Case C-135/08, *Janko Rottmann* v. *Freistaat Bayern*, judgment of 2 March 2010 (Grand Chamber), not yet reported.

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1. Introduction

Nationality law of the Member States *is* within the scope of EU law. General principles of EU law *are* applicable in the context of conferring Member State nationalities and withdrawing them. The ECJ is the final arbiter in disputes arising in this context. These most predictable[1] conclusions were reached in the remarkable *Rottmann* case, shaping the new *status quo* in the interaction between the EU and the Member States in the sphere of nationality. In reaffirming the general trend within the dynamics of EU federalism,[2] which knows less and less clear-cut competence borders and no 'reserved domains' for the Member States,[3] the importance of the case goes far beyond its facts. In particular, it reassesses the position of the individual *vis-à-vis* the national, European, and international legal orders in a situation where his very personhood is at issue: the problem of statelessness is at the centre stage.

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[1] See *e.g.* Davies, "The Entirely Conventional Supremacy of Union Citizenship and Rights" in Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (EUI RSCAS Working Paper, 2010 (forthcoming)); Kochenov, "Two Sovereign States vs. A Human Being" in Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (EUI RSCAS Working Paper, 2010 (forthcoming))

[2] Schütze, "On 'Federal' Ground: The European Union as an (Inter)National Phenomenon", 46 CML Rev. (2009), 1069; Piris, "L'Union européenne: Vers une nouvelle forme de fédéralisme?", 41 RTD eur. (2005), 243. For the analysis of EU citizenship in this context see e.g. Schönberger, "European Citizenship as Federal Citizenship", 19 REDP (2007), 61; Kochenov, "On Options of Citizens and Moral Choices of States", 33 Fordham ILJ (2009), 156.

[3] As brilliantly explained in Schütze, *From Dual to Cooperative Federalism* (Oxford, 2009).

2. Factual and legal background

Accused of occupational fraud in his native Austria in 1995, Dr. Janko Rottmann, an Austrian citizen from birth, and EU citizen since the accession of Austria to the Union in 1995, used his EU citizenship rights to move to Germany, where he successfully naturalised in 1999. He lost his Austrian nationality *ex lege* from the moment of naturalisation.[4] Dr. Rottmann concealed from the German authorities the fact that he was being prosecuted in Austria and that a national arrest warrant on his name has been issued in that state. Upon receipt of this information, the German authorities withdrew his nationality on the ground that it had been acquired by fraud.[5] To make matters worse, according to Austrian law, Dr. Rottmann does not satisfy the conditions for the recovery of his previous nationality. An interesting situation occurred, when a European citizen as a result of moving from his native Member State to another and naturalising there lost not only his initial and the newly-acquired nationality, but also his EU citizenship, which made the move and subsequent naturalisation possible in the first place. Faced with imminent statelessness, Dr. Rottmann appealed, arguing that the withdrawal of nationality was contrary to international law, which prohibits statelessness and also contrary to EU law, as it entails the loss of EU citizenship.

The *Bundesverwaltungsgericht* (German Federal Administrative Court) referred two questions to the ECJ. The first one concerned the legality under EU citizenship provisions of the withdrawal of nationality acquired by fraud which leads to statelessness. The second dealt with the available remedies, should such withdrawal be contrary to EU law: would Germany be obliged, under EU law, not to withdraw nationality, or should Austria interpret or amend its law in such a way as to make the loss of its own nationality and, consequently, of EU citizenship in such a context impossible?

[4] On the basis of Para. 27(1) of the Austiran *Staatsbürgerschaftsgesetz*.

[5] Para. 48(1) of the Bavarian *Verwaltungsverfahrensgesetz* was used as a legal ground for this decision by the Freistaat Bayern, since the German nationality law at the time did not contain such a ground for the withdrawal of nationality.

3. Opinion of the Advocate General

In an extremely cautious opinion, AG Poiares Maduro found a cross-border element in the case, declaring it admissible (1) and, in substance, came to the conclusion that the withdrawal of Dr. Rottmann's German nationality was not contrary to EU law and that EU law did not require the restoration of his Austrian nationality (2).

1). The AG interpreted the scope of EU citizenship very restrictively. Following the mantra that EU citizenship 'is not intended to extend the scope *ratione materiae* of the Treaty to internal situations' he found that a cross-border element was needed, assuming that nationality rules could not fall within the scope of the Treaty 'on the sole ground that they may lead to the acquisition or loss of Union citizenship' (para. 10). He found such a cross-border element in the 'origins of Mr. Rottmann's situation' (para. 11).[6] Only relying on Article 18 EC [now Art. 20(2)(a) TFEU] allowed Dr. Rottmann to establish himself in Germany, leading to naturalisation.

