Loss and Acquisition of EU Citizenship in the Case Law of the CJEU

In the Spirit of the Underlying Logic of Gradual Integration?

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Abstract

According to the CJEU, EU citizenship is destined to be the fundamental status of the nationals of the EU Member States. The rules of EU primary law regarding this status however require interpretation in various dimension, with the relationship between national citizenship and EU citizenship being one of them. This paper analyses recent case law – focusing especially on the novelties of the JY judgment – regarding the loss and acquisition of EU citizenship, including the relevance of free movement and the concept of gradual integration. It finally offers some conclusions on how the scope of EU law should be interpreted in this context.

Keywords: EU citizenship, nationality, statelessness, free movement, gradual integration.

1. Introductory Remarks

According to the well-known mantra of the CJEU, EU citizenship is destined to be the fundamental status of the nationals of the EU Member States.[1] Ever since its inception via the Maastricht Treaty,[2] the status of EU citizenship has been the subject of CJEU case law in terms of its nature, content and limits – moreover, the related jurisprudence often carried constitutional relevance, and even more so in

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1 This was first proclaimed in Grzelczyk (Judgment of 20 September 2001, *Case C-184/99*, *Grzelczyk,* ECLI:EU:C:2001:458). The statement was since then repeated in other significant CJEU judgments on EU citizenship and has also been incorporated into the preamble of Directive 2004/38. Slight variations in wording exist: Grzelczyk *uses the verb "destined" (para. 31), in* Rottmann *(Judgment of 2 March 2010, Case C-135/08, Rottmann*, ECLI:EU:C:2010:104), for instance, "intended" is used (para. 43), whereas Directive 2004/38 opts for "should be" [recital (3) of the preamble].

2 For an earlier account and analysis of interpretation dilemmas, *see* Jo Shaw, 'The Interpretation of European Union Citizenship', *The Modern Law Review*, Vol. 61, Issue 3, 1998, pp. 293-317.

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recent years.[3] This article focuses on recent case law of the CJEU pertaining to rules on the loss and acquisition of EU citizenship. The concept of EU citizenship will be briefly introduced, elaborating also on how it lies at an intersection of national, international and European law. Then, against this backdrop, it will be analyzed how recent CJEU case law meanders between these legal orders, with special attention to the most recent development: the *JY* case.

2. EU Citizenship at the Intersection of Three Legal Orders

By reading only the EU Treaties, one could be excused for making the assumption that the loss or acquisition of EU citizenship is clearly regulated by – and only by – the national citizenship laws of the EU Member States: based on a textual interpretation of Article 9 TEU and Article 20 TFEU, one can surmise that, as EU citizenship is dependent on Member State citizenship, and is additional to the latter and not a replacement of it, EU law has no further role in regulating either the acquisition or the loss of this status. This seems to suggest that national law is the only legal order of relevance in this context. It is of course true that national law does regulate how individuals may acquire or lose national citizenship: this is a field not harmonized by EU law, and national rules within the EU exhibit not only many inevitable similarities with each other but many differences as well. This, at first glance, is fully acceptable, for the aforementioned reasons. However, a deeper analysis reveals that in fact international law, EU law and national law all have an effect on the acquisition or loss of EU citizenship.

Nonetheless, it is national law that comes to mind first – the regulation of citizenship or nationality is generally considered a traditional element of state sovereignty. States lay down the rules for the acquisition and loss of citizenship; these rules are shaped by many different aims relating to perceived state interests and policy goals.[4]

Accordingly, international law (and also European law) can only have a limited effect on such national laws. In the late 19th and early 20th century, it was generally accepted that, flowing from the independence of states, these states alone can decide whether or not to grant or revoke membership in their political community.[5] In the second half of the twentieth century, following the establishment of the UN and the advent of human rights in international law, it was gradually recognized that international law may have – albeit a rather limited – effect on nationality

3 On the role of the CJEU's jurisprudence on EU citizenship, *see* Koen Lenaerts, 'The Concept of EU Citizenship in the Case Law of the European Court of Justice', *ERA Forum*, Vol. 13, Issue 4, 2013, pp. 569-583. On some more recent developments, as well as the CJEU's 'incremental approach' to adjudicating constitutional aspects of EU citizenship, *see* Koen Lenaerts, 'EU Citizenship and the European Court of Justice's 'Stone-by-Stone' Approach', *International Comparative Jurisprudence*, Vol. 1, Issue 1, 2015, pp. 1-10.

4 For a comparative analysis of factors shaping citizenship laws, *see* Maarten Peter Vink & Rainer Bauböck, 'Citizenship configurations: Analysing the multiple purposes of citizenship regimes in Europe', *Comparative European Politics*, Vol. 11, Issue 5, 2013, pp. 621-648.

