been taken, despite the persistence in several member states of investor citizenship schemes similar to that first proposed by Malta. Thus, one interpretation of the case of Malta, the EU’s smallest member state and hence possibly a relatively easy target for Commission attention, is that naturalisation policies remain within the legal competence of each member state acting autonomously, despite the Commission’s admonishment that ‘Member States should use their prerogatives to award citizenship in a spirit of sincere cooperation with the other Member States and the EU as stipulated by the EU Treaties’ (ibid.).

### ***Denaturalisation: Member States Subject to EU Law***

Like naturalisation, states guard decisions about denaturalisation (by which individuals give up or are stripped of their previous nationality) as a central element of nationality law. But here, too, European integration has created situations in which member state nationality law must adapt to the growth of EU citizenship. One paradigmatic example is the *Rottman* case, in which an Austrian citizen who was charged with financial crime fled to Germany and was naturalised. By becoming a German citizen, he lost his Austrian citizenship under Austrian nationality law. When Austrian authorities later asked Germany to extradite Mr Rottmann, German authorities decided that he had obtained German citizenship fraudulently and moved to revoke his German citizenship. But doing so could render him stateless, and thus also result in loss of EU citizenship (which had originally provided him the right to reside in Germany). The Advocate General’s opinion noted that EU citizenship is a ‘legal and political status conferred on the nationals of a State beyond their State body politic’ in which EU citizenship is ‘a citizenship beyond the State’; it is based on the member states’ ‘mutual commitment to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance on a European scale’ (Case C-135/08 [2010] *Rottmann*, Opinion of Advocate General Poiares Maduro, 30 September 2009, paras 16, 23). Thus, although decisions about the acquisition or loss of member state (and thereby EU) citizenship are not in themselves governed by EU law, ‘the conditions for the acquisition and loss of nationality must be compatible with the Community rules and respect the rights of the European citizen’ (ibid,

para 23). The judgment concluded that it is not contrary to EU law for a member state to denaturalise its citizen 'when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality' (Case C-135/08 *Rottmann* [2010] para 59). The idea that member state nationality law must be compatible with EU citizenship and respect the rights of the EU citizen leads in the judgment to the conclusion that, for EU citizens, member state decisions about naturalisation and denaturalisation are 'amenable to judicial review carried out in the light of European Union law' (*ibid*, para 48).<sup>18</sup>

Quite clearly, then, the *Rottmann* case places limits on member state autonomy in the field of citizenship (Kochenov 2010a; Shaw 2011), as do subsequent cases such as *Ruiz Zambrano*, *McCarthy* and *Dereci*. The European Parliament resolved in 2014 that, while naturalisation and denaturalisation decisions are regulated by member state law, there should be 'closer coordination and a more structured exchange of best practices between Member States with respect to their citizenship laws in order to ensure fundamental rights and particularly legal certainty for citizens', and also called for 'comprehensive common guidelines clarifying the relation between national and European citizenship' (European Parliament 2014c). Though not forced by any EU law to take into account EU citizenship status in their general naturalisation and denaturalisation policies, increasing numbers of member states do distinguish between EU citizens and citizens of third countries – for example concerning the length of residence periods required before naturalisation, even though naturalisation is far less important for citizens of other member states (because they already enjoy almost all the same rights as domestic citizens) than citizens of third countries (Kochenov 2010b: 3). This fits with the idea that discrimination between citizens of member states and those of third countries has developed gradually over time: the strict separation between EU citizens and third country nationals observable today is at least partly judge-made (Maas 2008; Kochenov 2016). Member state autonomy can thus be limited by the general principles of EU law even in areas of member state competence, such as decisions regarding the acquisition and loss of member state (and hence EU) citizenship.

### ***Closer Coordination and Common Guidelines***

In the historical development of nation-states, the introduction of central rights that took primacy over local ones empowered individuals and redrew the relationship between the governments of the centre and those of the units. Similarly, EU citizenship limits the power of member states to treat their own nationals worse than nationals of other member states, and most of the recent free movement of persons and explicitly citizenship cases at the Court of Justice of the European Union can be seen as attempts to grapple with the new constitutional status of EU citizenship (Carens 2013; Longo 2013; Staver 2013), despite transition periods for the full implementation of all rights (such as free movement) for citizens of new member states (Caviedes 2014; Johns 2013; Riemsdijk 2013). Whichever future direction these debates take, it is clear that the introduction and growth of a common legal status for EU citizens has profoundly altered the nature of Europe and the meaning of European integration for its citizens, which forces even notionally sovereign EU member states to coordinate their citizenship and nationality policies.