2). Answering 'the question whether Community law restricts the power of the State to regulate questions of nationality' (para. 14), the AG found that the conferral and withdrawal of nationality are indispensable for the definition of 'the limits of … body politic by determining the persons whom [a Member State] considers to be its nationals' (para. 17). They both lie within the exclusive competence of the Member States – a view supported by international law[7] and respected by the EU, which is confirmed by *Kaur*, *Micheletti* and *Mesbah*. However, no national competence in the Union is absolute, should the situation fall within the scope of EU law. Finding that EU citizenship and Member States' nationalities, although interconnected, are also *independent* of each other, Poiares Maduro concluded that notwithstanding the fact that 'nationality of a Member State is a precondition for access to Union citizenship, […] the body of rights and obligations associated with the latter cannot be limited in an unjustified manner by the former' (para. 23). This necessarily implied the possibility of EU involvement in the

[6] Unlike what the Commission, Austria, Belgium, the Czech Republic, Estonia, Germany, Greece, Latvia and Poland have argued in their submissions. See the *Sitzungsbericht*, paras. 32–40.

[7] The AG referred to Art. 3(1) of the European Convention on Nationality and *Tunis and Morocco Nationality Decrees* (PCIJ) and *Nottebohm* (ICJ) cases.

sphere of nationality: 'the competence of the Union to determine the rights and duties of its citizens would be affected' (para. 26) if the Union were absolutely not competent in this sphere. Although the deprivation of nationality cannot be illegal merely on the ground that it causes the loss of EU citizenship (as this would mean to deprive the Member States of their autonomy in this sphere, as well as amount to failing to respect the national identities of the Member States, mandated by the Treaty), EU law ought to be taken into account: 'any rule of the Community legal order' (para. 28) can serve as a limitation to the exercise of the Member States' discretion in this field.[8]

The AG concluded that in the case of Dr. Rottmann neither the rules of international nor of EU law had been broken. The former allows for statelessness resulting from the revocation of nationality acquired by deception, notwithstanding the general principle that statelessness must be avoided. In the context of the latter the AG did not find any principle that would run counter to the statelessness at issue. Seemingly contradicting his own conclusion that 'the exercise by Mr. Rottmann of his rights as a citizen of the Union … had an impact on the change of his civil status' (para. 13), Poiares Maduro found that 'deprivation of nationality [at issue] is not linked to exercise of the rights and freedoms arising from the Treaty' (para. 33). According to the AG, the withdrawal of nationality obtained by fraud 'corresponds to a legitimate interest [of the Member States] in satisfying itself as to the loyalty of its nationals' (Id.).

As for the Austrian law denaturalising all those who acquired any other nationality, the Opinion simply accepted it as a given, stressing that Austrian nationality is lost 'as a consequence of the personal decision [...] deliberately to acquire another nationality' (para. 34) – European law is powerless, opined the learned AG, to resolve problems arising of such deliberate personal decisions.

[8] The AG substantiated his reasoning with the classical academic literature on the subject: e.g. Kotalakidis, *Von der nationalen Staatsangehörigkeit zur Unionbürgerschaft* (Baden-Baden, 2000); de Groot, "The Relationship between Nationality Legislation of the Member States of the European Union and European Citizenship", in La Torre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer, 1998), p. 115; Hall, "Loss of Union Citizenship in Breach of Fundamental Rights", 21 EL Rev. (1996), 129.

4. Judgment of the Court

In its important judgment the Court dramatically departed from the AG's timid Opinion and made four interrelated points of fundamental significance. It indicated that it is not necessary to construct any cross-border situation when the status of EU citizenship is at stake (1); that the ECJ is competent to exercise judicial review of nationality decisions of the Member States (2); and that the principle of proportionality, which applies in this context (3) covers both the cases of loss and (re)acquisition of EU citizenship (4).

1). In contrast to the approach taken by the AG in his Opinion, the Court did not feel the need to demonstrate the existence of a cross border element in the case, declaring that

> It is clear that the situation of a citizen of the Union who […] is faced with a decision withdrawing naturalisation […] placing him […] in a position capable of causing him to lose the status conferred by Article 17 EC [now 9 EU] and the rights attaching thereto falls, *by reason of its nature and its consequences*, within the ambit of European Union law (para. 42, emphasis added).

For the first time the issue of EU citizenship fell within the scope of EU law 'by reason of its nature' – i.e. because the very status of EU citizen was at stake. The Court established that the mere fact that the Member States are competent 'does not alter the fact that, in situations covered by [EU] law, the national rules concerned must have due regard to the latter' (para. 41). Since the cases involving nationality are directly concerned with the acquisition of the status of EU citizenship which is 'intended to be the fundamental status of nationals of the Member States', any such case is potentially covered by EU law, no matter what the factual background of the situation at issue.[9] The Court made this point overwhelmingly clear. Referring to *Micheletti* it stated that 'the

[9] Expectedly, the cases where the loss or conferral of a Member State nationality is not at issue are not covered: the Court distinguished *Kaur* in para. 49.