5 Peter J. Spiro, 'A New International Law of Citizenship', *American Journal of International Law*, Vol. 105, Issue 4, 2011, pp. 698-699.

laws. In 1948, the Universal Declaration of Human Rights[6] famously proclaimed that everyone had a right to nationality, although the contours of this right remain ambiguous.[7] Nevertheless, the international community has adopted binding instruments relating to nationality and statelessness,[8] albeit without fundamentally altering the *status quo* regarding the regulation of nationality. This was *inter alia* reaffirmed by the ICJ as well, in the (otherwise much debated) *Nottebohm* case.[9] States thus retain, under international law, the competence to determine who their citizens are and, among other things, if they allow for multiple citizenship.[10]

Turning to EU law, one must rely firstly on the Treaties, which established EU citizenship as a status dependent upon and additional to national citizenship.[11] EU law does not contain any further rules as to the acquisition or loss of EU citizenship: since the status depends on national citizenship, national rules pertaining to acquisition and loss prevail.[12] It is up to the Member States to determine who their nationals are (and aren't), thus, they act as the 'gatekeepers'[13] of EU citizenship. This status, although undoubtedly a European concept, therefore remains anchored in the various nationality laws of the Member State. EU law contains no rules on multiple citizenship, either. However, the CJEU has in its case law introduced limiting considerations based on EU law which the Member States must have due regard to. These include, but are not limited to the following: *(i)* Member States must not restrict the effects of nationality granted by another Member State by laying down additional conditions for the recognition of that nationality with a

6 UNGA Res. 217A (III), UN Doc A/810, p. 71.

7 For an analysis of what the right to a nationality means in today's international law, *see* Alice Edwards, 'The meaning of nationality in international law in an era of human rights: procedural and substantive aspects', *in* Alice Edwards & Laura Van Waas (eds.), *Nationality and Statelessness under International Law*, Cambridge University Press, Cambridge, 2014, pp. 11-43.

8 *See* most importantly the 1954 UN Convention relating to the Status of Stateless Persons (UN Treaty Series, Vol. 360), the 1961 UN Convention on the Reduction of Statelessness (UN Treaty Series, Vol. 989), and, regionally, the 1997 European Convention on Nationality (ETS No. 166) adopted under the aegis of the Council of Europe.

9 "It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation." ICJ, *Nottebohm (Liechtenstein v Guatemala)*, Second Phase, Judgment of 6 April 1955, ICJ Reports 1955, at 4.

10 Marcel Szabó, 'A többes állampolgárság – új nemzetközi és uniós perspektívák felé', *Állam- és Jogtudomány*, Vol. 54, Issue 1-2, 2013, pp. 126-127.

11 *Cf*. Article 9 TEU and Article 20 TFEU. The express clarification of the complementary nature of EU citizenship has been added to the treaty definition via the Amsterdam Treaty, and the wording was amended from 'complementary' to 'additional' by the Lisbon Treaty. This clarification is seen as a clear reaffirmation of the fact that the concept of EU citizenship cannot be equated with the traditional concept of nationality and shall not, in and of itself, be considered as a step towards the creation of European federal state. *See* Ágoston Mohay & Davor Muhvić, 'The legal nature of EU citizenship: perspectives from international and EU law', *in* Tímea Drinóczi *et al*. (eds.), *Contemporary legal challenges: EU – Hungary – Croatia*, Faculty of Law, University of Pécs & Faculty of Law, J. J. Strossmayer University of Osijek, Pécs-Osijek, 2012, pp. 163-164.

12 Judgment of 7 July 1992, *Case C-369/90, Micheletti*, ECLI:EU:C:1992:295, para. 10.

13 Dora Kostakopoulou, *The Future Governance of Citizenship*, Cambridge University Press, Cambridge, 2008, p. 36.

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view to the exercise of a fundamental freedom provided for in the Treaty;[14] *(ii)* Member States need to have due regard to EU law in connection with decisions withdrawing naturalization, in case the withdrawal results in the loss of EU citizenship as well;[15] *(iii)* in a situation where an EU citizen has lost this status as the result of a withdrawal of naturalization, the Member State of which the individual had previously been a national of must also have due regard to EU law (and more specifically, the principle of proportionality) when considering the possibility of the recovery of the 'original' citizenship.[16]

Due regard to EU law must thus be had in cases of Union law relevance even when granting nationality and withdrawing naturalization. The decisional freedom of the Member States is thus limited by EU law-related considerations originating from the case law of the CJEU.

