Challenges Arising From the Multi-Level Character of EU Citizenship

The Legal Analysis of the Delvigne and Tjebbes Cases

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Abstract

Studies on the relationship between EU citizenship and Member State legal orders speak either of the loss of control over national sovereignty or, on the contrary, the judicial deconstruction of Union citizenship. These firm positions on how EU citizenship should be perceived fit well with the two markedly different mindsets represented in legal literature: while representatives of the federalist view envision a politically integrated, supranational community behind the treaty provisions on EU citizenship, sovereignists oppose the extension of EU powers via judicial interpretation tooth and nail. This study aims to find an answer to the question whether the CJEU, in its latest judgments on EU citizenship issues, has succeeded in consolidating the constitutional basis of EU citizenship in a way that is reassuring for Member States, i.e. by respecting the principle of conferral. In this respect, it may be established that in both cases analyzed below, such as the Delvigne and Tjebbes cases, the CJEU made well-balanced decisions keeping EU as well as Member State interests in mind, which, although has brought no substantial progress in the process of recognizing EU citizenship as an autonomous status, makes efforts to consolidate the fundamental characteristic thereof.

Keywords: Union citizenship, supranational status, voting rights in the European Parliament elections, dual citizenship, loss of citizenship.

1. Introduction

The 2015 judgment of the CJEU in *Delvigne*[1] rendered on voting rights in the European Parliament elections was a promising implication that the institution of EU citizenship might 'rise to a next level' and the political dimension of the status – hinted at in Maastricht – would at last be able to unfold. This assumption was not completely unfounded as the judgment in question, which confirmed EU citizens' electoral rights irrespective of their exercising the right of free movement, meant beyond doubt a stage of development of the supranational institution of EU citizenship. A new stage towards the institution of citizenship

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1 Judgment of 6 October 2015, *Case C-650/13, Delvigne*, ECLI:EU:C:2015:648.

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in the classical sense of the word: granting to its citizens the right of election to parliament and contributing thereby to the consolidation of the EU as an autonomous political and constitutional order. The above seems to be supported also by the literature on the case, which considers *Delvigne* as a kind of constitutional milestone or a judicial decision of extraordinary significance to say the least.[2] Beyond filling the institution of EU citizenship with political substance, the judgment serves as a new example for the CJEU's jurisprudence, which emphasizes the supranational character of Union citizenship.[3] In the unrelenting period of crisis engulfing the EU for considerable time now, where respect for national identity has increasingly served as grounds for limiting EU powers, it would seem desirable to consolidate the constitutional fundamentals of the legal institution concerned.[4]

Yet, as Stephen Coutts, too, points out in relation to *Delvigne*, the above "picture of an autonomous political and constitutional order is not the whole truth."[5] However, progressive *Delvigne* may be, its final conclusion, which ultimately ruled that the restriction of electoral rights on the basis of national law was lawful and proportionate, cannot be ignored. With this judgment the judicial body once again confirmed the opportunity to restrict EU rights at a national level, thereby emphasizing the significance of Member State legal orders not only with respect to the granting and withdrawal, but also to the exercise of supranational rights.

In light of all these, it is hardly surprising that *Tjebbes*[6] on restricting EU citizenship status based on Member States' national citizenship regulations raised considerable interest from the very beginning.[7]

As far as the main issue of the case is concerned, it is essentially the same as that of *Rottman, i.e.* the effects of the withdrawal of Member State nationality on EU citizenship status. While, however, in *Rottman* the loss of nationality was the consequence of a single decision of withdrawal, in *Tjebbes* it happened *ex lege, i.e.* by operation of the law.

In its ruling in question, the CJEU made an effort to consider both Member State and individual (and therewith EU citizens') interests. Although it ruled that

2 This is so despite the fact that it was given undeservedly little attention as it was delivered the same day as the 'Facebook' judgment which garnered strong public interest. Hanneke van Eijken & Jan Willem Van Rossem, 'Prisoner Disenfranchisement and the Right to Vote in Elections to the European Parliament: Universal Suffrage Key to Unlocking Political Citizenship?', *European Constitutional Law Review*, Vol. 12, Issue 1, 2016, p. 127; Stephen Coutts, 'Delvigne: A Multi-Levelled Political Citizenship', *European Law Review*, Vol. 42, Issue 6, 2017, p. 871.

3 *Cf.* Judgment of 8 March 2011, *Case C-34/09, Zambrano*, ECLI:EU:C:2011:124; Judgment of 2 March 2010, *Case C-135/08, Rottman*, ECLI:EU:C:2010:104.

4 Judgment of 22 December 2010, *Case C-208/09, Sayn Wittgenstein,* ECLI:EU:C:2010:806; Judgment of 12 May 2011, *Case C-391/09 Runevic Vardyn and Wardyn,* ECLI:EU:C:2011:291; Judgment of 5 June 2018 *Case C-673/16 Coman and others,* ECLI:EU:C:2018:385.

5 Coutts 2017, p. 871.

6 Judgment of 12 March 2019, *Case C-221/17, Tjebbes and others,* ECLI:EU:C:2019:189.

7 Beyond the legal institution of citizenship, it discusses several other cross-cutting issues attracting general interest such as respect for fundamental rights or protection of the child's best interest.

the Dutch regulation of nationality was on the whole lawful, it also stated that this was only the case, provided that a strict proportionality test was performed. In view of the sensitive nature of the issue, however, critical reviews that spoke of the loss of control over state sovereignty[8] or, on the contrary, the slow decline of the institution of EU citizenship,[9] could not be avoided. Some commentators go so far as saying that with the above judgment the CJEU 'subordinates' this status 'to third country laws',[10] thereby questioning its fundamental nature as well as the autonomy of EU citizenship and the EU legal order in general.

These firm positions on how EU citizenship should be perceived fit well with the two markedly different mindsets represented in legal literature: while representatives of the federalist view envision a politically integrated, supranational community behind the treaty provisions on EU citizenship, sovereignists oppose the extension of EU powers *via* judicial interpretation tooth and nail. This study aims to find an answer to the question of how well grounded the above critical considerations are. Has the CJEU, in its latest judgments on EU citizenship issues, succeeded in consolidating the constitutional basis of EU citizenship in a way that is reassuring for Member States, *i.e.* by respecting the principle of conferral?[11]

2. The Delvigne Case

2.1. Statement of Facts in Delvigne

Mr Delvigne as a French citizen living in France was given a custodial sentence of 12 years on the charge of murder, in 1988. This criminal sentence also entailed Delvigne's deprivation of civic and political rights, including his being deprived of his right to vote in the EP elections. In 1992, however, a new law entered into force, which provided that the deprivation of civic rights could not be an automatic additional penalty but was to be subject of a court ruling in every case. At the same time, in *Delvigne* the deprivation was sustained with reference to the fact that the judgment had become final before the new law entered into force. In

8 Tom Boekestein, 'The CJEU Judgment in Tjebbes: EU Citizenship, the Advent of the Charter, and Implications for the Loss of Nationality After Criminal Conviction', *Cambridge International Law Journal,* at http://cilj.co.uk/2019/06/24/the-cjeu-judgment-in-tjebbes-eu-citizenship-the-advent-of-the-charter-and-implications-for-the-loss-of-nationality-after-criminal-conviction/. Martijn van den Brink takes a more moderate stance; he believes it was not an intentional judgment by the CJEU that led to the intrusion of European law into the domain of nationality law. Martijn van den Brink, 'Bold but Without Justification. Tjebbes.' *European Papers*, Vol. 4, Issue 1, 2019, at http://europeanpapers.eu/en/europeanforum/bold-without-justification-tjebbes.