Member States *must* when exercising their powers in the sphere of nationality, have due regard to European Union law' (para. 45, emphasis added).

2). The main issue of the case, according to the ECJ is to clarify *Micheletti* in explaining to what extent EU law is to be taken into account when decisions on nationality and, consequently, EU citizenship are taken by the Member States. Although EU law 'does not compromise the principle of international law […] that the Member States have the power to lay down the conditions of the acquisition and loss of nationality, [… it makes it …] amenable to judicial review carried out in the light of European Union law' (para. 48). The Court duly proceeded to test the legitimacy of the revocation of nationality acquired by fraud in the light of international law. Such revocation was acceptable under a number of relevant documents which the learned AG also referred to.[10] The Court equally found that the principle that 'no one is arbitrarily to be deprived of his nationality'[11] was adhered to, since 'when a State deprives a person of his nationality because of his act of deception [...] that deprivation [... is not] an arbitrary act' (para. 53).

3). Even if '*in theory* valid' (para. 54, emphasis added), any decision on nationality based on national or international law cannot automatically be embraced when EU citizenship status is at stake. To make a judgment on the validity of such a decision the principle of proportionality applies. In line with its normal practice, the ECJ left it up to the national court to 'ascertain whether the withdrawal decision [...] observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European law' (para. 55), indicating that this is to be done 'in addition […] to examination of the proportionality of the decision in the light of national law' (Id.).

The ECJ then provided the *Bundesverwaltungsgericht* with guidance, asking it to take into account the consequences for the person concerned, as well as his family

[10] I.e. under the Convention on the reduction of statelessness (Art. 8(2)) and the European Convention on nationality (Art. 7(1) and (3)).

[11] Art. 15(4) of the Universal Declaration of Human Rights (also restated in Art. 4(c) of the European Convention on nationality).

members, of the loss of EU citizenship and the rights associated with this status, and to assess whether the loss of EU citizenship 'is justified in relation to the gravity of the office committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover original nationality' (para. 56). Should the national Court conclude that the withdrawal of nationality leading to statelessness is proportionate, it can decide 'to affor[d] a reasonable period of time in order to recover the nationality of […] origin' (para. 58) to the person concerned. Agreeing with AG's observations, the ECJ noted in this context that the mere prospect of losing EU citizenship should not be read as entailing a prohibition for the Member State to withdraw its nationality.

4). The main rule distilled by the ECJ is thus the necessity to apply the principle of proportionality in the situations when Member State nationality and EU citizenship is at stake. Importantly, this consideration applies both to the instances of loss and (re)acquisition of EU citizenship: 'the principles […] with regard to the powers of the Member States in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, apply both to the Member State of naturalisation *and* to the Member State of the *original nationality*' (para. 62, emphasis added). The Court was not in the position to rule on the possible restoration of nationality, since the Austrian decision to re-naturalise (or not) Dr. Rottmann has not yet been adopted.

5. Comment

Although confirming the general trend in the recent development of EU law, characterised by the shift from dual to co-operative federalism, which stands for 'a philosophy where sovereignty is shared'[12] and no 'reserved domains' exist, *Rottmann* is fundamentally innovative in a number of important respects. Firstly, it built on *Micheletti* in order to establish definitive competence of the ECJ to exercise judicial review of the

[12] Schütze, op.cit. *supra* note 3, 5.

Member States' decisions in the sphere of nationality, hailing 'entirely conventional supremacy of EU citizenship and rights'[13] and disappointing orthodox commentators.[14] Secondly, it created an overhaul of the legal construction of the wholly internal situations. After *Rottmann* the material scope of EU law is not the same and the romantically narrow vision of EU law based on the belief that EU citizenship is not there to enlarge its scope *ratione materiae* (irreconcilable as it is with the status and nature of EU citizenship) became even shakier. Thirdly, the case demonstrated that all its human rights rhetoric notwithstanding, the EU is unable, when given a chance, to take an ethical stance against statelessness[15] and thereby improve the lives of a great number of individuals. Agreeing with Weiler that there is no need for more human rights lists in the EU,[16] since EU citizens in general enjoy a sufficient level of human rights protection, it is necessary to distinguish human rights protection *per se* from dealing with the issue of statelessness, which can boast a different level of significance. Possessing nationality usually provides a necessary precondition for the enjoyment of a number of crucial rights and protections. Where else, if not in the EU, can one expect citizens to be absolutely protected against the loss of their 'right to have rights',[17] especially in the context where statelessness arises as a result of playing with the national regulation in the 'ever closer Union'?[18] There is definitely room for improvement here.

All in all, after *Rottmann*, the legal status of EU citizenship comes across as seriously reinforced: the AG and the Court admitted its autonomy, potentially liberating

[13] Davies, op.cit. *supra* note 1.