It has been argued that EU citizenship should not (or at least not yet) be considered as political enfranchisement (due to several perceivable disconnections), but as a jurisdictional issue; this is in line with the fact that the EU is commonly regarded as a *sui generis* legal order, but not, however, as a polity with its own citizens. It is accordingly justifiable to regard EU citizenship first and foremost as a 'legal construct based on a jurisdictional conception'.[17] While this stance in my view does not exclude the simultaneous viability of the polity approach, it nevertheless lends itself quite well to assessing EU-law constraints on the rules of acquisition and loss of citizenship: the relevance of EU citizenship rules will depend on whether the situation even falls within the ambit of EU law or not.

3. Acquisition and Loss of Citizenship in the Case Law of the CJEU: In the Spirit of the Underlying Logic of Gradual Integration

As mentioned above, EU law does not explicitly regulate the acquisition and loss of citizenship. A power to harmonize the nationality laws would be regarded by the Member States as a serious limitation of their sovereignty,[18] thus, such a competence was not conferred on the EU[19] and, as is known, any competence not conferred upon the EU by the Treaties remains with the Member States.[20] The question that the CJEU has nevertheless been (and continues to be) confronted with is to what extent EU law restricts Member States in regulating citizenship because of an existing connection to EU law.

14 *Case C-369/90, Micheletti*, para. 10. This is repeated *verbatim* in *Garcia Avello* (Judgment of 2 October 2003, *Case C-148/02, Garcia Avello*, ECLI:EU:C:2003:539, para. 28) and *Zhu and Chen* (Judgment of 19 October 2004, *Case C-200/02, Zhu and Chen*, ECLI:EU:C:2004:639, para. 39).

15 *Case C-135/08, Rottmann*, para. 62.

16 Id.

17 Lorin-Johannes Wagner, 'Member State nationality under EU Law – To be or not to be a Union citizen?', *Maastricht Journal of European and Comparative Law*, Vol. 28, Issue 3, 2021, pp. 312-313.

18 Imola Schiffner, 'Az uniós polgárság hatása a tagállami állampolgársági politikákra', *De Iurisprudentia et Iure Publico*, Vol. 9, Issue 2, 2015, pp. 1-2.

19 *Cf.* Articles 3-6 TFEU.

20 *Cf.* Article 4(1) TEU.

One of the considerations that was introduced into this debate by the CJEU in its case law is the concept of gradual integration – namely, the gradual integration of mobile EU citizens into the host Member State. According to the CJEU, this concept is the underlying logic of Article 21(1) TFEU,[21] signifying a crucial connection between mobility and societal integration in the EU – notwithstanding the fact that, as the *Zambrano* jurisprudence shows, free movement is not a *sine qua non* precondition to direct reliance on Article 20 TFEU.[22] As we will see however, the effects of this concept remain somewhat unclear.

3.1. The Rottmann Case

The question of acquisition and loss of nationality becomes relevant for the CJEU (and thus EU law) if it impacts upon EU citizenship. The 'classic' judgment in this context is *Rottmann*.[23] Dr Rottmann, originally an Austrian citizen, having made use of his free movement rights, moved to and later obtained the nationality of Germany. This resulted in him losing his Austrian nationality in accordance with Austrian citizenship law. However, due to the fact that he obtained German nationality by deception, his German naturalization was later withdrawn, with him becoming stateless, and also losing his EU citizenship in the process.[24] In this much-analyzed preliminary ruling, the CJEU reaffirmed that the withdrawal of naturalization by a Member State was not contrary to EU law, even if it resulted in statelessness and the loss of EU citizenship. Nevertheless, the CJEU did not rule that this question was outside of its competence either, echoing its settled case law that a matter that falls within the competence of the Member States does not alter the fact that, in situations covered by EU law, the national rules concerned must have due regard to the latter.[25] In this judgment, the fraudulent nature of acquisition seems to override the relevance of previously exercised free movement, as well as the question of how the withdrawal relates to the gradual integration of the individual in the recipient Member State. Neither of these considerations are mentioned by the CJEU, even though Dr Rottmann had obviously exercised free movement before the judicial proceedings caught up with him.

21 Judgment of 14 November 2017, *Case C-165/16, Lounes*, ECLI:EU:C:2017:862, paras. 56-58. In the context of dual Member State nationality and free movement, the CJEU proclaimed that the rights conferred on EU citizens and their family members via Article 21(1) TFEU was intended to promote the gradual integration of the Union citizen concerned in the society of the host Member State, and that it would be contrary precisely to the underlying logic of gradual integration if "citizens, who have acquired rights under that provision as a result of having exercised their freedom of movement, must forego those rights –– in particular the right to family life in the host Member State –– because they have sought, by becoming naturalized in that Member State, to become more deeply integrated in the society of that State."