9 Dimitry Kochenov, 'The Tjebbes fail', *European Papers,* Vol. 4, Issue 1, 2019, at www.europeanpapers.eu/en/europeanforum/the-tjebbes-fail. Or at least some commentators speak about the judicial deconstruction of EU citizenship. *See* more about this in Daniel Thym, 'The Judicial Deconstruction of Union Citizenship', *in* Daniel Thym, *Questioning EU Citizenship,* Hart Publishing, Oxford, 2017, pp. 1-17.

10 Id.

11 Under this principle, the EU shall act only within the limits of the competences conferred upon it by EU Member States in the Treaties.

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short, although the 1992 act abolished the automatic and indefinite nature of the ancillary penalty, it did so only in respect of sentences made after the new law took effect.

Delvigne lodged an application with the Court of Bordeaux on the basis that the competent administrative body had ordered his removal from its electoral roll. In its request for a preliminary ruling the referring forum sought an answer from the CJEU to the question whether the automatic and long-term removal from European Parliamentary (EP) elections was compatible with Article 39 of the Charter of Fundamental Rights on EP elections or its Article 49(1) on the retroactive applicability of a criminal code (*i.e.* of a law not yet in force at the time the criminal offence was committed) imposing a lighter penalty. The latter provision is not strictly related to the subject of this study, and shall therefore not to be discussed here.

2.2. The Legal Context of Delvigne

The focus of the case concerns the interpretation of Article 39 of the Charter of Fundamental Rights, whose provision lays down certain Union citizen rights with respect to the election of the European Parliament representing Union citizens. The Article, however, does not have provisions on EP suffrage granted to EU citizens on the basis of their quality as such in general; it merely provides for non-discriminatory treatment for those who exercise these rights in a Member State that is different from their nationality. Article 39(1) declares that

> "Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State."

By contrast, Article 39(2) codifies the major principles of democratic elections by laying down that "Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot."

The above provisions are certainly not without precedent; the first paragraph goes back as far as the Maastricht Treaty laying down the rights of EU citizens,[12] while the second paragraph as far as the election document of 1976. Article 1(3) of the 1976 Act which provides that "Elections shall be by direct universal suffrage and shall be free and secret" was adopted almost verbatim in Article 14(3) TEU.[13]

These complex constitutional provisions comprised the legal context of *Delvigne*. This cannot be otherwise considering Article 52(2) of the Charter, by virtue of which "rights recognized by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties." What these conditions and limits exactly are can be specified

12 Article 8b of the Maastricht Treaty regulated the rights of Union citizens. Currently: Articles 20(2)(b) and 22(2) TFEU.

13 Article 14(3) TEU stipulates that "The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot."

in light of the reform process of the Lisbon Treaty. The relevant wording of the treaty was amended at two points [Articles 14(2)[14] and 10(2)[15] TEU]. While the Treaty had provided earlier that the European Parliament "shall consist of representatives of the peoples of the States brought together in the Community", the articles in question explicitly speak of the representation of EU citizens.[16]

The CJEU had already dealt with the issue of establishing the circle of those with a suffrage prior to *Delvigne* or the Lisbon Treaty's entering into force. First, in the case of *Spain v. United Kingdom*[17] it had to decide whether it was contrary to the relevant provisions of the EC Treaty if Member States granted active suffrage to citizens having close bonds with them, thus, specifically to Commonwealth citizens who were residents of Gibraltar but did not qualify as Community nationals. In *Eman and Sevinger*,[18] on the other hand, the question arose the opposite way, *i.e.* whether a Member State could deny its own citizens residing in overseas territories of the Community such as Aruba suffrage in EP elections. The CJEU's reply was in the negative in both cases.

In the reasoning of its judgments the CJEU pointed out that in the current state of Community law no straightforward conclusion may be drawn from EC provisions on EP elections as regards the scope of those who should have suffrage, since the expression 'Union citizen' was not used in the provisions. Thus, it was the competence of respective Member States to establish who had suffrage, by respecting EU law in every case.[19] Therefore, in *Eman and Sevinger* the CJEU found that by virtue of the principle of equal treatment persons who were in a comparable situation, *i.e.* Dutch citizens residing in Aruba or a third country must not be treated differently, unless such treatment could be objectively justified, which was not the case in the case concerned.

2.3. Opinion of the Advocate General

Offering an unusual solution in his opinion, Advocate General Cruz Villalón found that the applicability of the Charter of Fundamental Rights to the case concerned should be assessed separately with respect to the two rights examined, *i.e.* the right to vote at EP elections and the right to a more lenient punishment by virtue of a later provision. Thus, while France is not implementing EU law with respect to the points of criminal law relevant in the case, it does so with respect to the right to suffrage, therefore the ban should be examined in the light of Article 39 of the Charter. His latter claim is based on the competence of the EU with regard to the EP elections, more specifically Article 223(1) TFEU, by virtue of which the Council is responsible for laying down provisions for a uniform procedure governing EP elections or at least one in accordance with principles

14 "The European Parliament shall be composed of representatives of the Union's citizens."
15 "Citizens are directly represented at Union level in the European Parliament."
16 What is more, by virtue of Article 10(3) TEU, "Every citizen shall have the right to participate in the democratic life of the Union."
17 Judgment of 12 September 2006, *Case C-145/04, Spain v. United Kingdom,* ECLI:EU:C:2006:543.
18 Judgment of 12 September 2006, *Case C-300/04, Eman and Sevinger,* ECLI:EU:C:2006:545.
19 *Case C-145/04, Spain v. United Kingdom,* paras. 70-76; *Case C-300/04, Eman and Sevinger,* paras. 43-45 and 52.

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common to all Member States.[20] He opines the latter is also facilitated by the development in the 'representational nature' of the EP in that the EU's interest in the procedure for appointment of the members of the EP underwent a qualitative change in the course of integration. First, with the introduction of a direct election procedure, later, with the gradual increase of the powers of the EP and finally, with the Lisbon reforms, which refer to representatives directly as 'representatives of the Union's citizens.'

As regards the substance of the case, the Advocate General points out that due to the purely internal nature of the situation only Article 39(2) can be relevant to the case.[21] This provision refers to a subjective right to vote now granted to all EU citizens, which at the same time, by virtue of Article 52(1) of the Charter, can very much be restricted.[22] With reference to the case-law of the ECtHR among others, the Advocate General ultimately concludes that the compatibility of national law with EU law can be established provided that the ban is not general or automatic and is subject to review for those concerned: the above questions must be decided by the national courts.

2.4. Judgment in Delvigne

Departing from the opinion of the Advocate General on several points, the CJEU essentially draws the same conclusion establishing the compatibility of the national provision with EU law.[23]

As regards the question of competence, the CJEU arrives at the conclusion that the situation of an EU citizen whose removal from the electoral roll entails the loss of the right to vote in EP elections is governed by EU law. Unlike the opinion of the Advocate General, however, the CJEU establishes the relevance of EU law from Article 1(3) of the 1976 Act and Article 14(3) TEU. According to these provisions, Member States must ensure when organizing the elections that they are conducted on the basis of direct universal suffrage, free and secret.[24]

Discussing the substance of the case, the CJEU points out that for lack of a cross border element, the Member State provision can only be examined in light of Article 39(2) of the Charter.

Within the framework of this review the CJEU proceeds directly to the essence of its judgment, *i.e.* to declaring the suffrage of EU citizens at the supranational level. The CJEU opines that Article 39(2), *i.e.* the provision laying down the main principles of democratic elections, corresponds to Article 14(3) TEU, which is the expression of EU citizens' suffrage in the Charter. It is clear

20 This is unaffected even by the fact that the EU legislator has not exercised its competence in this field yet.

21 Which provision adopts the main election principles in a democratic state. Opinion of Advocate General Cruz Villalón, delivered on 4 June 2015, *Case C-650/13, Delvigne,* paras. 43-45.

