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**EU Citizenship: assessing its future in post-Brexit United Kingdom**

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# European Union Law Working Papers

**Editors: Siegfried Fina and Roland Vogl**

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## Abstract

The aim of this thesis is to present a legal analysis of the concept of EU citizenship, specifically in the context of Brexit. The outcome of the Brexit referendum on the continuous membership of the United Kingdom in the EU, and thus, the first-ever invocation of Article 50 TEU, has been of seismic significance, as it has produced considerable uncertainty for the citizenship rights of both EU citizens and UK nationals. As the *acquis* of EU citizenship will cease to apply in Great Britain, meaning that UK nationals will experience a significant loss and erosion of the rights associated with the status, academics and politicians have proposed several ideas in an attempt to secure an easier path to citizenship and the preservation, of at least, most of citizenship rights for Britons, especially those still residing in the Union; and those who had determinedly voted for Britain to remain in the EU. At the root of such conundrum are the classical concepts of EU citizenship law, especially the contingency of EU citizenship on Member State nationalities. The majority of the reactions underpinning the preservation of EU citizenship question the fundamentality of the status, as that has been stipulated in landmark CJEU case law and call for the reconstruction of EU citizenship as an autonomous status, whilst also arguing that the EU ought to prevent the *en masse* strip of the status for a whole Member State polity, whereas failure to do so would indicate the loss of the normative purchase of the status. It seems that the maximal interpretation of the CJEU in the momentous case regarding the *telos* of Union citizenship, has informed the academic opinion that the era may not only have substantiated Article 20 TFEU, but that it has even also contributed to a transformation of the status of Union citizenship in the abstract. However, as it will be illustrated in this work, such theories are incomplete and unjustifiable, based on erroneous interpretations of the status. This work argues that should the Court opt to do so, it would clearly infringe the highly sought after and reclaimed sovereignty of the United Kingdom. This work will also consider the ideas regarding the preservation of EU citizenship rights, through the introduction of an 'associate EU citizenship', which is also to be dismissed on several grounds. Not only are they violating the letter and spirit of EU law, the implementation of which is impractical, but also the Union's core values, particularly the promise to respect the constitutional traditions of the Member States, the values of democracy, and the rule of law. Furthermore, it will also be concluded that associate rights acquired by means of payment of an imposed fee, may also undermine the coherence of the edifice of Union constitutionalism, eventually leading to the creation of a second-class EU citizenry which would be denied the central right of political representation in the indirect channels of the EU, but they would also exacerbate the British social divisions as they currently stand, which will collectively transform the status of EU citizenship into a meagre commodity.

## **Table of contents**

Introduction.....	1
1. Union Citizenship .....	4
1.1. The Historical Origins of Union Citizenship.....	6
1.2. Direct Effect of Article 21 TFEU .....	12
1.3. Union Citizenship as supplementary to Member State Nationality.....	14
2. European Citizenship in light of Brexit .....	18
2.1. Can EU Citizenship be retained for British nationals after Brexit?.....	21
2.1.1. The Orthodox Approach .....	21
2.1.2. Consequences of Fragmentation for individual rights .....	23
2.2. Theories for the Preservation of Union Citizenship under International Law .....	26
3. Associate European Citizenship .....	33
3.1. The Case for Associate European Citizenship.....	35
3.2. The Case against Associate European Citizenship .....	39
3.2.1. Practical Grounds for Rejecting the notion of ‘associate EU citizen’ .....	41
3.2.2. Respect for Britain’s democratic values and sovereignty.....	44
3.2.3. The decoupling of EU citizenship and Member State nationality as a justification for the introduction of associate citizenship .....	45
3.2.4. Associate EU Citizenship and the classification of both UK nationals and EU citizens .....	49
4. Conclusion .....	53
Bibliography .....	58

## Table of Abbreviations

(n)	Number
CJEU	Court of Justice of the European Union
Ed.	Editor
Edn.	Edition
EU	European Union
EU-27	European Union Countries after the United Kingdom left the EU
Ibid	Ibidem
MEP	Member of the European Parliament
Para	Paragraph
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties

## Introduction

In the discussions concerning the citizenship of the EU, the first issue that has to be raised is how European citizenship has been, in fact, granted formal status so as to become a formal concept, and whether the creation of the status constitutes a dynamic process from a methodological perspective. The issue of Union citizenship usually revolves around the conception of persons as citizens of certain states, which themselves are members of the EU. The term ‘European citizenship’ is generally understood as a condition by which people coming from different European nations are to enjoy similar rights, which are to be asserted *vis-à-vis* both public officials and European public courts. In reality, this particular conception of citizenship has been clearly realised within the Union, and this is an achievement that is obviously not to be disparaged.<sup>1</sup> European citizenship for all the nationals of the EU Member States is of apparent importance, as it principally both enlarges and multiplies the horizons of opportunities for European citizens.

Despite the fact that EU citizenship was officially ‘born’ back in 1992 with the ratification of the Treaty on European Union (hereinafter referred to as the ‘Maastricht Treaty’), as early as 1976 it was stated that the citizenship of the EU was ‘incipient’.<sup>2</sup> Likewise, in 1982, EU citizenship was described as being in an ‘embryotic’ state of development.<sup>3</sup> The status of the citizenship of the Union and the rights that arise from it, and primarily the right of free movement of persons, comprise one of the core foundations of the EU. Sitting on top of the pillars that have created it is the citizenship itself, as its existence distinguishes it from other regional, or even international organisations, whilst its supranational nature has been the subject of both extensive academic commentary and political conjecture. With the formal

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<sup>1</sup> Percy B Lehning, ‘European Citizenship: Towards a European Identity’ (2001) 20 *Law and Philosophy* 239, 240.

<sup>2</sup> Richard Plender, ‘An Incipient Form of European Citizenship’ in Francis Jacobs (ed.), *European Law and the Individual* (North Holland Publishing 1976), 39.

<sup>3</sup> Andrew Evans, ‘European Citizenship’ (1982) 45(5) *Modern Law Review*, 497, 497.

insertion of Union citizenship in the Maastricht Treaty, also came a wide debate concerning its legal nature among scholars, politicians, and also the general public.

It is possible, however, that should a referendum by one of the largest and most influential Member States of the Union on the very membership on which Union citizenship is predicated upon, had not taken place, especially during an era of a witnessed Pan-European populism, an approach of an apparent deconstructivism towards the evolution of the free movement of persons, might had been of clear academic relevance. In essence, what the Brexit process has served to do is to put the structure of EU citizenship under a microscope, in order to assess whether what were initially thought to be the concrete foundations and pillars, were after all and in reality, compacted sand, which contained numerous unresolved and improperly assessed fractures.

Brexit has been proven to be unavoidable though, despite the noteworthy and courageous efforts of supporters of what has become known as ‘Bremain’, to overturn the result of the referendum, and thus, for the United Kingdom to remain a Member State of the Union,<sup>4</sup> with its immediate consequences and effects being described as wavering between “nuisance and disaster”.<sup>5</sup> The British decision to secede the EU and the avalanche of the academic and political discussions that it has generated, give a clear idea of its apparent historical, sociological, geopolitical, and legal significance. Those most prone to tragedy have made refer of a dying Europe,<sup>6</sup> whereas for others the project of European integration has been damaged “beyond repair or redemption”.<sup>7</sup> Others have also spoken about a potential revival of the theory

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<sup>4</sup> Adam Forrest, ‘Revoke Article 50 petition calling for Brexit to be cancelled hits 6 million signatures’ (Independent, 31 March 2019) < <https://www.independent.co.uk/news/uk/politics/brexit-petition-article-50-revoke-signatures-six-million-latest-a8847506.html> > accessed 27 July 2022.

<sup>5</sup> Simon Jenkins, ‘The evidence is all around us: life outside the single market is an utter disaster’ (The Guardian, 17 February 2022) < <https://www.theguardian.com/commentisfree/2022/feb/17/brexit-life-outside-single-market-utter-disaster> > accessed 27 July 2022.

<sup>6</sup> Ignacio Forgado Barona, ‘Brexit and European Citizenship: Welcome Back to International Law’ (2020) 24 Spanish Yearbook of International Law 210, 211.