[14] E.g. Jessurun d'Oliveira, "Ontkoppeling van nationaliteit en Unieburgerschap?", NJB (2010), 785; see also Jessurun d'Oliveira, "Nationaliteit en de Europese Unie", in *Ongebogen recht: Opstellen aangeboden aan Prof. Dr. H. Meijers* (The Hague, 1998), pp. 80–81.

[15] For the alarming analysis of the wanting ethical foundations of European integration see Williams, *The Ethos of Europe* (Cambridge, 2010); Williams, "Taking Values Seriously: Towards a Philosophy of EU Law", 20 Oxford Journal of Legal Studies (2009), 549.

[16] Weiler, "Europa: 'Nous coalisons des Etats noun n'unissons pas des hommes'", in Cartabia and Simoncini (eds.), *La Sostenibilità della democrazia nel XXI secolo* (Il Mulino, 2009), 51.

[17] Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1968). See also Bosniak, "Persons and Citizens in Constitutional Thought", 8 I-CON (2010), 9.

[18] Kochenov, op.cit. *supra* note 1.

its essence from the vestiges of derivative thinking: although acquired through Member States' nationalities, EU citizenship is clearly far more than their mere extension,[19] inviting ideas on the decoupling of the two statuses in the future.[20] While making it clear that the EU is not ready to take a stance against statelessness arising as a result of the lack of coordination between the Member States, *Rottmann* demonstrated with clarity that the Member States have to be more serious in taking EU law into account when establishing and applying the national rules on the loss and acquisition of nationality.[21]

5.1. Definitive confirmation of the EU's growing involvement in nationality matters

Rottmann is the first case to hold unequivocally that the field of nationality regulation is not a 'reserved domain' for the Member States where EU law does not apply. In fact, clearly, there *are no* such reserved domains at all, since EU competences are goal-oriented and interpreted teleologically, which makes immunity of particular fields of regulation to EU law impossible.[22] Clearly, any Member State competence has to be exercised in the light of EU law. Plentiful examples of EU penetration into the fields of 'exclusive' Member State competence exist.[23] However, before *Rottmann*, in all the important cases where the Court had a chance to clarify the interplay of competences in

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[19] Kochenov, "*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights", 15 CJEL (2009), 169.

[20] Kostakopoulou, "The European Court of Justice, Member State Autonomy and European Union Citizenship", in de Witte and Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* (EUI, 2011 (forthcoming)); Kostakopoulou, "European Union Citizenship and Member State Nationality: Updating or Upgrading the Link?", in Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (EUI RSCAS Working Paper, 2010 (forthcoming)); Jessurun d'Oliveira (2010), op.cit. *supra* note 14; Kochenov, *Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship* (EUI RSCAS Working Paper No. 2010/23, 2010), pp. 29–33.

[21] For analysis of the general context when Member States are put under pressure to alter their established approaches to regulating virtually any field see Davies, "The Humiliation of the State as a Constitutional Tactic", in Amtenbrink and van den Berg (eds.), *The Constitutional Integrity of the European Union* (The Hague, 2011 (forthcoming)).

[22] On competencies see von Bogdandy and Bast, "The European Union's Vertical Order of Competences: The Current Law and Proposals for Reform", 39 CML Rev. (2002), 227.

[23] The ECJ used a number of those in *Rottmann*, varying from *Bickel and Franz*, *Garcia Avello*, and *Schempp*, to *Spain v. UK*.

the sphere of nationality regulation, such as *Micheletti*, or *Zhu and Chen*, at issue was the *recognition* of a Member State nationality, and its conferral as such was not disputed, leaving the Member States at liberty to regulate their nationalities as they saw fit.[24] In *Rottmann* the Grand Chamber followed the observations of the AG on this point entirely: para. 10 of *Micheletti* on 'due regard to [EU] law' stands, obliging the Member States to take EU law into account when decisions on nationality are taken. Although the Court made an emphasis on proportionality, it is clear, as AG has also underlined, that *any rule* of EU law could apply (para. 28); the principle of EU loyalty would be another good candidate, as Greece submitted.

The obvious nature of the case probably explains why less than one third of the Member States intervened. In fact, the literature – de Groot and Hall in particular[25] – has been absolutely unequivocal on the issue: Member States' decisions in the field of nationality law could be in breach of EU law. To have a different point of view would mean to ignore the changing legal reality in Europe: nationalities of the Member States are very deeply affected by the process of European integration for the simple reason that, besides borders, what used to be their essential component is now virtually gone: in an ever growing number of situations the Member States are prohibited by law to treat their nationals better than any other European citizens,[26] which *de facto* leads to nothing less than the *abolition* of nationality in a certain sense – a fact which Evans and Davies also outlined.[27]

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[24] Interestingly, in the context of pre-accession (i.e. in a different competences context) the EU played an important role in promoting nationality law reforms in the (then) candidate countries, which is especially true of Estonia, Latvia and the Czech Republic (all intervening in *Rottmann* to claim the lack of EU competence): Kochenov, 'Pre-Accession, Naturalisation, and 'Due Regard to Community Law'", 4 Romanian JPS (2004), 71; Kochenov, "EU's Influence on the Citizenship Policies of the Candidate Countries", 3 JCER (2007), 124.