22 Judgment of 8 March 2011, *Case C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi*, ECLI:EU:C:2011:124, paras. 44-45.

23 *Case C-135/08, Rottmann*.

24 For further analysis, *see* Ágoston Mohay, 'A Rottmann-ügy. Újabb adalékok az uniós polgárság és a tagállami állampolgárság összefüggéseihez', *Jogesetek Magyarázata*, Vol. 2, Issue 2, 2011, pp. 50-58.

25 *Case C-135/08, Rottmann*, para. 41.

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3.2. The Tjebbes Case

Almost ten years later, the CJEU was expressly asked to elaborate further on the effects of the *Rottmann* judgment in *Tjebbes and others*.[26] The joined case before the Dutch Council of State, the Raad van State concerned four individuals who had been dual nationals but have lost their Dutch nationality and thus their EU citizenship due to permanent residence abroad, as in accordance with Dutch nationality law, dual nationals who resided for an uninterrupted period of 10 years outside the Netherlands or the territory of the EU lose their Dutch nationality.[27] The CJEU was asked to provide a preliminary ruling on the EU law compatibility of such rules by the Raad van State, as the national court was of the opinion that the Dutch rules contradicted the *dictum* of *Rottmann* – specifically, the proportionality test prescribed in it.[28] The situation leading up to the preliminary ruling did not relate to free movement within the EU, thus the CJEU decided the case based purely on Article 20 TFEU.[29] The CJEU recalled once again that EU citizenship is intended to be the fundamental status of nationals, but that it was still legitimate for the Member States to

> "wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality."[30]

The CJEU went on to reaffirm that in principle, regulations such as the Dutch nationality law were legitimate in requiring a genuine link between the nationals and the State, supporting this with international law-based arguments as well, referring to the Convention on the Reduction of Statelessness: said Convention allowed measures leading to loss of nationality subject to the condition that this did not result in statelessness.[31] The CJEU was of the opinion that this condition has been met, as the national provisions were conditional upon the individual in question possessing the nationality of another state. Furthermore, the individual concerned could, within the 10-year period request the issuance of either a declaration regarding the possession of Netherlands nationality, a travel document or a Netherlands identity card, thus demonstrating the intent to retain a genuine link with the State – this interrupts the 10-year period, and precludes the loss of Dutch nationality.[32]

The CJEU accordingly concluded that EU law did not preclude national rules which provided for the loss, by operation of law, of the nationality of that Member State entailing also the loss of EU citizenship and the rights attached thereto – subject to the requirement that the national authorities and courts need to be in a position to be able to examine the consequences of the loss of that nationality and,

26 Judgment of 12 March 2019, *Case C-221/17, Tjebbes and others*, ECLI:EU:C:2019:189.
27 Id. para. 10.
28 Id. paras. 20-22.
29 Id. para. 28.
30 Id. paras. 31-33.
31 *Cf.* Articles 6 and 7(3)-(6) of the Convention on the Reduction of Statelessness.
32 *Case C-221/17, Tjebbes and others*, paras. 37-38.

where appropriate, to have the persons concerned recover their nationality *ex tunc* in the context of an application by those persons for a travel document or any other document showing their nationality. In the course of that examination, the national authorities and courts are obliged to determine whether the consequences of the loss of nationality (and, as a corollary, EU citizenship) comply with the EU law principle of proportionality or not.[33] In *Tjebbes*, the CJEU prescribed a strict proportionality analysis, requiring an individual review of the EU law consequences of nationality-related decisions as in the case at hand.[34] Thus it can be said that, in situations where the loss of EU citizenship is involved based on an act of a Member State, the CJEU requires the Member State to conduct the proportionality analysis, regardless of the reasons behind the withdrawal decision, thereby placing stricter obligations on EU Member States the those contained in international law.[35]

As a follow-up of *Tjebbes*, the *Raad van Staat*, the highest level Dutch administrative court passed judgment on how to 'react' to the judgment, and effectively prescribed a direct application of Article 20 TFEU for Dutch authorities, specifically the Minister of Foreign Affairs: since the Netherlands Nationality Act does not provide for a legal basis for a decision where a person reacquires Netherlands nationality if it was lost in violation of the EU law principle of proportionality, which in light of *Tjebbes* constitutes a violation of Article 20 TFEU, the competent Dutch minister must apply Article 20 directly and conduct an EU law-compatible proportionality assessment.[36]