22 By virtue of Article 52(1) of the Charter there may be limitations to exercising this right on certain conditions.

23 *Case C-650/13, Delvigne*, para. 58.

24 The CJEU referred to its earlier expansive case-law to confirm its position. Judgment of 26 February 2013, *Case C-617/10, Åkerberg Fransson,* ECLI:EU:C:2013:105, para. 17.

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that the deprivation of the right to vote represents a limitation on exercising this fundamental right.

After establishing the restrictive nature of the provision, the only question that remained was whether it was justifiable under Article 52(1) of the Charter. In that regard the CJEU found that since deprivation is provided for by a regulation of a level of law which does not question the essence of the right – as it excludes certain individuals from the scope of those having suffrage under special conditions – it qualifies as lawful.[25]

The CJEU concludes its judgment by performing an abstract proportionality test where it considers the restrictive national provision to be proportionate in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty.

2.5. Analysis of the Judgment

2.5.1. The Supranational Political Dimension of EU Citizenship

A most exciting legal aspect in *Delvigne* is the way the CJEU derives the applicability of the Charter from the Member States' obligation to enforce the democratic election principles laid down in the 1976 Act and the TEU. Thus, some general principles prove sufficient for activating EU law, thereby enabling a broad interpretation of Article 51(1) of the Charter. The grounds for this broad interpretation may be the CJEU's reading of the substance of Article 39(2) of the Charter, which acknowledges EU citizens' right to vote at EP elections owing to their status as Union citizens. This brings us to the most spectacular conclusion of the judgment[26] according to which the substance of Article 39(2) laying down the main principles of democratic elections actually mean the expression of EU citizens' suffrage in the Charter. In relation to the above the question certainly arises how it is possible that the CJEU acknowledged the suffrage of EU citizens based on their status as such only now, in relation to *Delvigne*, even though the general nature of suffrage became a part of EU law much earlier.[27]

There are basically two answers that come up. On the one hand, in its famous *Eman and Sevinger* judgment the CJEU did not point out emphatically enough that the institution of EU citizenship entailed legally enforceable rights for Member State citizens beyond that of free movement. As we have seen, in *Eman and Sevinger*, with reference to the general legal principle of equality, the CJEU provided protection for the deprived applicants in relation to a purely internal issue,[28] and thus the judgment fit well with the CJEU's latest *Zambrano* line of cases.

25 *Case C-221/17, Tjebbes and others,* paras. 47-48.

26 Van Eijken & Van Rossem 2016, p. 123.

27 As Advocate General Tizzano explicitly implies in his opinion on *Eman and Sevinger*. *See* Opinion of Advocate General Mengozzi, delivered on 12 July 2018, *Case C-221/17, Tjebbes and others*, para. 69.

28 Thus, lacking the element of free movement and without quoting the relevant provision.

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A similarly obvious response would be that the constitutional context itself has changed in the meantime.[29] More specifically, that general suffrage – which used to be a part of EU law before – acquired deeper meaning by adding the new EU provisions of the Lisbon Treaty on political participation and democracy.

The Lisbon Treaty undoubtedly gave special attention to the institution of democracy. With the provisions governing the democratic principles under Title II of TEU the EU consolidated its own democratic basis. What is more, this new democratic structure was connected to the institution of EU citizenship itself.[30] A good example for this is the launching of the Citizens' Initiative under the Treaty, which is a remarkable attempt at consolidating direct democracy and involving citizens in the EU's democratic life in the hitherto deepest way possible.[31]

By considering the principles of suffrage in themselves one can easily miss who they actually refer to. The interpretation of the above principles in the context of the provisions for the democratic operation of the EU[32] clearly reflects that the European Parliament represents the interests of EU citizens. Furthermore, as the Charter gained full legal effect through the Lisbon Treaty, the democratic aspirations expressed in the TEU could be directly connected to the document on fundamental rights laying down the rights of individuals.[33]

The judgment discussed is essentially the judicial confirmation of the change of wording brought about by the Lisbon Treaty, which instead of the 'peoples of Member States' speaks of 'the European Parliament representing Union citizens', thereby extending the relationship between EU citizens and direct democracy also to EU level representative democracy.

The judgment in question therefore reflects the vision of a democratic order beyond the nations, in the center of which stands the EU citizen as a member of a supranational community, represented by the European Parliament.[34] By ensuring the scope of EP suffrage on a personal rather than a territorial basis, the judgment seems to consolidate the political dimension of EU citizenship remedying the problem, as it were, of 'democracy without *demos*' discussed by Weiler.[35] What is more, the suffrage in *Delvigne* is no longer merely a transnational right, but a supranational right[36] that can be exercised and invoked by EU citizens, and which must be respected by Member States, on the basis of a purely internal status, *i.e.* even lacking a cross-border element. This certainly does not mean that this right cannot be restricted on the basis of national law, whose benchmark of lawfulness, as we have seen, is Article 52(1) of the Charter of Fundamental Rights.

29 Van Eijken & Van Rossem 2016, p. 124.
30 This is also reflected by the launching of the Citizens' Initiative by the Lisbon Treaty.
31 Even if this is suitable for consolidating EU level political identity only to a limited extent.
32 Articles 10(2), 10(3) and 14(2) TEU.
33 The Charter echoes these democratic principles in a separate title on EU citizenship.
34 Coutts 2017, p. 877.
35 Joseph H. Weiler, *The Constitution of Europe*, Cambridge University Press, Cambridge, 1999, p. 337.
36 Delvigne as a French national wished to refer to this right in his own country.

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2.5.2. The Restriction of Supranational Rights at National Level

As is publicly known, the EU continues to be defined as something other than a state even though it has very similar characteristics to states. Its existence and operation – in a system of multi-level governance – is inseparable from the national communities it is built upon.

> "This is an inescapable legal, political and indeed social fact even if it is painful for those who see the EU as an incomplete project which must cross the Rubicon and become a fully fledged federal state."[37]

The above is also supported by the judgment of the CJEU made in *Delvigne*, which ruled that the restriction of supranational suffrage based on national criminal law was compatible with EU law, yet it arrived at this conclusion without performing an in-depth review of the lawfulness of the restriction based on the Charter.[38] In its judgment, the CJEU makes no reference to either the ECHR or to the relevant ECtHR case-law. What is more, the CJEU fails to specify the public interest serving as the basis for justifying lawfulness and counterbalancing the violation of individual interests,[39] so one may only assume what considerations underlie the convicted persons' deprivation of their suffrage. The CJEU's failure to provide details in this regard is particularly surprising in light of the substance of Article 52(1) of the Charter, by virtue of which the restriction must serve objectives of a general interest recognized by the EU.

The restriction of EU citizens' rights based on national criminal law is certainly not unprecedented, however, considering the CJEU's case-law related to expulsion. It should be noted, however, that the lawfulness test laid down in secondary legislation with reference to the expulsion of EU citizens by Member States imposes much stricter constraints than the approach witnessed to the restriction of political rights included in the Charter, which leaves ample room for Member State discretion.[40]

Thus, the restriction of free movement may prove lawful if the personal conduct of the persons concerned involves sufficiently serious threat affecting one of the fundamental interests of society. What is more, previous criminal convictions may not serve as a basis for taking measures of public order or public security *per se*. The proportionality test is also sufficiently strict, since it is required that the degree of social integration of the person concerned as well as

37 Koen Lenaerts, & Jose A. Gutierrez-Fons,'Epilogue on EU Citizenship', *in* Dimitry Kochenov, *EU Citizenship and Federalism,* Cambridge University Press, Cambridge, 2017, p. 754.