<sup>7</sup> Richard Maher, ‘International Relations Theory and the Future of European Integration’ (2021) 23 International Studies Review 89, 90.



of the so-called ‘domino effect’,<sup>8</sup> referring to a spiral of subsequent exits from the EU following the British wake, which would inevitably lead to the dissolution of the Union, altogether.<sup>9</sup> As already noted, the impact of Brexit has been translated into an avalanche of academic and political literature, the primary objective of which was to analyse the repercussions of Brexit in various fields, whereas the Brexit and EU citizenship binomial, has been among the most discussed and heavily studied,<sup>10</sup> which also serves as the purpose of this very work.

Instead of focusing on the evident and already greatly discussed benefits of Union citizenship, this work aims to address the theories relating to the reconstruction of the status from its very foundations, especially in the context of a contested decoupling of EU citizenship from Member State nationality, and primarily within the context of Brexit. This will be achieved by means of taking into consideration numerous CJEU rulings, academic discussions, and by highlighting the inherent flaws of such claims. This thesis will initially introduce and discuss the historical origins that have led to the genesis and development of Union citizenship, as the status that is has been transformed to be today, in order to familiarise the reader and expand their understanding. Then, this work will proceed to present the discussions that the Brexit process has given rise to, especially in the context of the future of EU citizenship and the rights associated with thereby, referring primarily to either its future preservation and retention by Britons; or at least the partial preservation of certain rights associated with the status, by means of either the reconstruction of EU citizenship as an autonomous status or through the introduction of an ‘associate EU citizen’ status. This work will conclude, however, that such theories and notions remain rather flawed and in clear discrepancy with the apparent meaning and wording of the EU Treaties.

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<sup>8</sup> Haluk Yergiin, ‘Does Brexit Would Cause Domino Effect on Other European Union Countries? Is It the End of Regional Integrations?’ [2016] 5(12) International Journal of Humanities and Social Science Invention 1.

<sup>9</sup> Ibid.

<sup>10</sup> Jed Odermatt, ‘Brexit and International Law: Disentangling Legal Orders’ [2017] 31 Emory International Law Review Recent Developments 1051.

## 1. Union Citizenship

The Maastricht Treaty first introduced the legal concept of the citizenship of the EU into Union law in 1992,<sup>11</sup> as part of an attempted shift from a primarily economic community towards a political Union.<sup>12</sup> Even though the notions of a ‘People’s Europe’<sup>13</sup> and that of a common European citizenship had long been in circulation prior to the formal coming into existence by the ratification of the Maastricht Treaty,<sup>14</sup> the introduction of EU citizenship was greeted with a wide array of academic scepticism, nonetheless.<sup>15</sup> Shortly after the formal insertion of the institution, both academics and lawmakers sought to address the content, impact and legitimacy of EU citizenship from institutional, empirical and normative points of view.<sup>16</sup> Such scepticisms were primarily concerned with the absence of reciprocal duties, which could lead to a more active citizenship,<sup>17</sup> the subjection of residence rights of citizens to the conditions laid out in previous Directives; and arguably the constant discrimination and exclusion of both the nationals of other Member States and third-country nationals.<sup>18</sup> On this matter, some have also recently spoken of a “growing phenomenon of EU migrants, despite the existence of a common EU citizenship”.<sup>19</sup> The vast majority of scholars not only saw EU citizenship as an institution of purely symbolic and decorative nature,<sup>20</sup> which had introduced

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<sup>11</sup> Carlos Closa, ‘The Concept of Citizenship in the Treaty on European Union’ (1992) 29 CML Rev 1137, 1158.

<sup>12</sup> Paul Craig and Grainne de Búrca, *EU Law: Text, Cases and Materials* (6<sup>th</sup> edn, OUP 2016) 853.

<sup>13</sup> Commission of the European Communities, *A People’s Europe: Implementing the conclusions of the Fontainebleau European Council*, (EU Commission 1984) COM (84) 446 final.

<sup>14</sup> Commission of the European Communities, *Towards a Europe for Citizens*, (EU Commission 1975) Bull. EC 7-75, 11.