Coordination does not, of course, mean harmonisation, as the legal basis of EU oversight of member state citizenship and nationality policies remains weak. Aside from the obligation of member states to adhere to the general principles of EU law, and the specific role of judicial oversight to ensure that naturalisation and denaturalisation policies are compatible with EU citizenship, member states remain free to determine the particularities of their citizenship and nationality policies – a wide scope of action for member states that the European Court will likely continue to safeguard in forthcoming decisions such as *Rendón Marín* (expected in early 2016). But the closer coordination

and common guidelines called for by the European Parliament resolution can also occur informally, fitting with the idea of ‘governance of governance’ explored in this special issue; instead of top-down policymaking, governance is shared across multiple levels, with the European level mostly involved in developing guidelines or norms to which the member states generally conform (Caviedes and Maas, this issue). This type of dynamic can be identified in the way in which the naturalisation laws of the member states seem to have converged so that the length of residence required for naturalisation is quite close in all the member states. Similarly, the Long-Term Residence Directive (European Council 2003) has ensured that third-country nationals enjoy permanent rights after five years, and are ready to naturalise – thus the Directive arguably creates a ‘subsidiary form of EU citizenship’ escaping direct control of the member states and providing a kind of civic status for its recipients (Acosta Arcarazo 2015: 217). In this way, the Parliament’s 1985 proposal, discussed above, that member states should reorganise their naturalisation policies in order to permit the integration of migrants has in fact been implemented in most member states – though this implementation reflects informal coordination and alternative means of enforcement rather than direct EU regulation of citizenship and nationality policies.

### CITIZENSHIP AND ‘EVER CLOSER UNION’ REVISITED

Returning now to the core rights of EU citizenship – the freedom of EU citizens to live, work, study, and access public resources anywhere within the common territory – it is clear that the evolution of EU citizenship is far from finished. The extension of rights has been bumpy and disjointed but, to date, there have never been reversals in the extension of rights to free movement, as would be the case if a certain category of citizens gained free movement rights but later lost them. Rights that could be extended further include cross-border recognition for same-sex couples, to ensure family relationships recognised in one member state are accorded equal treatment across the EU. More important than the expansion of rights is ensuring they are respected; the existence of a legal right does not necessarily mean individuals can exercise that right effectively. Even today there is significant discrimination against the least well-off EU citizens, those who are perceived to pose a threat to or constitute a burden on the host member state. Such forms of discrimination against ‘undesirable’ migrants commonly occur in jurisdictions where different levels of government are responsible for social welfare provision, and the EU is no exception (Maas 2013c). British Prime Minister David Cameron’s proposal to ‘exert greater control on arrivals from inside the EU [...by] addressing ECJ judgments that have widened the scope of free movement in a way that has made it more difficult to tackle this kind of abuse’ (Cameron 2015) should be understood in this comparative light.

One driver of dissatisfaction with free movement by governments such as those of Austria, Germany, the Netherlands, and the UK flows from the fact that a common European citizenship has not resulted in common social rights. As Olsen states, free movement has ‘made national borders less firm, but the boundaries of welfare states and social systems are still at work in contemporary Europe’ (Olsen 2015: 99). European law broadens EU citizens’ opportunities to claim social benefits in other member states, while narrowing the ability of member states to regulate and restrict access to national welfare systems (Blauberger and Schmidt 2014). Indeed, Directive 2004/38, which codifies European jurisprudence on free movement, states in its preamble, that ‘Union citizenship is the fundamental status of nationals of the member states when they exercise their right of free movement’ (European Parliament/Council 2004). But welfare states and social systems in Europe remain national, and jurisprudence sometimes underscores the ability of member states to exclude individuals despite shared EU citizenship, as judgments such as *Dano* (Case C-333/13 [2014] *Dano*) and *Alimanovic* (Case C-67/14 [2015] *Alimanovic*) emphasise (even though Mrs Dano still ended up receiving the childcare allowance).<sup>19</sup> Indeed, the most vulnerable citizens who would benefit most

from the protections of EU citizenship often do not receive any significant protection, as the example of the Roma deported from France, Italy, Spain and other member states illustrates (Gehring 2013; Gould 2015). European law continues to allow member states 'a significant margin to make judgements with respect to the 'desirability' or propriety of non-national EU citizens seeking to reside on their territory' (Parker and López Catalán 2014: 393).