In relation to the 10-year period defined by Dutch law, *Tjebbes* brings to mind an earlier case related to the voting rights of Dutch EU citizens living outside of the 'continental' Netherlands. In *Eman and Sevinger*, the legal dispute concerned the voting rights (in European Parliament elections) of Dutch citizens resident outside of 'continental' Netherlands – in Aruba, to be exact. Such citizens were not entitled to vote in European Parliament elections, unless they had been resident for at least 10 years in the Netherlands.[37] Apart from ascertaining that the Dutch rules contradicted the general principle of proportionality (*i.e.* not the specific principle enshrined in Article 18 TFEU, but the general principle of law discernible from CJEU case law), the CJEU confirmed that EU citizenship as a status was not at all conditional upon residence within the EU.[38] With *Eman and Sevinger* in mind, one

33 Id. paras. 48-49.

34 Laura Gyeney, 'Challenges Arising from the Multi-Level Character of EU Citizenship: The Legal Analysis of the Delvigne and Tjebbes Cases', *Hungarian Yearbook of International Law and European Law*, Vol. 8, Issue 1, 2020, pp. 292-293.

35 Marcel Szabó, 'A tagállami állampolgárság és az uniós polgárság viszonya: félúton vagy tévúton?', *in* Laura Gyeney & Marcel Szabó (eds.), *Az uniós polgárság jelene és jövője: úton az egységes európai állampolgárság felé?* ORAC, 2023, pp. 28-29.

36 Judgments 201504577/2/A3, 201507057/2/A3, 201508588/2/A3, 201601993/2/A3, 201604943/1/A3 and 201608752/1/A3 (NL:RVS:2020:423). *See* Gerard-René de Groot, 'A follow-up decision by the Council of State of the Netherlands in the Tjebbes case', *EUI Global Citizenship Observatory*, 18 February 2020, at https://globalcit.eu/a-follow-up-decision-by-the-council-of-state-of-the-netherlands-in-the-tjebbes-case/.

37 Judgment of 12 September 2006, *Case C-300/04, Eman and Sevinger*, ECLI:EU:C:2006:545, paras. 13-15.

38 Id. paras. 27-28, and 57-58. The individuals in the case at hand resided in an "overseas country and territory" of an EU Member State, but the statement can be extrapolated to residence in general.

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may be inclined to wonder: can a Member State citizenship regime that is in some cases conditional upon residence be fully compatible with EU law?

3.3. The JY Case

Whereas *Rottmann* and *Tjebbes* centered on the loss of nationality, *JY* revolved first and foremost around its acquisition, but nevertheless ultimately involved its loss, leading to statelessness.[39] JY was originally an Estonian national who applied for Austrian nationality and received an assurance from the relevant Austrian authority that she would indeed be granted Austrian nationality provided that she relinquished her Estonian nationality beforehand, in accordance with Austrian nationality law.[40] With this prospect in mind, JY relinquished her original nationality and became stateless for a period which was meant to be a temporary one – however, she was not granted Austrian nationality for the reason that she had, since receiving the assurance, committed two serious administrative offences.[41] According to the Austrian authority, these offences, viewed together with eight other offences committed before receiving the aforementioned assurance, demonstrated that JY represented a threat to public security, precluding her from being granted Austrian nationality in accordance with the *Staatsbürgerschaftsgesetz*.[42] JY took the matter to court in Austria, but her action was dismissed, as the Vienna Administrative Court found the matter to be in line with national law and international law (specifically the Convention on the Reduction of Statelessness). The court did not perform an analysis of the applicable EU law as it held the matter to be outside the scope of EU law.[43] JY in turn appealed to the Austrian Supreme Administrative Court, which decided to request a preliminary ruling. With its reference to the CJEU, the Supreme Administrative Court sought the interpretation of two questions, namely whether the situation of JY fell within the scope of EU law at all, and if it did, whether the measures taken by Austria complied with the proportionality test as conceived in *Rottmann*.[44]

As to the applicability of EU law – *i.e.* the jurisdiction question – the referring court (and the Austrian government) were of the opinion that the situation fell outside the scope of EU law, mainly for the reason that JY had voluntarily requested the termination of her original nationality.[45] The CJEU however came to the opposite conclusion: in the CJEU's view, it had to be taken into account that JY had only relinquished her original nationality because she intended to comply with Austrian nationality law – and she had already been in the possession of an assurance that she would be granted Austrian nationality. In this context, it cannot be said that she intended to lose her EU citizenship: instead, she intended to temporarily relinquish one nationality for the sake of another, thereby also

39 Judgment of 18 January 2022, *Case C-118/20, JY*, ECLI:EU:C:2022:34.
40 Id. paras. 13-14.
41 Id. para. 16.
42 BGBl. Nr. 311/1985.
43 *Case C-118/20, JY*, paras. 18-19.
44 Id. para. 28.
45 Id. paras. 31-34.