[25] Hall, op.cit. *supra* note 8; de Groot, "Towards a European Nationality Law", 8 Electronic JCL (2004). Also Kochenov, op.cit. *supra* note 19, 190–193.

[26] The dubious freedom to treat them worse than others is still held sacred, however. See, *inter alia*, Van Elsuwege and Adam, "Situtations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'*Assurances soins flamande*", CDE (2008), 655, 662–678.

[27] Evans, "Nationality Law and European Integration", 16 EL Rev. (1991), 190; Davies, "Any Place I Hang My Hat?' or: Residence is the New Nationality", 11 ELJ (2005) 43, 55.

In this context of the rapid rise in importance of EU citizenship, it is not surprising that even without any kind of co-ordination by the EU, the Member States are changing their nationality laws, to treat EU citizens differently from third country nationals.[28] This is particularly clear in the field of the acquisition and loss of nationality. Six Member States already have separate naturalisation procedures for EU citizens. In one example, while an Estonian can become Italian after four years of residence, it would take an American at least ten.[29] In a situation when EU citizens exercising their free movement rights are not quite foreigners any more, strictly speaking, such changes are inevitable and will only be growing, affecting regional citizenship statuses too.[30] Clearly, some of the classical approaches to nationality, like requiring its exclusivity, simply make no sense in the EU, where EU citizenship is playing an increasingly important role and where privileging 'your own' – however 'exclusive' their status – is, more frequently than not, against the law. In this context the Austrian law on the loss of nationality upon naturalisation elsewhere[31] is logically unjustifiable.[32]

It is still not clear in this context what would actually be contrary to EU law: law and common sense do not always go hand-in-hand. Consensus has arisen on the issue that Member States are bound to adapt their nationality regulation to the difference in the vectors of the two personal statuses in Europe, i.e. to the fact that Member State nationalities classically expect their owners *to stay*, while EU citizenship gives the freedom to *move away*, necessarily loosening the link between a Member State and a

[28] For analysis see Kochenov, op.cit. *supra* note 20.

[29] Ibid., 2. Besides the strictly formal side of the naturalisation procedures, making the acquisition of a new Member State nationality by EU citizens easier compared with third country nationals, there is an important informal side, which consists in the influence on the internal market and EU citizenship provisions as such on the naturalisation prospects of EU citizens. EU free movement rights, in particular, are of importance in this context, as the case of Dr. Rottmann also proves: Ibid., 26.

[30] Kochenov, "Regional Citizenships in the EU", 35 EL Rev. (2010), 307.

[31] Austria is not alone in the EU to have such legislation. For details see de Groot and Vink, *Loss of Citizenship: Trends and Regulations in Europe* (EUI EUDO RSCAS Paper, 2010), chapter 2.

[32] Kochenov, 'Multiple Nationality in the EU: An Argument for Tolerance', 17 ELJ (2011 (forthcoming)). The AG clarified that going against common sense is not necessarily illegal: para. 34, note 42 of the Opinion.

national.[33] Consequently, depriving of nationality those who live elsewhere in the EU is clearly contrary to EU law.[34] But what about treating such people as foreigners upon their return;[35] or disenfranchising them?[36] The very content of Member States' nationalities is changing, reflecting the new reality in the EU. Clearly, benefitting from EU law should not make one worse off in the eyes of her own Member State; in particular, it should not put her nationality (and thus EU citizenship) at stake.

The same does not seem to apply to the issue of acquisitions of Member State nationalities by third country nationals. The view expressed in the literature that 'mass naturalisations' of non EU citizens are somehow 'illegal' seems unfounded and knows no confirmations in practice. When *DDR* joined the Federal Republic, the growing number of 'Europeans' was not an issue.[37] Spain could pardon thousands of 'illegal' migrants in 2005 successfully ignoring protests from other Member States.[38] Nobody seems to mind the creation of millions of Italians in Argentina and elsewhere in the world.[39] Unless acquisition of EU citizenship is harmonised at least to some extent, Member States seem to be at absolute liberty to distribute their nationalities, and, following *Micheletti* and *Zhu and Chen* all other Member States are bound to accept all the new EU citizens.

The ECJ will be facing more occasions to interpret the law in the coming years. The clarification, made in *Rottmann*, that the EU can limit the exercise by the Member States of their competences in this field is a perfect start.

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[33] AG Opinion, para 23; Kochenov, op.cit. *supra* note 20, 20–22.

[34] de Groot, op.cit. *supra* note 25.

[35] Davies, op.cit. *supra* note 27.

[36] Kochenov, "Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?", 16 MJ (2009), 197.

[37] Not a single Member State protested the Declaration on nationality made by the Federal Republic upon signing the Treaties.