38 Van Eijken & Van Rossem 2016, p. 129; Coutts 2017, p. 878.

39 Contrary to the case-law of the ECtHR, for details on which *cf.* Jo Shaw, *Prisoner Voting: Now a Matter of EU Law,* at http://eulawanalysis.blogspot.com/2015/10/prisoner-voting-now-matter-of-eu-law.html.

40 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States.

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the effects of the measure on his family and private life be considered in every case and weighed against the danger posed by his presence in society.[41]

The various degree of control exercised by the CJEU in *Delvigne* on the restriction of political rights and in public interest cases related to free movement primarily follows from the legal context itself. While in the public order cases it is the EU citizens' most fundamental right of free movement rooted in the internal market that is restricted, in the sensitive field of suffrage the CJEU understandably wishes to give more room for maneuver to the Member States.

The various approaches of national criminal legislations to the restriction of EU citizens' rights throws light on two fundamental characteristics of EU citizenship at the same time. First of all on the fact that the cross-border nature of EU citizenship – thanks to the vast body of EU law – continues to enjoy enhanced protection compared to its supranational nature.[42] On the other hand, *Delvigne* emphasizes the multi-layered character of EU citizenship, the superimposition of the national and supranational levels, which is of decisive significance both for the acquisition/loss of the legal status and the exercise of the related rights. Delvigne's act against the French legal order does affect him in exercising his entitlements as an EU citizen as, following from its nature, it is related to his Member State citizenship. This is even more obvious in *Tjebbes*, rendered following *Delvigne*, with its focus on the *ex lege* loss of EU citizenship status, to be outlined below.

3. The Tjebbes Case

3.1. Statement of Facts in Tjebbes

The focus of the case concerns the disputed provision of the Dutch citizenship regulation by virtue of which those holding dual or multiple citizenship and living outside the Netherlands or the territorial scope of the TEU for 10 years lose their Dutch citizenship without prior warning. This period can be interrupted by a longer stay (of at least one year) in the Netherlands or an application for issuing a Dutch passport/personal ID card and finally by filling in an online form according to which the person in question wishes to continue to belong to the Dutch state. Somewhat exaggerating one could say that those who, quoting Kochenov, 'fail to submit non-self-evident paperwork' are thrown out of the body of citizenship without a reminder.[43] What is more, following from the principle of the unity of citizenship within the family, losing the citizenship has legal consequences also for the children of minor age whose parents lose their citizenship the above way, *i.e. ex lege*.

41 This strictness seems to have somewhat been eased in the judgments of CJEU in *PI* and *Tsakouridis*, where more room was provided to Member States in the application of exceptions to public order.

42 The judgments of the CJEU related to the social rights of EU citizens have meant some backward development in this respect. *Cf.* Judgment of 15 September 2015, *Case C-67/14, Alimanovic,* ECLI:EU:C:2015:597.

43 Kochenov 2019, p. 322.

The situation of the applicants affected by the Dutch regulation, while having acquired their citizenship in different ways,[44] was similar in that all of them had lived outside the territory of the EU since their birth or at least for a long time. Tjebbes, living in Canada, held dual Canadian-Dutch citizenship since his birth. Koopman was born in Holland but later moved to Switzerland, where he acquired citizenship and started a family. Koopman's child Dubois lived in Switzerland all his life but through his parents he acquired Swiss as well as Dutch citizenship. Finally, Abady acquired, in addition to his Iranian nationality, the Dutch citizenship through naturalization, but has lived in Iran for many years. All the above citizens had to face the fact that by being refused the prolongation of their passports they no longer belonged to the Dutch state and as a consequence, as citizens of a third state, they did no longer hold the Union citizenship either.

What is remarkable about *Tjebbes* is therefore that the applicants lost their Member State citizenship – and thereby the EU citizen status – without prior warning,[45] automatically, *ex lege*, contrary to the earlier *Rottman* case of a similar subject, where citizenship was withdrawn by virtue of a specific individual decision.

The question of the court acting in the main proceeding sought an answer to the question whether the statutory regulation which ordered the loss of citizenship without individual consideration, was compatible with the provisions of the Treaty ensuring citizenship status and free movement,[46] with special regard to Article 7 of the Charter of Fundamental Rights on respect for private and family life.

3.2. The Legal Context of Tjebbes

Due to the derivative nature of EU citizenship, the status it is closely related to Member State citizenship.[47] Citizenship issues as such continue to be in exclusive Member State competence. This was also laid down in Declaration No. 2 enclosed in the Maastricht Treaty, which says

> "Wherever in the Treaty reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned."

44 By birth or naturalization.

45 The Netherlands passport is valid for exactly ten years, so unless its prolongation is requested before it expires, the Netherlands citizenship of those staying outside the territory of the EU and holding another citizenship as well is essentially lost automatically, while the state, as Vlieks puts it, "sits back and relaxes". To make things worse, Netherlands law does not require its citizens to renew their documents necessary for exercising suffrage. Vlieks Caia, 'Tjebbes and Others v. Minister van Buitenlandse Zaken: A Next Step in European Union Case Law on Nationality Matters?', *Tilburg Law Review*, Vol. 24, Issue 2, 2019, p. 145.

46 Articles 20 and 21 TFEU, respectively.

47 By virtue of Article 20(1) TFEU: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

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This exclusive Member State competence in citizenship issues was once again confirmed in the case-law of the CJEU. First, it was at issue in the context of the right to establishment in *Micheletti* where the CJEU confirmed keeping the matter of nationality in Member State competence.[48] It added at the same time that a Member State must not restrict the effects of another Member State granting its citizenship by imposing an additional condition for exercising a fundamental freedom with reference to recognizing the citizenship. Thereby it was essentially established that national competence in this field could actually be restricted by EU law. To the question in which cases this could happen the answer was given in *Rottman* made 20 years later, where the Court examined for the first time the question of the compatibility of the withdrawal of citizenship with EU law. In the respect, the CJEU declared that the decision of the national authority withdrawing citizenship did in fact affect EU citizenship status and the rights arising from the latter, and this aspect was to be considered in the application of national regulations and their judicial review.[49] Although fraudulent conduct in the course of the naturalization process could serve as a justification for the Member State, in the course of the proportionality review of the measure, the EU law consequences on the individual and, as the case may be, the individual's family, were to be considered.

3.3. Opinion of the Advocate General

In his opinion, Advocate General Mengozzi was careful not to interfere with the area of citizenship, which is cherished by Member States, and considered to embody national sovereignty. This is well illustrated by the way the Advocate General described the right of nationality as an area of law that sets the boundaries of the national community, which thus remains in Member State competence. In relation to this he pointed out that "the composition of national body politic is clearly an essential element" of national identity,[50] which, by virtue of the provisions of Article 4(2) TEU shall be respected as such.