<sup>15</sup> Carole Lyons, ‘Citizenship in the Constitution of the European Union: Rhetoric or Reality?’ in Richard Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Averbury 1996).

<sup>16</sup> Theodora Kostakopoulou, ‘Towards a Theory of Constructive Citizenship in Europe’ (1996) 4(4) *Journal of Political Philosophy* 337, 351.

<sup>17</sup> Joseph Weiler, ‘Citizenship and Human Rights’ in Jan Winter and others (eds.), *Reforming the TEU: The Legal Debate* (Kluwer 1996).

<sup>18</sup> Annette Schrauwen, ‘Granting the Right to Vote for the European Parliament to Third-Country Nationals: Civic Citizenship Revisited’ [2013] 19(2) *European Law Journal* 201.

<sup>19</sup> Solange Isabelle Maslowski, ‘EU Citizenship and the categorization of EU migrants’ (2019) 9(1-2) *Approaching Religion* 27, 30.

<sup>20</sup> Jessurun d’Oliveira, ‘Union Citizenship: Pie in the Sky?’ in Allan Rosas and Esko Antola (eds.), *A citizens’ Europe: In Search for a new Order* (Sage 1995).

rather insignificant additions to the citizens' rights of free movement, as already existed in the pre-Maastricht regime, but also as an institution of weak nature and content, potentially calling for the defence and preservation of the primacy of national citizenships.<sup>21</sup>

In the context of EU citizenship, the relationship and contingency of the status with the nationalities of the Member States, and the fear that the institution could infringe the sovereignty of the Member States, whilst also ultimately governing their national laws, comprises the central discussion, which is recurrent in the academic literature concerning the particular issue.<sup>22</sup> The primary focus on the supremacy of national citizenships and the assumptions originating from the national order have formed competing normative perspectives, either 'maximalist' positions, which praise the judicial construction of the institution as being destined to be the 'fundamental status' of all the citizens of the EU Member States; or either 'minimalist' positions,<sup>23</sup> according to which the status should remain supplementary to the one deriving from national citizenships.<sup>24</sup> Whereas the discussions concerning the relationship between Member State nationalities and EU citizenship and the arguments calling for a decoupling of the two are to be discussed in a subsequent part of this submission, the historical origins and evolution of EU citizenship will be presented, in order for the reader to fully comprehend both the objectives of the institution, and the concerns raised by commentators.

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<sup>21</sup> Maarten Vink, 'Limits of European Citizenship: European Integration and Domestic Immigration Policies' (2003) 4 *Webpapers on Constitutionalism and Governance beyond the State*, 20.

<sup>22</sup> Gerard-René de Groot and Ngo Chun, 'Twenty Years of CJEU Jurisprudence on Citizenship' (2014) 15(1) *German Law Journal* 821, 822.

<sup>23</sup> Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13(5) *European Law Journal* 623, 625.

<sup>24</sup> Oliver Garner, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status' (2018) 20 *Cambridge Yearbook of European Legal Studies* 116, 122.

## 1.1. The Historical Origins of Union Citizenship

In addressing the question as to what exactly the citizenship of the EU both means and entails, whether it constitutes a merely political, legal, or societal ‘fundamental status’ for those who hold it, or a disparate collection of economically oriented Treaty rights granted with the purpose of facilitating the *raison d'être* of European integration, some have argued that Union citizenship remains the paradigmatic “unidentified political object”,<sup>25</sup> the existence of which simply precedes its essence.<sup>26</sup> Even though such statements are not necessarily erroneous, certain incipient threads of the essence of Union citizenship in the era preceding its formal insertion may indeed be identified.

The assessment of the political objective of EU citizenship requires the renewed urgency in the current periods of both employment and immigration crises, during which the principal objective of the European project is being questioned the most, especially if we are to take into consideration the growing use of like terms at an exponential rate.<sup>27</sup> The concept of political objective, that referring either to EU citizenship specifically or European integration generally, gives rise to the idea of a goal-oriented process and evolution towards a clear objective or *telos*. During the early years of European integration, and in particular the post-war era, for many such objective referred primarily to the establishment of a European federation. In ratifying the Treaty of Paris in 1951, the six founding Member States promised to “substitute for historic rivalries a fusion of their essential interests, to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts, and to lay the foundations for institutions which will give direction to a destiny henceforward shared”.<sup>28</sup>

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<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> Peo Hansen, “European Citizenship’, or where neoliberalism meets Ethno-Culturalism’ (2000) 2(2) *European Societies* 139, 140.