[38] Rostek and Davies, "The Impact of Union Citizenship on National Citizenship Policies", 10(5) EIoP (2006), 1.

[39] The only exception in this context seems to be related to the citizenship laws of some new Member States (Bulgaria, Hungary and Romania in particular) and remains as much rhetorical as it is hypocritical in nature, given the practices widely accepted in the 'old' Member States.

5.2. Impact on the scope of EU law

Spaventa was the first to seriously question the generally held assumptions about the limited impact of EU citizenship on the scope of EU law.[40] Her analysis is now entirely confirmed by the ECJ. With regard to the scope *ratione personae* it has been clear from the very beginning: by making all Member States' nationals EU citizens, all of them fell within this scope of the law, which *Martínez Sala* and *Eman and Sevinger*, among numerous others, confirmed.[41] Regarding material scope, however, some doubts existed. Until now the Court has been cautious in finding cross border situations to justify the application of EU law to EU citizens. The status of citizenship was not enough to benefit from EU law.[42] However, the nationality of an escaping wife (as in *Schempp*)[43] or another passport which you might hypothetically use in the future (as in *Garcia Avello*) were taken by the ECJ as valid pretexts to establish an elusive cross-border situation. The law was vague up 'to the point of becoming meaningless'.[44] This approach, which has already been largely set aside in the context of the regulation of free movement of goods,[45] has been trashed in *Rottmann*. Unlike the AG, who adhered to the traditional reading of the scope of the law, the Court did not even mention any 'cross-border' element at all. Para. 42 of the judgment is fundamentally important in this regard: the situation of Dr. Rottmann falls within the scope of EU law 'by reason of its nature and its

[40] Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects", 45 CML Rev. (2008), 13.

[41] E.g. Kochenov, "The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community", 36 LIEI (2009), 239.

[42] For criticism see Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe", 35 LIEI (2008), 43; Van Elsuwege and Adam (2008), op.cit. *supra* note 26; Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move on?", 39 CML Rev. (2002), 731; Gaja, "Les discriminations à rebours: Un revirement souhaitable", in *Mélanges en Hommage de Michel Waelbroeck* (Bruylant, 1999), 993, pp. 997–998; White, "A Fresh Look at Reverse Discrimination?", 18 EL Rev. (1993), 527.

[43] Spaventa, op.cit. *supra* note 40, 21 esp. note 34.

[44] Ibid., 16, esp. note 11.

[45] Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer, 2009) with scores of examples from *Jersey Potatoes* to *Carrara Marbles*.

consequences'.[46] It is only logical that being a citizen is enough to fall within the scope of the law when the very status of citizenship is in question. In practice this means that *any decision* on conferral or revocation of nationality taken by the Member States which is able to affect the EU citizenship status of an individual now falls within the scope *ratione materiae* of EU law.[47] It remains to be seen whether the Court will build on this achievement of common sense, advocated by scholars for decades.

5.3. Missing the point of human rights

Notwithstanding the positive impact of the case on the development of EU citizenship, it provides an illustration of the stunning antagonism existing between law in Europe as it stands and the need to protect the most basic rights of individuals. It seems undeniable that in the contemporary world possessing citizenship and enjoying rights are in direct connection with each other. Stateless persons tend to be harassed by all the states and the mere fact that this is tolerated by international law should be abhorred and frowned upon, rather than taken as a sound point of departure in forming the ethical foundations of citizenship analysis. Consequently, the non-existence of a binding right to nationality in international law[48] is not an ideal standard which the EU can be expected to protect.

It is suggested that even given the diversity of the nationality laws in the EU, the cases of statelessness like that of Dr. Rottmann should not arise, ensuring that the main principle of international law concerning nationality, i.e. the prohibition of statelessness,

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[46] As de Groot rightly observes, to accept the reasoning of the AG would effectively mean the creation of two parallel systems of acquisition and loss of nationality in the Member States (those within and outside the scope of EU law): de Groot, "Overwegingen over de *Janko Rottmann*-beslissing van het Europese Hof van Justitie", 1 *Asiel- en migrantenrecht* (2010), 293, 296.

[47] It can be presupposed that two instances of nationality regulation by the Member States are bound to stay outside the scope of EU law. Firstly this is the regulation of Member States' nationalities which are not connected with the status of EU citizenship, such as British Overseas Citizenship, for instance. Secondly, any withdrawal or conferral of nationality unable to affect the enjoyment of EU citizenship status – as a result of the fact that an individual in question has several Member State nationalities, for instance – would equally fall outside EU law's scope.