The opinion of the Advocate General started from the basic premise of *Rottman* that the situation of applicants losing their Member State nationality, and accordingly, their legal status of EU citizen is governed by EU law and as such, lacking a movement element, shall be evaluated in light of Article 20 TFEU. The Advocate General furthermore emphasized the special nature of the relationship between the Member State and its citizen, and that Member States may prescribe that the loss of any genuine link entails the loss of nationality. Moreover, in order to ensure that the restrictive rule adopted by the Netherlands can be supported by a justification of public interest, he considered the Member State's choice from the various aspects that may indicate a genuine link, habitual residence in the territory, to be correct or at least 'not unreasonable'.[51] As regards the question of proportionality, after lengthy consideration he concluded that

48 Judgment of 7 July 1992, *Case* 369/90, *Micheletti and others*, ECLI:EU:C:1992:295, para. 10.
49 *Case C-135/08, Rottman,* para. 4.
50 *Case C-221/17, Tjebbes and others*, Opinion of the Advocate General, para. 107.
51 Id. paras. 54-55.

from the case-law in force no obligation follows that a Member State court must evaluate on an individual basis and in a comprehensive way, the existence of a genuine link.[52] In other words, he arrived at the conclusion that the abstract examination of the Netherlands' regulation performed at a general level is sufficient. He established that, in view of the fact that a period of 10 years can easily be interrupted; the provision is in compliance with EU law and thus does not merit further individual examination.

He substantiated the above by stating that national courts would otherwise have to establish the relevant criteria showing a connection with the Member State concerned, which would cause legal uncertainty.[53] To support the finding that the abstract proportionality test is sufficient he specifically quoted the judgment made in *Delvigne*.[54] What is more, he opined that, although in less straightforward way, the set of criteria laid down in *Rottman* point in the same direction.[55]

The Advocate General was of the view that his above final conclusion is supported also by Article 7 of the Charter laying down respect for private and family life. He opined that the rights of the persons in question are not violated as they continue to travel and move freely in possession of their travel documents, within the limits of the rules governing the entry of third country nationals, they may enter the territory of the EU, what is more, they continue to have full enjoyment of family life in the territory of the third country.

Finally, as regards the rules governing minors, he concluded that although ensuring the unity of nationality within the family is a legitimate goal, the rule in question is more restrictive than necessary, especially considering the best interests of the child. In this respect the Advocate General underlined that minors enjoy the status of EU citizenship autonomously and their procedural and substantive rights should be acknowledged irrespective of their parents. Unlike adults, EU citizens of minor age do not have the opportunity to prevent the loss of their EU citizen rights by applying for the required documents.

3.4. Judgment in Tjebbes

Similar to the Advocate General's opinion, the CJEU repeats what was declared in *Rottman*. Hence, it points out that the way towards EU citizenship status is *via* Member State citizenship, the granting and withdrawal of which falls under Member State competence. When exercising this competence, however, Member States must have due regard to EU law. The CJEU furthermore repeats the theorem according to which "it is legitimate for a Member State to wish to protect

52 The applicants of the case complained exactly about the fact that Netherlands law barred national courts from considering other circumstances demonstrating the existence of a genuine link.

53 *Case C-221/17, Tjebbes and others*, Opinion of the Advocate General, para. 110.

54 Id. para. 67.

55 In this judgment the CJEU focused in the course of the proportionality test on evaluating the relationship between the weight of the deprivation of rights and that of the legal violation, which test can be performed in an abstract way, just as the recovery of the original citizenship does not require the consideration of the individual's specific circumstances, either.

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the special relationship of solidarity and good faith between it and its nationals [...]."[56]

It is based on the latter that the CJEU reaches the conclusion that the protection of the genuine link between the Member State and its citizen – by mitigating the undesirable effects of multiple citizenship, as also intended by the Dutch legislator– can be considered a legitimate interest with reference to which the national provision on the withdrawal of citizenship may be justified.

On whether the requirement of 10 years of residence outside the Netherlands is a suitable instrument for achieving the above objective, the CJEU states with laconic brevity that 10 years of uninterrupted residence outside the Member State may be regarded as an indication that there is no such link, to which the Member State, in accordance with international law, imposes the loss of nationality as a legal consequence, extending this also to the children of the EU citizen concerned. The CJEU maintains that the legitimacy of the measure is further substantiated by the interruptibility of the 10-year period. While establishing that the automatic loss of rights is lawful in principle, the CJEU points out at the same time that this holds only

> "if the relevant national rules permit at any time an individual examination of the consequences of the loss of citizenship for the persons concerned from the point of view of EU law."[57]

Thus the CJEU, departing from the opinion of the Advocate General, now requires that Member States authorize competent national authorities and courts to examine, with the comprehensive consideration of all circumstances, the consequences of the loss of nationality with due regard to consequences under EU law, which may, where appropriate entail the recovery of nationality with *ex tunc* effect.[58] The proportionality examination may thus only cover the EU law consequences of the withdrawal, on the condition that these consequences cannot be 'hypothetical or merely a possibility'.[59] In the course of such examination compliance with the contents of the Charter must be ensured, specifically the right to respect for private and family life laid down under Article 7 as well as 'the requirement of the best interests of the child'[60] recognized in Article 24.

The CJEU maintains with respect to the above examination that relevant factors may include the future limitation of the right to move and reside in the territory of the EU, as well as the security risk that may arise from the lack of consular protection in the territories of third countries.

56 *Case C-221/17, Tjebbes and others,* para. 33.
57 Id. para. 41.
58 Id. para. 42.
59 Id. para. 44.
60 Id. paras. 46-47.

3.5. Analysis of the Judgment

As we have seen, it was the findings in *Rottman* that served as a basis for both the Advocate General's opinion and the judgment of the CJEU, which, considering the similar facts of the two cases is not at all surprising. Hence, *Tjebbes* gives a sort of extended interpretation of *Rottman* in so far as it confirms that its contents are authoritative, beyond the individual decisions, for provisions depriving of nationality with a normative effect as well.[61] Which elements of the judgment does this confirmation refer to? First of all that in the case of an individual or even a normative act depriving of nationality there is EU law relevance irrespective of the fact whether or not the person concerned exercised their right of free movement before.[62] Similarly, it confirms that the 'ultimate gatekeepers' of nationality are the Member States themselves, *i.e.* the granting or withdrawal of citizenship comprises an issue falling under Member State competence.[63] Last but not least that Member States, while exercising this competence, also taking into consideration the fundamental nature of EU citizenship, must observe the legal minimum standards of the EU, in particular the legal principle of proportionality, which limits Member States' discretion in the regulation of nationality.[64] In what follows it is these questions I wish to examine in more detail.

3.5.1. The Legitimate Aim

As we can see, apart from the minimum standards of the EU, Member States have wide discretionary powers with respect to regulating how their citizens may lose their nationality.

This is also underlined by *Tjebbes* according to which it is not only fraudulent conduct as was the case in *Rottman* that may serve as the basis for the requirement of public interest justifying the withdrawal of a right. Absence from the territory of the Member State in question for a certain period of time may also be grounds for withdrawal which, at least in the CJEU's interpretation, may be regarded as an indication that there is no genuine link with the Member State.

61 Peers takes the view that the contents of *Rottman* may be applied *ad absurdum* to a situation related to the exit of a Member State, thus even to Brexit itself. With the exit of the UK, British citizens will in principle lose their EU citizenship as well, that is, lacking the citizenship of another Member State they will become third country nationals. This is supported by the withdrawal agreement as well, which differentiates between EU and British citizens. It may serve as a kind of counterargument at the same time that the agreement itself is about acquiring the EU citizen status only, failing to mention cases of losing the status, which according to a somewhat poorly supported interpretation suggests that British citizens may not be deprived of their EU citizenship even by Brexit. For more details on this issue, *see* Steve Peers, *Citizens of Somewhere Else*, at https://eulawanalysis.blogspot.com/2019/03/citizens-of-somewhere-else-eu.html.

62 While in *Rottman* there was the opportunity in principle as regards reference to free movement rights, *Tjebbes* is clearly a purely internal issue.

63 Hanneke van Eijken, 'Tjebbes is Wonderland: On European Citizenship, Nationality and Fundamental Rights', *European Constitutional Law Review*, Vol. 15, Issue 4, 2019, p. 721.