continuing to enjoy the rights associated with the status of EU citizenship.[46] Consequently, the facts of the case, even though it involved the decisions of two different Member States, placed the situation of JY within the scope of EU law, as the naturalization procedure affected the status of EU citizenship as conferred by Article 20 TFEU.[47] As a further argument, the CJEU brought up the concept of gradual integration, emphasizing the free movement element in the case. Undoubtedly, JY had exercised her right of free movement under Article 21 TFEU, moving to and residing in Austria for years. This underlying logic requires that the situation of EU citizens who acquired and exercised rights under Article 21 TFEU and are liable to lose those rights (*i.e.* in this case, movement and residence rights) as well as the status of EU citizenship must fall within the scope of EU law, thereby establishing the jurisdiction of the CJEU.[48]

As for the proportionality issue, the CJEU recalled a number of concepts from its case law. It recalled that the competence to regulate their nationality remained with the Member States, but stated that this competence had to be exercised having due regard to EU law by both Member States involved, *i.e.* the Member State of the original nationality and the Member State of the 'prospective' nationality. In this context, the CJEU essentially prescribed an obligation of cooperation by stating that where a national of a Member State applies to relinquish his or her nationality in order to be able to obtain the nationality of another Member State, the Member State of origin should not adopt, on the basis of an assurance given by that other Member State that the person concerned will indeed be granted nationality, a final decision "concerning the deprivation of nationality without ensuring that that decision enters into force only once the new nationality has actually been acquired."[49] The CJEU further added that in a situation such as that of JY, where the original nationality has already been lost before the new nationality could be acquired, "the obligation to ensure the effectiveness of Article 20 TFEU falls primarily" on the Member State of the 'prospective' nationality – and it is here where the principle of proportionality must be observed. The CJEU emphasized that the EU law concepts of public policy and public security had to be interpreted strictly, and concluded that based on the relatively minor traffic offences, it did

> "not appear that JY represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or a threat to public security in the Republic of Austria."[50]

It is noteworthy that in *JY*, the CJEU – for the first time – actually conducted the proportionality analysis regarding the national decision leading to the loss of nationality, as opposed to *Rottmann* and *Tjebbes*. It laid out the elements of the analysis in detail, based not only on the guidelines of the aforementioned judgments

46 Id. paras. 35-36.
47 Id. para. 40.
48 Id. para. 43.
49 Id. para. 50.
50 Id. paras. 64-70.

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but on international law as well. In the latter context, the CJEU examined the relevant provisions of the European Convention on Nationality and the Convention on the Reduction of Statelessness, underlining the legitimacy of national discretion in the field of loss and acquisition of nationality.[51]

Ironically, in his Opinion in *Tjebbes*, Advocate General Mengozzi took an extreme, hypothetical example on how the withdrawal of naturalization would be disproportionate as a response to a mere traffic offence.[52] Although in JY, it was not naturalization itself but the assurance of naturalization that was withdrawn, it does underline the disproportionate nature of the decision.[53]

4. The Uncertain Contours of the Scope of EU Law in Citizenship Matters

As described above, the case law of the CJEU relies on a number of concepts to deal with the precarious issue of loss and acquisition of nationality and EU citizenship. Even though it has *prima facie* no jurisdiction to rule on issues of nationality as such, the existence of EU citizenship as an *addendum* of Member State nationality requires the CJEU to take a more nuanced approach.

In this context, the concept of gradual integration into the host society (*i.e.* a host Member State) is a notable one as it seems to reach beyond the 'practical' effects of EU citizens' rights and aims to position EU citizenship (and especially free movement) as vehicle of societal integration within the EU. As noted in *Lounes* and, of course, *JY*, EU citizens cannot be allowed to end up having less rights because of their intent to naturalize and thus become 'better' integrated in another Member State.[54] It is obvious that the original judgment of the Austrian court as regards JY's situation did not exactly seem receptive towards this argument when it simply stated that JY's long period of residence and her integration in Austria – in both professional and personal terms – did not affect the state's decision to withdraw the previously issued assurance.[55]

Naturalization procedures of the Member States should not by the mere fact of the implementation of those procedures lead to the individual being liable to losing their EU citizenship[56] – this sentiment expressed by the CJEU has a strong focus on safeguarding the 'fundamental' status of EU citizenship and individual rights associated with it, to fully ensure such a situation in legal terms is likely impossible without harmonization. Of course, EU level harmonization in this field would require first that the EU be endowed with the necessary legislative competence and legal basis. This in turn would require the Member States to amend the Treaties,

51 Id. para. 55. The same factors were pointed out by the Advocate General Szpunar. *See* Opinion of Advocate General Szpunar, Delivered on 1 July 2021, *Case C-118/20, JY*, ECLI:EU:C:2021:530, para. 92.