[48] The literature arguing for the formulation of such a right is well known. See e.g. Swan Sik, "Nationaliteit in het Volkenrecht", 83 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (1981), 1; Chan, 'The Right to Nationality as a Human Right', 12 HRLJ (1991), 1.

is observed. The Union has an obvious role to play here, able to formulate and enforce a strong ethical position against statelessness at least in the cases where EU citizenship is at issue. This is particularly acute given that the problem at issue is partly of the EU's own making. As Poiares Maduro observed in his Opinion, if not for free movement rights, Dr. Rottmann would not have been able to naturalise in Germany (para. 11). The failure of the ECJ to take a principled stance siding with the individual is disappointing, even if not surprising, as it provides yet another illustration of the thin ethical core undermining the legal system of the Union,[49] the just nature of which can legitimately be questioned, given the underlying philosophy, which 'appears to be based on a theory of interpretation (of original political will) rather than a theory of justice'[50] – an issue lying outside the scope of this note. Although going further than *Kaur*, where the issue of *de facto* statelessness was not discussed at all, [51] the issue of statelessness did not receive sufficiently critical attention in *Rottmann* either.[52]

The application of proportionality in the cases of statelessness seems more of a farce, indicating the dangerous limitations of thinking about rights in Europe.[53] A more principled approach seems to be required. While proportionality is frequently used by Courts outside of the US[54] and has been rightly praised for the capacity 'to transfer a debate over values into a debate over facts, which is easier to resolve',[55] thus illustrating the global shift from the culture of authority to the culture of justification, [56] the

[49] For remarkable analysis see Williams (2010), op.cit. *supra* note 15.

[50] Williams (2009), op.cit *supra* note 15, 549.

[51] On the reaffirmation of the fact that *Kaur* was, in essence, a case concerned with *de facto* statelessness see Toner, "Annotation of *Kaur*", 39 CML Rev (2001), 881. *Kaur* thus continued the British African Indians saga, analysed by Lester, "Thirty Years on: The East African Case Revisited", 47 Public Law (2002), 52.

[52] But see von Toggenburg, "Zur Unionsbürgerschaft: Inwieweit entzieht sich ihr Entzug der Unionskontrolle?", ELR (2010), 165, 170.

[53] Tsakyrakis, *Proportionality: An Assault on Human Rights?* (NYU Jean Monnet Paper 09/08, 2008).

[54] Aleinikoff, "Constitutional Law in the Age of Balancing", 96 Yale LJ (1987), 943.

[55] Cohen-Eliya and Porat, "Proportionality and the Culture of Justification", American JCL (2011 forthcoming).

[56] Ibid.

application of this principle in the context when the very legal personhood of an individual is at stake seems unwarranted: balancing away 'the right to have rights' should not be possible. Agreeing with Tsakyrakis, 'the view that constitutional rights are nothing but private interests whose protection depends every time upon the balancing against compelling public interests in reality renders the Constitution futile'.[57] The presumption of the relativism of rights is undoubtedly capable destroying their very rationale. What kind of legitimate state interest would justify 'erasing a person'?[58]

That a nationality is acquired by fraud seems to change little. No convincing justification for the creation of statelessness is offered in *Rottmann*, but even if there were justifications which would seem 'convincing', it is submitted that the proportionality approach is unsuitable to adjudicating the issues where a principled approach is required. AG's remarks pointing to the state interest in having loyal citizens (para. 33) are particularly out of place, since even treason is not among the reasons of nationality withdrawal in Germany[59] and, to restate the obvious, the absolute majority of nationals, however disloyal, will have standard administrative sanction applied to them, should they fail to disclose some information to the authorities. The Court's guidance given to the *Bundesverwaltungsgericht* with regard to taking into account the severity of Dr. Rottmann's offence seems particularly ironic, since it is nothing but an acknowledgement that nationality deprivation is just an additional punishment which does not know general application but is, nevertheless, tolerated by the law.

All in all, it is regrettable that the ECJ chose proportionality – 'a specific test which pretends to balance values avoiding any moral reasoning'.[60] There is no doubt that the application of proportionality deprives nationality, in the context of imminent statelessness, of the weight it deserves and tends to ignore the fundamental potential it

[57] Tsakyrakis, op.cit. *supra* note 53, 4 (writing in the context of US Constitutional law).

[58] For the most literal example of such erasure condemned by the ECt.HR see ECt.HR *Kurić et al. v. Slovenia*, Appl. No. 26828/06, judgment of 13 July 2010. For the analysis of the context giving rise to this case, when thousands of Slovenians were 'erased' from the citizenship register see Shaw, *The Transformation of Citizenship in the European Union* (Cambridge, 2007).

[59] See EUI EUDO citizenship database, 'the modes of loss', available at www.eudo.eu.

[60] Tsakyrakis, op.cit. *supra* note 53, 8.

has in terms of rendering human rights and the most basic protections unusable, i.e. erasing a person.