64 According to these minimum standards, furthermore, the deprivation of rights cannot be arbitrary, as also laid down in the European Convention on Nationality of the Council of Europe (1997) and the Universal Declaration of Human Rights (1948).

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As the ICJ pointed out earlier, in *Nottebohm*, "Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[65]

The fact that this bond may change overtime is not at all surprising, just as it is totally understandable that in such cases Member States may decide themselves whether this special link with their citizen still exists.[66] The CJEU maintains that the same is supported also by the relevant international agreements including the Convention on the Reduction of Statelessness, signed in New York in August 1961,[67] and the Convention on Citizenship, which, in the lack of a genuine link between the state party and the citizen staying abroad consider the withdrawal of citizenship as a legal consequence to be lawful.

At this point we should note that the CJEU's reference to international law with respect to approving the regulation requiring a genuine link by the EU law is unfortunate. On the one hand, such international treaties were not tailored to EU law specifically and, on the other hand, the CJEU declared in its earlier case-law already that the application of the principle of effective nationality in international law, *i.e.* to establish nationality based on the 'place of habitual residence', did not comply with EU law.[68] The CJEU had made it clear in *Micheletti*[69] already that 'genuine link' between the state and its citizen was a concept long superseded in the EU,[70] the CJEU, however, remains inexplicably silent on this judgment in the statement of reasons in *Tjebbes*.[71]

At the same time, the brief and somewhat abstract implication of merely a few words in the statement of reasons of the judgment, *i.e.* that absence may be interpreted as the lack of a genuine link duly reflects the CJEU's uncertain approach as regards the EU evaluation of the requirement of staying in the territory. The CJEU's moderate attitude towards the issue is not surprising given the fact that they had to make their judgment considering the derivative and at the same time fundamental nature of EU citizenship status.

When considering the latter set of criteria exclusively, *i.e.* its fundamental role in the EU structure, tying EU citizenship to the requirement of staying in the territory may indeed be problematic. As was confirmed in *Eman and Sevinger*, EU citizenship status remains a fundamental legal status outside the territory of the EU as well; what is more, several entitlements of EU citizens may be exercised

65 *Nottebohm (Liechtenstein v. Guatemala)*, Judgment of 6 April 1955, ICJ Reports 1955, p. 4.

66 Van Eijken 2019, p. 722.

67 Convention on the Reduction of Statelessness, signed in New York in August 1961.

68 *Case C-369/90, Micheletti and others*, para. 6.

69 According to Kochenov, reading international regulations without a critical view, what is more, doing so to the detriment of the autonomy of the EU, is for this reason a rather worrying development in light of the earlier case-law of the CJEU. Kochenov 2019, p. 332.

70 It is noteworthy furthermore that the requirement of a 'genuine bond' formulated in *Nottebohm* of an international law issue was laid down only with reference to exercising diplomatic protection rather than with general relevance. Pál Sonnevend, 'Állampolgárság, idegenjog', *in* Tamás Kende *et al., Nemzetközi jog*, Complex, Budapest, 2014, p. 518.

71 A reason for this may be at the same time that *Micheletti* was not about granting or withdrawing the citizenship status, but about having it acknowledged by another Member State explicitly for the exercise of internal market rights.

even beyond the EU borders.[72] Putting the derivative nature of the legal status in focus, with the CJEU thereby respecting the principle of conferral, sheds quite a different light on the issue, as is also demonstrated in the following proportionality examination of the Netherlands regulation.

3.5.2. The Question of Proportionality as the Achilles Heel and at the Same Time Novel Element of the Judgment

The applicants in the main proceedings complained in their application among others about the fact that Netherlands law barred national courts from considering other circumstances certifying genuine link. Individual circumstances demonstrating the preservation of a genuine link with the Netherlands included proficiency in the Dutch language, the preservation of family and/or emotional relations in this Member State, or the exercising of suffrage at the Netherlands elections.

The CJEU, as implied above, undoubtedly failed to respond to the question whether the 10-year-rule in itself, *i.e.* without evaluating any other connecting factor to the Member State, proved to be a suitable tool for achieving the objective of public interest, *i.e.* the attainment of a genuine link between the Member State and its citizens.[73] Thus, instead of providing a detailed consideration on the suitability of the 10-year-rule for the attainment of the objective of public interest, the CJEU, with reference to the easy interruptibility of that period,[74] simply confirmed the lawfulness of the Netherlands provision. By doing so, the CJEU not only avoided the trap of evaluating the national tools described by the Advocate General but at the same time fully complied with the fundamental EU requirement of the principle of conferral.

Nevertheless, this does not by far mean that the CJEU failed to stand up for the EU law requirement of the implementation of EU citizenship rights. It is true that it did not prove ready to fight on open ground against the discriminative practice of the Netherlands law, which, in the case of dual citizenship provides that citizenship may be retained on the condition that the holder stays in the territory of the country or prolongs their document. It did, however, make an effort to limit the scope of the latter provision when ruling that in the case of an automatic loss of status following from a legal provision, an opportunity of an ancillary examination by Member State courts or authorities must be provided, as a result of which citizenship could be restored even with *ex tunc* effect.

With this, in procedural law sense, the CJEU intruded into a territory that used to be a field of discretion for Member States exclusively; it is not without a reason that legal literature refers to *Tjebbes* as a bold one.[75] Thus, the provision requiring the individual examination of the EU law consequences in *Tjebbes* actually constitutes a strict proportionality test, which is not the case by far in

72 Kochenov 2019, p. 328.

73 Kochenov opines that the examination of the principle of proportionality is senseless from the outset, lacking a starting point to be defended. Kochenov 2019, p. 320.

74 By extending the expiration of the documents.

75 Stephen Coutts, *Bold and Thoughtful*, at https://europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes/.

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other recent judgments of the CJEU on EU citizenship where the CJEU either found it unnecessary to perform a proportionality test or applied a lenient one. For example, in *Alimanovic* and *Garcia-Nieto and others*[76] concerning social provision for economically inactive EU citizens, the CJEU found that a Member State could deny the provision applied for without performing any individual examination considering that the 2004/38 EC Directive on free movement already took the applicant's individual circumstances into consideration.[77] In *Delvigne* concerning the restriction of suffrage to the European Parliament, on the other hand, it ruled that restricting suffrage based on national criminal law was proportionate without explicitly examining the individual penalty imposed on the applicant of the case or considering the potential mitigating circumstances of the individual's situation.

Tjebbes can be characterized as a well-balanced judgment that considered both EU (or individual) and Member State interests. While the CJEU strongly intrudes into a field that used to be subject to Member State competence by demanding individual examinations to be performed by Member State courts and authorities, it does so very considerately by restricting the individual examination of legal consequences to the fields of EU interests only. What these fields in fact are, will be discussed next.

3.5.3. The Neuralgic Points of the Judgment: Minors' Loss of Rights and the CJEU's Approach to Multiple Citizenship

As we can see, the CJEU's judgment is a well-balanced one on the whole. Nevertheless, it would have been desirable if the CJEU had put more emphasis on accentuating EU interests/values in the reasoning of its judgment.

Only at one point of the reasoning does the CJEU address the issue of the situation of minors,[78] which is surprisingly short, especially when compared to the contents of the opinion of the Advocate General. The latter, following a lengthy argumentation, regarded the Netherlands regulation to be more restrictive than necessary and thus disproportionate, pointing out the vulnerability of the situation of children in respect of retaining their nationality. The CJEU did not follow the opinion but nevertheless acknowledged that the principle of uniform nationality within the family did not always serve the child's best interest, so even in their case ensuring the opportunity of an ancillary examination is of significance. The principle of the child's best interest, although

76 *Case C-67/14, Alimanovic;* Judgment of 25 February 2016, *Case C-299/14, García-Nieto and others*, ECLI:EU:C:2016:114.