<sup>28</sup> Treaty Establishing the European Coal and Steel Community 1951, Introductory Notes.

Such a promise had undoubtedly echoed the Schuman Declaration of the previous year, which made reference to the “common foundations for an economic development as a first step in the federation of Europe”,<sup>29</sup> and the creation of a common market which would create a “wider and deeper community”<sup>30</sup> and also the “realisation of the first concrete foundation”<sup>31</sup> of such federation. The idea of a European federation as both expressed in the Treaty of Paris and the Schuman Declaration, constituted at the time the orthodox notion, as it comprised the consensus vision across the political spectrum, whilst also receiving a strong impetus from the aversion to nationalism, as a direct response to the events that had shattered the continent, and more specifically as a result of the Second World War.<sup>32</sup> The establishment of a federal Europe aimed at the creation of a truly supranational community in which its citizens would share a common identity and status, instead of that being a mere international relations model, limited only to selected states. Britain’s then Prime Minister Winston Churchill, made reference to a “European group which could give a sense of enlarged patriotism and common citizenship to the distracted peoples of this turbulent and mighty continent”,<sup>33</sup> whilst also calling for this European federation to also provide for a “common citizenship where men will be proud to say, ‘I am European’”.<sup>34</sup> In light of such an agenda of a European political community and common citizenship, Belgian Prime Minister Paul-Henry Spaak and Lionello Levi Sandri, the then Social Affairs Commissioner, had in the early years of integration conceived the notion of free movement of workers, as the first step towards the formation of a supranational

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<sup>29</sup> Schuman Declaration 1950.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Willem Maas, ‘European Union Citizenship in retrospect and prospect’ in Engin Isin and Peter Nyers (eds.) *Routledge Handbook of Global Citizenship Studies* (Routledge 2014).

<sup>33</sup> Sir Winston Leonard Spencer Churchill, ‘Churchill’s Zurich Speech’ (University of Zürich, Zürich, 19 September 1946) < <https://rm.coe.int/16806981f3> > accessed 18 July 2022.

<sup>34</sup> Willem Maas, ‘The origins, evolution, and political objectives of EU citizenship’ (2014) 15(5) *German Law Journal* 797, 799.

community.<sup>35</sup> On the other hand, the French President, Charles de Gaulle, argued that “a united Europe could not be a fusion of its people”,<sup>36</sup> whilst also opposing the idea that national citizens could become “fellow citizens of an artificial motherland”.<sup>37</sup> That was a view which was clearly contrasting that of Churchill’s vision of a “Europe where men of every country will think of as much as being European as of belonging to their native land”,<sup>38</sup> which one may see as an early discord.

The free movement of economic actors, even long before the formal insertion of EU citizenship, composed the ‘ostensible core’<sup>39</sup> for the realisation of both European integration and citizenship. The formal insertion of EU citizenship by the Maastricht Treaty had consolidated decades of both political and legal developments, leading eventually to the formation of a common citizenship status for the citizens of the Member States of the Union, by means of improvement and promotion of the active enjoyment of the pre-existing citizenship rights, rather than through the introduction of novel regulations. Inspired by the same thinking, the Maastricht Treaty intended to epitomise the sense of belonging, as prior to 1992 both the status and rights of the individuals within the European legal order comprised an instrument aiming at facilitating the goals of the then Community’s micro-economic constitutions, rather than accommodating and constituting an existential status of belonging. As a result, the rights of those who did not fulfil the requisite criteria, as those have been repeatedly highlighted in CJEU case law,<sup>40</sup> were governed in a piecemeal manner through secondary legislation.<sup>41</sup>

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<sup>35</sup> Lisa Conant and others, ‘Patrolling the boundaries of belonging’ in Susan M Sterret and Lee D Walker (eds.), *Research Handbook on Law and Courts* (Law 2019).