That international law tolerates statelessness in the factual situations like that of Dr. Rottmann in derogation from the main rule is rightly characterised by the Court as valid only 'in theory'. However, stricter scrutiny of such a 'theory' seems to be required. The example when a more principled approach has been taken by the Court is well known and is cited by the ECJ in *Rottmann* many times. It is *Micheletti*. At stake in that case was not only the rule of Spanish law under which Member States' nationalities could end up not recognised in Spain. International law formed the crucial part of the *Micheletti* landscape, given that the Spanish rule struck by the ECJ was directly rooted in a well established norm of international law, spelled out in the *Nottebohm* case, where the ICJ formulated the requirement of 'genuine links'.[61] Without further ado the ECJ demanded that Spain depart from the well-established rule of international law – and no proportionality was required.[62]

The principled stance leaving no room for balancing in *Micheletti* and resulting in the immediate disapplication of international law was taken by the ECJ based on the internal market rationale: the non-recognition of Member States' nationalities, even if occurring only in theory, could clearly endanger the coming about of the internal market. This is a clear reminder of the fact that not everything is relative in the eyes of the ECJ. The need to avoid the multiplication of the cases of statelessness, apparently, is. The EU is clearly slow in outgrowing its market rationale and is falling short in building on the citizenship promise.[63]

At the same time, the failure of the ECJ to be faithful to the *Micheletti* tradition in *Rottmann* can be viewed as yet another demonstration of the strength of co-operative federalism in Europe: the German court is believed to be able to take the right decision.

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[61] For analysis see Bleckmann, "The Personal Jurisdiction of the European Community", 17 CML Rev (1980), 467, 477.

[62] For analysis see Kochenov, op.cit. *supra* note 19, 128.

[63] See also Weiler, op.cit. *supra* note 16.

Yet, in deviating from *Micheletti* on this issue the ECJ demonstrated an inability to take a principled stand-point on the issue of fundamental importance, making the cases of statelessness arising in the EU context possible also in the future.[64] It is telling that while internal market thinking allowed the ECJ to dismiss an important rule of international law in *Micheletti*, human rights rationale of avoiding statelessness has been incapable in *Rottmann* to make it depart even from an *exception* to a rule of international law. Those suffering as a result of such an approach are certainly the (former) citizens. Preserving the legal disorder in EU citizenship is to no one's advantage, since in trapping the citizens it does not leave much power with the Member States either – merely an 'illusion of control'.[65]

6. The way forward

Now that the legitimacy of the Union's involvement in the matters related to the acquisition and loss of EU citizenship is established beyond any doubt, nationality regulation of the Member States will be affected instantly, as the Member States will be amending the provisions of their nationality laws which might be problematic in the light of *Rottmann*.[66] In fact, the process of adaptation of nationality laws to the reality of EU citizenship and internal market started long before the misfortunes of the sly doctor. Without any harmonisation or direct interference from the EU, separate procedures for the acquisition of Member States' nationalities by EU citizens and third country nationals are emerging, reconfirming the overwhelming importance of the legal status of EU citizenship.[67] This process is bound to receive a new impetus with the clarity over competences shaped by *Rottmann*: it is now beyond any doubt that the Member States are

[64] This stance of the Court in *Rottmann* might seem puzzling after *Kadi and Al Barakaat*, where the ECJ nuanced the supremacy of international law in the EU legal order, yet as Williams convincingly explained, *Kadi* should not be misread as a victory of human rights thinking: Williams (2009) op.cit. *supra* note 15, 572.

[65] Kochenov, op.cit. *supra* note 20, 22

[66] The first proposals to this end have been made immediately after *Rottmann* had been decided: *e.g.* de Groot, op.cit. *supra* note 46.

[67] Kochenov, op.cit. *supra* note 20.

not at liberty to confer and withdraw nationality as it pleases them. A prediction can be made that plenty of approaches to nationality regulation which are – their dubious logical foundations notwithstanding – deemed perfectly legitimate today, will soon be out of place, like the withdrawal of nationality following naturalisation elsewhere, since this might be disproportionate in the light of *Rottmann*. But most importantly, the growth in importance of EU citizenship reinforced with ECJ's powers to also subject the field of nationality regulation to judicial review, coupled with the already observable influence of EU citizenship on the nationalities of the Member States, allows posing the question of the possibility of a fully autonomous status of EU citizenship yet again.[68] Before such a definitive step is taken, however, it is necessary to ensure that everybody's 'right to have rights' is treated most seriously: relativising of entitlement to EU citizenship through the application of proportionality does not solve the problems caused by the interplay of nationality rules of the Member States in the EU citizenship context.

The principle of Union loyalty might be the right instrument to explore in pushing the Member States towards limited coordination. At least, statelessness should definitively be made an impossible outcome of playing with different EU nationalities. EU loyalty could be construed in such a way that the Member States are bound to coordinate their nationality regulation at least to such a minimal extent that the outcome of statelessness and the loss of EU citizenship be made impossible in the EU. To achieve this will absolutely require embracing an ethical position against statelessness, which is probably expecting too much.

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[68] For remarkable analysis see Kostakoloupou's contributions, op.cit. *supra* note 20.

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