77 However, we must keep in mind that the above cases are strongly related to free movement, and thus, are closely linked to the internal market. On the contrary, *Tjebbes* is grounded on Article 20, which is less connected to the internal market; simply because none of the main criteria are met there (*e.g.* economically active status and the cross-border nature). Therefore, their constitutional context differs markedly. While in *Alimanovic* and *Garcia Nieto* it is the EU citizens' most fundamental right of free movement rooted in the internal market that is restricted, in the sensitive field of Member State citizenship the CJEU understandably wishes to give more room for maneuver to the Member States.

78 *Case C-221/17, Tjebbes and others,* para. 47.

now part of primary EU law,[79] has gained explicit acknowledgement in the latest CJEU case-law only within a narrow circle.[80] This certainly does not mean that the CJEU did not implement its substance in its earlier judgments implicitly.[81] It is all the more surprising therefore, that in its argumentation the CJEU left only marginal room for the protection of children by degrading it to a mere constituent of the ancillary examination. This is especially incomprehensible in light of the fact that the CJEU, unlike in *Rottman*, now seemed clearly ready to deal with fundamental rights aspects, or at least this is what the CJEU's reference to the substance of Article 7 of the Charter suggests. But it is not only the field of children's rights where certain fundamental rights aspects get lost in the reasoning of the CJEU. Unlike *Eman and Sevinger*, the judgment does not concern the legal consequences of the Netherlands regulation potentially violating the principle of equality of EU law.[82] Meanwhile, the regulation discriminating against dual citizens in the above way – although it follows from the international law targeting the avoidance of statelessness – strongly questions the effective implementation of the legal principle of equality.[83]

The question may arise in relation to the above how the regulation affects the situation of those holding dual citizenship, considering that it speaks of foreign and not specifically third country nationals.[84] While the CJEU is silent about this issue, the opinion of the Advocate General even suggests that the Netherlands regulation does not merely refer to third country nationals but citizens holding dual EU nationality as well.

> "As I pointed out above, the loss of Netherlands nationality laid down in that article equally applies to nationals of the Kingdom of Netherlands who are also nationals of another Member State and who reside in a third country."[85]

At this point we cannot but agree with Kochenov, who opines this approach is problematic especially because it suggests that it is not worth acquiring a second nationality for EU citizens. While at the same time the supranational structure of

79 Since the Charter acquired binding force.

80 Namely in the case-law on the family reunification of third country nationals. *See* Judgment of 27 June 2006, *Case C-540/03, Parliament v. Council*, ECLI:EU:C:2006:429; Judgment of 6 December 2012, *Joined Cases C-356/11 and C-357/11, O. S. and L.*, ECLI:EU:C:2012:776.

81 *Cf.* Judgment of 11 July 2002, *Case C-60/00, Carpenter*, ECLI:EU:C:2002:434; Judgment of 17 September 2002, *Case C-413/99, Baumbast and R*, ECLI:EU:C:2002:493; Judgment of 19 October 2004, *Case C-200/02, Zhu and Chen,* ECLI:EU:C:2004:639; *Case C-34/09, Zambrano*.

82 While in *Eman and Sevinger* the CJEU ruled that discrimination against certain groups of a Member State was unacceptable, in *Tjebbes* the CJEU apparently finds no fault with it.

83 According to van Ejiken, in this case it is an acceptable argument that the situation of third country citizens who simultaneously hold the citizenship of an EU state is not comparable with the situation of those who are purely the citizens of an EU country. At the same time, the contents of *Micheletti* somewhat contradict the statement that the rights of EU citizens who also hold the nationality of a third country must not be undermined in any way. *See* van Eijken 2019, p. 728.

84 Since *Lounes* it is well-known that in certain cases dual citizenship may be detrimental to EU citizens. Judgment of 14 November 2017, *Case C-165/16, Lounes,* ECLI:EU:C:2017:862.

85 *Case C-221/17, Tjebbes and others*, Opinion of the Advocate General, para. 93.

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the EU provides Union citizens exactly with the opportunity to decide where and how they wish to live in the territory of the EU.[86]

It is unfortunate that in the justification of *Tjebbes* the CJEU did not speak out against the opinion of the Advocate General by failing to stand up explicitly for the institution of dual citizenship in an EU context.[87] According to Kochenov, to punish those who, exercising their right of free movement, acquire nationality in a new Member State by naturalization, goes against the logic of integration.[88]

Finally, in relation to the above, the interpretation of the 'territorial scope of integration' may arise as a question. It is incomprehensible why the requirement of staying in the territory is related to the EU Treaty itself rather than the territorial scope of international agreements signed by the EU. By virtue of the bilateral agreement between the EU and Switzerland EU citizens gained free movement and employment rights in the territory of Switzerland and *vice versa*.[89] In light of this it is surprising that the CJEU does not mention the integration

86 As regards this practice of discrimination against dual EU citizens, Kochenov states that until the suffrage of all EU citizens extends to national elections – with respect to which the author himself is most sceptical – there is no reasonable counterargument supporting the deprivation of citizens – who gained a different nationality through naturalization from their original nationality. Kochenov 2019, p. 334.

87 Id. The negative perception of dual EU citizenship is not without precedent, suffice to think of the amendment of Act XL of 1993 on nationality of the Slovak Republic in 2010 as a response to the opportunity of simplified naturalization provided by the Hungarian state, by virtue of which everyone who acquires a new citizenship via naturalization automatically loses Slovak nationality. The fact of this withdrawal of right is not laid down in a decision and there is no justification, considering which there is no opportunity of a judicial review either. Although the amendment of the act was targeted against the Hungarian minority, as a result, persons who had acquired other, primarily German, Czech, Austrian or British nationalities also lost their Slovak nationality. The Slovak legislator, recognizing the 'unwanted' effects of the Slovak legal amendment restricting multiple citizenship, made it possible in 2015, by virtue of a decree by the Ministry of Interior for persons having held Slovak citizenship to regain it on preferential conditions. This preferential re-naturalization is made easier by a registered foreign place of residence available at the time of acquiring the foreign nationality. This seemingly neutral and objective criterion, however, very much restricts the circle of those who are actually able to regain their Slovak nationality under these preferential conditions. Accordingly, exactly those Hungarians living in Slovakia may suffer a disadvantage, who, using the opportunity of being granted Hungarian nationality on a preferential basis wished to acquire Hungarian nationality by keeping their original place of residence in Slovakia.

88 For those acquiring new citizenship in a Member State by exercising their right of free movement, the contents of the CJEU's latest judgment in *Lounes* apply. According to this CJEU judgment, the situation of EU citizens who exercise the right of free movement and, while keeping their original nationality, acquire new citizenship in the host country by naturalization, cannot be considered a purely Member State situation. In the contrary case they would receive the same treatment as citizens of the host country who have never left the host country, and on the other hand this would go against the logic of the closest integration possible as they would have to give up the advantage of maintaining family life in the host country. Thus, as a consequence of naturalization they are removed from under the scope of the Free Movement Directive but continue to enjoy the advantages stemming from (primary) EU law including Article 21 TFEU.

89 Agreement between the European Community and its Member States of the one part and the Swiss Confederation of the other on the free movement of persons.

implemented in the field of the free movement of persons between the EU and Switzerland with reference to the territorial scope of the Netherlands regulation.