<sup>36</sup> Charles de Gaulle, ‘Europe from Memoirs of Hope’ in Brent Nelsen and Alexander Stubb (eds.) *The European Union* (3<sup>rd</sup> edn, Palgrave 2003).

<sup>37</sup> Ibid.

<sup>38</sup> Willem Maas, *Creating European Citizens* (Rowman and Littlefield 2007) 12.

<sup>39</sup> Garner, ‘The Existential Crisis of Citizenship of the European Union’ (n 24) 119.

<sup>40</sup> Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-02703.

<sup>41</sup> Floris de Witte and others, ‘Freedom of movement under attack: Is it Worth Defending as the Core of EU Citizenship?’ (2016) RSCAS Working Paper 2016/89, 24.

The substance of EU citizenship has now been incorporated in Article 20 TFEU and Article 9 of the Maastricht Treaty, with Article 8(1) of which explicitly declaring that the “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union”. The rights comprising the substance, and which are attached to the status of EU citizenship are namely the right to freely move and reside within the territory of the Member States,<sup>42</sup> and the electoral right to stand as a candidate and vote in the elections to the European Parliament and in municipal elections in the Member State of residence, under the same conditions as the nationals of the hosting state.<sup>43</sup> Additionally, Union citizenship confers upon the citizens of the Member States the diplomatic right to enjoy the diplomatic protection and consular authorities of any other EU Member State, under the same conditions as the nationals of that Member State, in cases where a citizen of the Union find themselves within the terrain of a third-country in which the citizen’s home Member State is not being represented.<sup>44</sup> Moreover, EU citizenship also confers the right to petition the European Parliament, to apply to the European Ombudsman; and to address the advisory bodies or institutions of the Union in any of the Treaty languages and to obtain a reply in the same language.<sup>45</sup>

As already noted, the formal insertion of EU citizenship by the Maastricht Treaty into the documents governing the institutions of the European integration, consolidated decades of both legal and political developments. Nevertheless, at the insistence of the Member States, the negotiators of the next Treaty, namely the Treaty of Amsterdam, added the qualifier that EU citizenship is to be supplementary and additional to, and that it does not in any way intend to replace national citizenships,<sup>46</sup> which provides that a national of an EU Member State, is to be

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<sup>42</sup> Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), Article 20(2)(a) and 21.

<sup>43</sup> *Ibid*, Article 20(2)(b) and 22.

<sup>44</sup> *Ibid*, Article 20(2)(c) and 23.

<sup>45</sup> *Ibid*, Article 20(d) and 24.

<sup>46</sup> Decision of the Heads of State and Government, Meeting within the European Council, Concerning Certain Problems Raised by Denmark on the Treaty on European Union, Annex I [1992] *OJ C 348/2*, Section A.

concurrently considered a citizen of the Union as well. The particular qualifier has drawn rather broad academic commentary, whereas the lack of minimum standards for the acquisition and loss of the nationality of a Member State, from which EU citizenship derives, has been described as a “serious demographic deficit”.<sup>47</sup> Regardless, EU citizenship is still understood to be the first post-national citizenship worldwide, albeit being supplementary to national citizenships, as it has already been noted.<sup>48</sup> As Union citizenship is purely derivative in nature, it may be referred to as *ius tractum*,<sup>49</sup> as opposed to the *ius sanguinis* or *ius soli* practices by the Member States. In the momentous case of *Grzelczyk*,<sup>50</sup> the CJEU first uttered that the “Union citizenship is destined to be the fundamental status of the nationals of the Member States”.<sup>51</sup> The particular ruling constitutes the exemplary for the development of the citizenship of the Union, for both the legal concept and shift from an initially symbolic gesture towards an independent source of rights for the nationals of the Member States and their respective family members.<sup>52</sup>

It is utterly crucial to note that the scope of the aforementioned rights remains subject to certain conditions and limitations, nonetheless. The right to freely move and reside in the territory of another Member State, conferred upon by virtue of Article 21 TFEU, remains subject to the limitations and conditions as provided by both Treaty and secondary laws, and also the relevant Directive.<sup>53</sup> The Treaty text outlines that the rights are to be exercised “in accordance with the conditions and limits defined by the Treaties and by the measures

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<sup>47</sup> Rainer Bauböck, ‘If You Want to Make EU Citizenship More Inclusive You Have to Reform Nationality Laws’ (Verfassungblog: On Matters Constitutional, 21 January 2019) < <https://doi.org/10.17176/20190211-221156-0> > accessed 29 May 2022.