In the final analysis, the most significant right of EU citizenship remains the right to live and work anywhere within the common territory – a right that goes much deeper than the Schengen system of border checks or even the insertion of the term 'citizenship' into the EU treaties at Maastricht, because it is grounded in the principles of equality and non-discrimination on the basis of nationality that were agreed in the Paris and Rome Treaties in the 1950s. Gradually expanding from these origins, free movement today continues to epitomise the EU in the minds of Europeans (Recchi 2015). Yet perhaps analysing the impact of European 'governance of governance' in the field of citizenship should move beyond a formalistic, rights-based approach towards a more sociological approach that views citizenship as a mode of being in society with others; despite its strict legal definition in international law, the lived experience of 'citizenship' has different meanings in different societies, and those meanings may now be converging or otherwise being transformed as a result of Europeanisation and common governance.<sup>20</sup> Even in the narrower field of citizenship rights, the impact of EU law on member state policies is stronger than often assumed in the political science literature (Schmidt 2014), and Europeanization can be seen not only regarding EU law but also in terms of international norms (Džankić, Kacarska, Pantić and Shaw 2015). Despite the importance of law and common principles for driving integration, however, legal commentators generally acknowledge that the EU Court has generally preferred to leave room for member state discretion in areas of citizenship and nationality (Nic Shuibhne 2012; Nic Shuibhne 2015; Wollenschläger 2012), underscoring the continuing contingent nature of European rights (Maas 2009), despite the Court's oft-cited claim that EU citizenship is 'destined to be the fundamental status of nationals of the member states' (Case C-184/99 [2001] *Grzelczyk*).

## CONCLUSION: EUROPEAN GOVERNANCE OF CITIZENSHIP

The goal of creating European citizens has arguably always been an essential element of the European project (Maas 2014b). Yet throughout the long evolution of EU citizenship, member states have steadfastly refused to accede to pressures – from the European Parliament, Commission, and sometimes the Court – to harmonise or communitarise citizenship legislation, and the treaties specify that policies regarding the acquisition and loss of nationality remain the sole competence of the member states. Yet as the range of examples discussed in this article illustrate, there is nevertheless an emerging European governance even in this area so central to state sovereignty. European governance of citizenship at first sight seems impossible because, unlike almost all other policy areas, citizenship remains reserved to exclusive member state competence. But functional needs driven by free movement of individuals are coupled with the growing realisation that EU citizenship creates a new political sphere that is 'above' that of the member states and whose subjects, EU citizens, have rights and a status that similarly transcends the member states. In this sense, Europe is the home of the most advanced form of multilevel citizenship in the world today, anticipating possibly similar developments in other venues of regional integration (Maas 2013b; Maas 2015; Schönberger 2005).

The emergence of European governance of citizenship would not be surprising to early integration theorists such as Deutsch (1957: 53-54), who argued that '[f]ull-scale mobility of persons has followed every successful amalgamated security-community in modern times immediately upon its establishment' and that 'the importance of the mobility of persons suggests that in this field of politics persons may be more important than either goods or money'. In terms of the four phases of

European governance identified in this special issue, hierarchical intervention based on the traditional policy model of nation-states cannot be tried (because member states retain sovereignty over citizenship), and the search for common norms and standards (which characterised the second phase) indeed only results in fairly rudimentary principles, with implementation left to the discretion of the member states. The third phase also does not work in the area of citizenship, again because of the impossibility of hierarchical governance. That leaves the fourth phase, characterised by shared governance with the member states retaining their autonomy. As the examples above illustrate, shared governance within the framework of member state autonomy describes the form of European governance that is emerging in the field of citizenship and nationality.

### **Acknowledgements**

Like other pieces in this special issue, this article had its genesis at a conference held at Glendon College, York University, and I would like to thank the conference participants for their valuable input and Glendon College for hosting the conference. This research was supported by a Marie Curie International Incoming Fellowship within the 7th European Community Framework Programme. Thanks to the European University Institute and Leiden Law School for hosting my research. I am indebted to Alexander Caviedes, Dimitry Kochenov, and two anonymous reviewers for providing detailed comments.