3.5.4. The Characteristics and 'Substantive Elements' of EU Citizenship

The judgment once again throws light upon the most evident and therefore neglected fundamental trait of the legal institution according to which EU citizenship is of an ancillary nature, *i.e.* that its existence derives from the Member State legal order itself. The judgment points out, as Coutts puts it, that a prerequisite of EU citizenship status is participation in a national political community. This essential point must be certainly kept in mind when 'advocating an autonomous EU citizenship *per se*.'[90]

Tjebbes is also telling with respect to the fact what the CJEU believes to be the essence of the status in question. The CJEU discusses this in relation to the legal consequences to be examined in the course of the proportionality test, and in utmost detail. Thus, in its opinion the central elements of this status are constituted by the rights of free movement and residence in the territory of Member States explicitly with the purpose of family life and professional activity. Although the actual case was not decided by virtue of Article 21 TFEU, at this point the CJEU still makes a connection between the status according to Article 20 and the exercise of movement rights.[91] Furthermore, the CJEU mentions the right to consular protection or the lack of it as factors that may affect the lives of EU citizens and their families.

Careful readers also notice that the political/public life dimension is essentially missing from the list of EU law consequences. Beyond a mere reference to *Delvigne* the CJEU does not mention the right of participation at local elections or the opportunity of EU citizens' initiative entitlements either, losing which could be problematic in the case of a deprivation of rights. From all of the above, one may conclude that beyond professional and private life factors the CJEU does not wish to accentuate the political/public life nature of EU citizenship.

Kochenov puts it even more bluntly when saying that *Tjebbes* essentially excludes those living in the territory of the EU from exercising political rights.[92] Even if this formulation is somewhat exaggerated, *Delvigne* would have indeed required of the CJEU to deal with the withdrawal of political rights as a potentially emerging legal consequence at least in principle.

The CJEU finally adds to the above that from the point of view of individual examination the above legal consequences must not be merely hypothetical or potential. Although this statement is in compliance with the case-law of the

90 Coutts cites Kostakopolou and Garner in his article. *See* in general at http://global-citizenship.eui.eu/forum/eurozenship-debate/.

91 In the latest case-law of the CJEU these rights appear, by connecting the two articles, from the perspective of leading a life in the entire territory of the EU. *Cf.* Judgment of 13 September 2016, *Case C-165/14, Rendón Marin*, ECLI:EU:C:2016:675; Judgment of 10 May 2017, *Case C-133/15, Chavez-Vilchez and others*, ECLI:EU:C:2017:354.

92 Kochenov 2019, p. 334.

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CJEU, it is a surprising statement by the CJEU that for long decades had emphasized exactly the fundamental nature of this status.[93]

4. Conclusion

As Vörös very succinctly puts it in his study on EU citizenship, due to the legal development activity of the CJEU, the relationship between EU law and Member States "is made more complex also by the new legal institution of EU citizenship".[94] Excellent examples for this are the two cases analyzed above, in which the national and the EU strings are intertwined almost inextricably due to the multi- layered character of Union citizenship. Although the facts in the above cases are in Member State competence *a priori*, the exercise of this competence is strictly limited by the supranational institution of EU citizenship.[95]

This is certainly not the first time that, through the supranational institution of EU citizenship, EU law has intruded into a territory primarily reserved for Member State regulation. In the past two decades, with the 'concept of integration through law' gaining ground and the emphasis on the fundamental nature of EU citizenship, the CJEU has found an easy way for implementing supranational aspects. By now, however, the above concept has been questioned,[96] parallel to which the structure of EU citizenship built on innovative court decisions seems to be weakening. This trend is reflected in all CJEU judgments on the issue of EU citizenship where the relevant secondary legislation is interpreted restrictively or at least very 'literally', giving more room than before to the implementation of Member State interests. In view of this legal policy context it can be established that in both cases analyzed above, the CJEU made well-balanced judgments keeping EU as well as Member State interests in mind, which, although has brought no substantial progress in the process of recognizing EU citizenship as an autonomous status,[97] makes an effort to consolidate its fundamental character.

93 Kochenov opines that with this statement the CJEU denies exactly the abstract nature of the legal institution of EU citizenship, tilting things upside down. The opportunity to actually enjoy the essential rights that follow from the EU legal status must not be dependent on a minority's – Dutch persons holding dual nationality – exercising their rights. *Cf.* Id.

94 Imre Vörös, 'Néhány gondolat az uniós polgárság intézményéről', *Jogelméleti Szemle,* 2012/2, at http://jesz.ajk.elte.hu/voros50.pdf.

95 The complexity of the issue, which follows from the ancillary nature of EU citizenship, is well illustrated by the fact that in *Tjebbes* it was exactly this supranational status that was the main point of reference for retaining national citizenship.

96 The most conspicuous example for this was the failure of the Constitutional Treaty.

97 Although in *Delvigne* the CJEU declared universal suffrage for EU citizens, it provided ample room for restricting it by virtue of national criminal law. By contrast in *Tjebbes*: although it pointed out that the question of citizenship pertained fundamentally to the national competence, with respect to examining consequences in EU law, however, it intrudes into a legal field reserved for Member State discretion. Both cases therefore throw light upon the multi-layered character of EU citizenship, which is of a decisive nature both from the point of view of the acquisition/withdrawal of the legal status and the exercise of rights.

The latter is implied by the fact that in both cases the CJEU establishes European law relevance irrespective of the movement element. What is more, in *Delvigne* the confirmation of the political participation of EU citizens a forward-looking development by all means.[98]

However, this effort of the CJEU is far from being as ambitious as it was in the decade after the turn of the millennium. While it is clear from the cases in question that we can't speak about the judicial deconstruction of EU citizenship by far, as some of the Commentators do, it is thought-provoking that in *Tjebbes,* it was exactly these political entitlements that the CJEU forgot about when compiling the list summarizing the essence of EU citizenship. Nevertheless, as O'Leary puts it, the historical concentration on free movement should not lead us to overlook the political dimensions of the status.[99] Yet under the pressure of the Member States the CJEU continues to be unable or unwilling to break free from the shackle of the fundamentally economic approach to EU citizenship status.[100]

One swallow does not make a summer, the saying goes. Although from the point of view of EU law *Delvigne* can be categorized a rather progressive judgment, in itself it seems insufficient for moving the jurisprudence related to the status of EU citizenship really forward.[101]

However, the cautious approach taken by the CJEU in *Tjebbes* is quite understandable. The CJEU is right to believe that fostering the autonomy of EU citizenship status primarily requires the social consolidation of the institution in the form of an internal, organic process. The crisis processes that have spilled over the EU in recent times have made it obvious that the feeling of European togetherness should not rest on merely legal grounds such as treaty amendments and innovative court judgments. As Weiler puts it, the institution of EU citizenship as a fundamental status is not a "self fulfilling prophecy".[102] Its social and political embeddedness is direly needed for optimal operation. Whether judgments like the above will bring the EU closer to its citizens is a question which remains to be answered.

98 The CJEU statements made in earlier case-law were not straightforward with reference to the link between EU citizenship and EP elections. *Delvigne* puts an end to this ambiguity and consolidates the right to vote in the EP elections.

99 Siofra O' Leary, 'Nationality and Citizenship? Integration and Rights-based Perspectives', *in* Koen Lenaerts *et al., An Ever Changing Union*?, Hart Publishing, Oxford, 2019, p. 72.

100 This seems to be supported by the proportionality test used also in *Delvigne*, which in order to justify restricting suffrage on a national basis, stipulates the application of much more lenient conditions laid down in the Charter against the strict set of requirements for the restriction of the right of free movement laid down in secondary legislation.

101 From another point of view the Court in its decisions strikes a balance between the 'pressure' of the Member States and protecting EU citizenship.

102 Weiler 1999.

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