52 Opinion of Advocate General Mengozzi, Delivered on 12 July 2018, *Case C-221/17, Tjebbes and others*, ECLI: EU:C:2018:572, para. 83.

53 Advocate General Szpunar noted this coincidence as well – *see Case C-118/20, JY*, Opinion of Advocate General Szpunar, para. 127.

54 *Case C-165/16, Lounes*, para. 58; *Case C-118/20, JY*, para. 43.

55 Judgment of 23 January 2018 of the Verwaltungsgericht Wien. *See Case C-118/20, JY*, para. 18.

56 Id. para. 47.

something which has not been on the foreseeable agenda of the EU for quite some time. One could at first sight consider relying on the never-before used evolutive clause of the TFEU regarding EU citizenship,[57] but in my view that option has to be ruled out for two reasons. The first reason is formal and temporary: reliance on the evolutive clause must be based on the triannual European Commission reports on the application of the provisions on EU citizenship. These reports do not, so far, envisage a need to amend the treaties in the abovementioned way.[58] The second reason is substantive: the evolutive clause may only be used to adopt provisions to "strengthen or to add to the rights listed in Article 20(2)", and not to frame the status itself or its relationship with national citizenship.[59]

What is interesting is that based on *JY*, it seems that the concept of gradual integration itself can bring a situation within the scope of EU law – although in JY, this concept was coupled with a free movement-based reasoning.[60] The dual argumentation used in JY however does not aid clarity, as it remains unclear whether the consequences of the gradual integration concept alone would have been sufficient to bring the matter within the scope of EU law. Free movement certainly does, as has been established by settled case law, but the same cannot yet be said about gradual integration. The 'triggering' of the scope of EU law is of course a broader issue as it has other important connotations as well, for example as a precondition to the applicability of EU fundamental rights.[61]

The question of the scope of EU law is of course absolutely fundamental in the EU citizenship context, as the application of the CJEU's entire citizenship case law is contingent upon whether or not the situation at hand is deemed to fall within this scope – an important and difficult question of legal interpretation, especially bearing in mind that the scope of EU law cannot be extended to purely internal issues simply by reference to EU citizenship.[62] In the reasoning of *JY*, a level of

57 Article 25 TFEU.

58 For the most recent one, *see* COM(2020) 731 final.

59 Schiffner suggests that to avoid discrepancies between the nationality laws of EU Member States, EU-level approximation measures could be adopted (Schiffner 2015, p. 5). In my view however, measures attempting any approximation between the nationality laws of EU Member States cannot, under the current state of EU primary law, be adopted in the form of secondary legislative acts as they would lack an appropriate legal basis. Schiffner's other suggestion (id.) that 'corrective measures' could be adopted in national law as a response to relevant CJEU case law is on the other hand viable, as the case law analyzed in this paper and elsewhere shows – however, *(i)* firstly, the CJEU can only react *ex post* to such issues and *(ii)* secondly, as nationality laws are diverse to begin with, a CJEU judgment may not necessarily be relevant for all legal systems. Thus, to be able to achieve true harmonization in this field, Treaty modification remains unavoidable – even if this solution merely seems a theoretical possibility at the moment.

60 Ilaria Gambardella, 'JY v Wiener Landesregierung: Adding Another Stone to the Case Law Built Up by the CJEU on Nationality and EU Citizenship', *European Papers*, Vol. 7, Issue 1, 2022, p. 405.

61 Id., agreeing with Lenaerts 2015. Lenaerts analyzes this question in the context of the rights of family members of EU citizens, notably in *Dereci and others* (Judgment of 15 November 2011, *Case C-256/11, Dereci*, ECLI:EU:C:2011:734). *See* Lenaerts 2015, pp. 4-5.

62 *See* Erzsébet Szalayné Sándor, *A személyek jogállása az uniós jogrendben*, Nemzeti Közszolgálati Egyetem, 2014, p. 78; with reference to *Uecker* (Judgment of 5 June 1997, *Joined Cases C-64/96 and C-65/96, Uecker*, ECLI:EU:C:1997:285), para. 23 as well as *Kaur* (Judgment of 20 February 2001, *Case C-192/99, Kaur*, ECLI:EU:C:2001:106), para. 19.

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uncertainty is perceivable: the CJEU draws the situation at hand into the scope of EU law by reference to its nature and consequences but feels the need to add a free movement reference as well, leaving the precise correlation of these two factors unclear.