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<sup>1</sup> In this regard, Tömmel cites the case of gender equality directives, for which MacRae (2010: 158) argues that many measures ‘developed not out of a concern for women’s rights, but through competition policy and the need to harmonize social provisions in the face of the free movement of goods, services and people [...] gender equality has often been a side effect of other European policy initiatives’.

<sup>2</sup> This phrasing was influenced by the 1992 Edinburgh Summit declaration following Denmark’s initial rejection of the Maastricht Treaty, discussed in Maas (2007: 53).

<sup>3</sup> Declaration of the Government of the Federal Republic of Germany on the definition of the expression ‘German national’.

<sup>4</sup> Point 10 of the summit communiqué proposed a passport union, the ‘stage-by-stage harmonization of legislation affecting aliens and for the abolition of passport control within the Community’ (European Council 1974: 8).

<sup>5</sup> The same resolution also called for ‘stricter controls to ensure that the Member States do not adopt immigration policy provisions that conflict with the principles of the Treaty of Rome, particularly the principle of freedom of movement and freedom of establishment’ (ibid. 465).

<sup>6</sup> Nineteenth Amendment of the Constitution of Ireland, revisions to article 2.

<sup>7</sup> See Dáil Debates, vol 583 no 6 (21 April 2004), col 1186.

<sup>8</sup> 1,427,520 votes in favour, 375,695 votes against, and 20,219 invalid or blank votes. Available online <http://www.envron.ie/en/LocalGovernment/Voting/Referenda/PublicationsDocuments/FileDownload,1894,en.pdf> [accessed 1 February 2016].

<sup>9</sup> Technically it was not closed until the entry into force of the *Irish Nationality and Citizenship Act 2004* on 1 January 2005.

<sup>10</sup> The Advocate General’s opinion was delivered on ‘Chen and Zhu’ but the judgement was made on ‘Zhu and Chen’ as noted in the reference list.

<sup>11</sup> See the discussion of early integration theory in the conclusion.

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<sup>12</sup> See, for example, COM(2012) 99, *On the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals*.

<sup>13</sup> See, for example, COM(2014) 196, *Towards more democratic European Parliament elections. Report on the implementation of the Commission's recommendations of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament*.

<sup>14</sup> Initially the amount required was 650,000 EUR plus 25,000 EUR for spouses and children under 18 plus 55,000 EUR for dependent parents aged 55 or older or unmarried children aged 18-25. After amendments, the amount was raised to 1.15 million EUR (Carrera 2014: 409).

<sup>15</sup> The idea of a 'genuine link' was enunciated in the *Nottebohm* case, which remains controversial. See Audrey Macklin, 'Nottebohm Turns Sixty: Time to Retire?' keynote address, 2015 EUDO Dissemination Conference, 26 November 2015. *Nottebohm case (Liechtenstein v. Guatemala)* [1955] ICJ 1.

<sup>16</sup> See <https://www.henleyglobal.com/>

<sup>17</sup> Dali 2014. Prime Minister Muscat continued: 'Simon Busuttil [leader of the opposition] wanted to scrap this programme. All that was scrapped were his arguments'.

<sup>18</sup> '[I]n respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law'.

<sup>19</sup> Mrs. Dano was still entitled to childcare allowance, on the basis of her EU citizenship – the same outcome as in the paradigmatic *Martínez Sala* and *Grzelczyk* cases, in which the Court upheld the right to equal access to social benefits on the basis of EU citizenship (Case C-85/96 [1998] *Martínez Sala*; Case C-184/99 [2001] *Grzelczyk*; Maas 2007: 65).

<sup>20</sup> For example, Neveu argues that we should consider citizenship as not just a status with which individuals are endowed by states but as a constant construction fed by a diversity of sites, agents, and practices. Instead of one and only one level of belonging and loyalty, citizenship in this wider anthropological/sociological sense means that the rights and duties of citizenship do not emanate from a transcendent power (the state) but from social conventions based on social relations. This horizontal view of citizenship, 'stresses that the relationship between citizens is at least as important as the more traditional 'vertical' view of citizenship as the relationship between the state and the individual' (Neveu 2013: 205).



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