These considerations aside, in *JY* the CJEU once again relied on proportionality to save the day: as it has done already in *Rottmann* and *Tjebbes* (and, of course, countless other times regarding other subjects), but the fact that the CJEU felt the need to actually conduct the analysis represents a novelty. One may wonder whether some recent – stark – judicial criticism[63] regarding the quality of the proportionality analyses conducted by the CJEU could have contributed to convincing the CJEU to provide a detailed analysis instead of leaving it up to the national court.

5. Concluding Remarks

Since the establishment of EU citizenship, its relationship with nationality – which was originally deemed to be a straightforward one, with the EU status being clearly subordinate to its national counterpart – has become much more nuanced and complex as the case law of the ECJ has been, as van den Brink puts it, "nibbling away at Member State sovereignty in the domain of nationality".[64] Lenaerts on the other hand describes this jurisprudence of the CJEU as a 'stone-by-stone' approach to "building a solid edifice to the rights attaching to the status of citizen of the Union."[65] However one calls it, the CJEU's case law represents an extensive interpretation of the Treaty, although the fact that the Treaties leave many questions attached to the status of EU citizenship ambiguous does make systematic interpretation by the CJEU almost inevitable. There are of course absolute limits to extensive interpretation: the CJEU has made it clear that the *Rottmann* and *Tjebbes* line of judgments is not transferable to Brexit-related loss of EU citizenship rights.[66] The CJEU has also made it plain that there is a clear lack of jurisdiction of

63 *Cf*. the PSPP-ruling of the German Federal Constitutional Court (2 BvR 859/15, paras. 123-124). For analysis, *see e.g.* Ágoston Mohay, 'The Public Sector Purchase Programme Ruling of the German Federal Constitutional Court and the European Union Legal Order', *in* Mario Reljanović (ed.), *Regional Law Review: Collection of Papers from the First International Scientific Conference*, Institute of Comparative Law, Belgrade, 2020, pp. 11-20; or Ana Bobic & Mark Dawson, 'Making sense of the "incomprehensible": The PSPP Judgment of the German Federal Constitutional Court', *Common Market Law Review*, Vol. 57, Issue 6, 2020, pp. 1953-1998.

64 Martijn van den Brink, 'The Relationship Between National and EU Citizenship: What Is It and What Should It Be', *in* Dora Kostakopoulou & Daniel Thym (eds.), *Research Handbook on European Union Citizenship Law and Policy*. *Navigating Challenges and Crises*. Edward Elgar, Cheltenham, 2022, p. 100.

65 Lenaerts 2015, p. 9.

66 *Cf*. Judgment of 9 June 2022, *Case C-673/20, Préfet du Gers*, ECLI:EU:C:2022:449, para. 62. One of the main crucial differences to highlight is that whereas the judgments analyzed in this paper concern cases where the CJEU had to examine specific situations of loss of citizenship relating to individual acts of Member States, Brexit resulted in the general abolition of the EU citizenship status of the nationals of the UK by way of the Withdrawal Agreement. In the latter situation, the question of the examination of proportionality did not arise.

the CJEU as regards a case involving the automatic loss of nationality of a Member State before the accession of the state to the EU, even where this loss has only been ascertained in 2018 (*i.e.* following the Member State's accession), as the loss itself had taken effect before said accession (in 1994).[67]

The *sui generis* nature of EU citizenship – a legal relationship between roughly 450 million individuals and a supranational organization (itself also *sui generis* in its nature) – is one that differs from national citizenship in many aspects, and where the much debated requirement of 'effectivity' is not applicable.[68] The status nevertheless remains intrinsically linked to national citizenship. It has been argued that, slowly and gradually, a new international law of citizenship is emerging, where access to citizenship is becoming a crucial concept.[69] In the EU, citizenship as a concept is gradually moving away from its strictly national or 'ethnic' roots.[70] No matter how sensitive and close to the core of state sovereignty national citizenship may be, the time might be approaching for the EU Member State to reconsider the possibility of EU-level rules on acquisition and loss of nationality, in order to be able to maintain EU citizenship as a coherent and truly equal status for all nationals of the Member States. Although only in some cases, but the effects of the discrepancies between national rules on acquisition and loss of citizenship can run counter to the goal and logic of gradual integration.

67 Order of 15 March 2022, *Case C-85/21, WY*, ECLI:EU:C:2022:192, paras. 27-31.

68 *See* Mónika Ganczer, 'Az uniós polgárság természete, összevetése az állampolgársággal', *in* Mónika Ganczer & László Knapp (eds.), *Az uniós polgárság elmélete és gyakorlata*, Gondolat, Budapest, 2022. pp. 36-37, rightly noting that the effectivity of nationality criteria introduced in the *Nottebohm* judgment of the ICJ cannot be valid in EU law as demonstrated by *Micheletti*.

69 Spiro 2011, pp. 694-746.

70 Szabó 2013, p. 143.

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