<sup>48</sup> Patricia Mindus, ‘Dimensions of Citizenship’ (2014) 15(5) German Law Journal 735.

<sup>49</sup> Dimitry Kochenov, ‘Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights’ (2009) 15(2) Columbia Journal of European Law 169, 181.

<sup>50</sup> Case C-184/99 *Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

<sup>51</sup> *Ibid*, para 31.

<sup>52</sup> Peter Van Elswege, ‘Shifting the Boundaries? European Union citizenship and the scope of application of EU law’ (2001) 38(3) Legal Issues of Economic Integration 263.

<sup>53</sup> Directive 2004/38/EC of the European Parliament and of the Council of April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Citizens’ Rights Directive).



thereunder”.<sup>54</sup> On the matter of the enforcement of the right of free movement, the secondary legislations sustained to preserve the cleavages along the economic lines between citizens, which also found themselves upon the quantitative and qualitative conditions upon the different categories of citizens, nonetheless. The CJEU has made a tremendous effort, however, to create a general right of free movement for the citizens of the Union, more generally. Additionally, Article 22(1) provides that the right to stand and vote in both local and European elections, remains subject to the possibility of derogation where it is “warranted by problems specific to a Member State”, which yet again highlights the contingency and bareknuckle enforcement on national laws and affairs. On this matter, some have argued that the capacity of the Union legislative process to impose certain limitations upon the rights associated with EU citizenship, in fact, challenges the notion of political and legal equality among European citizens, that the status arguably provides.<sup>55</sup> Such arguments comprise the primary reason as to why the manner in which the institution of EU citizenship was brought into existence had been greeted with a distrustful reaction and scepticism from academics, who underlined the contested lacking and partial nature of the status. Furthermore, several policymakers and scholars were of the view that the content of EU citizenship, not only was rather limited in nature, as except from the electoral rights at the European Parliament and the diplomatic right to consular and diplomatic protection while abroad, the status remained primarily premised on the pre-existing Community law rights of free movement and residence, whilst adding insignificant additions to the existing Community laws.

As it has already been noted, the CJEU has made a substantial effort in creating a general right of free movement of the Union citizens and enriching the substance of Union citizenship. This is evident by the Court’s rulings in numerous cases, such as the landmark

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<sup>54</sup> Consolidated Version of the Treaty on the Functioning of the European Union, Article 20.

<sup>55</sup> Garner, (n 24) 122.

cases of *Chen*,<sup>56</sup> *Rottmann*,<sup>57</sup> *Baumbast*,<sup>58</sup> *McCarthy*<sup>59</sup> and *Zambrano*.<sup>60</sup> The cases track the developments that the institution of EU citizenship undertook and the evolution of the notion beyond its origins in internal market. In essence, it is evident that Union citizenship has expanded from a mere means of addressing the problems and irregularities as encountered by citizens when crossing the intra-European borders, whereas it is also manifested that the approach of the CJEU indicates that such a cross-border element does no longer constitute the sole ground for the application of EU law, as the effective enjoyment of Union citizenship has now also taken a central stage.<sup>61</sup>

## 1.2. Direct Effect of Article 21 TFEU

The first step in order to facilitate the effective enjoyment of EU citizenship has been to recognise the direct effect of Article 21 TFEU, in order to allow for the citizens of the Union to appeal under the particular Article. Such a facilitation went on to take place through the departure from the existing case law and former resident Directives, which went on to be replaced by the Directive 2004/28. The introduction of Article 20 TFEU did not just provide for a shift from a legislative towards a Treaty for the rights of residence provided by the citizens' Directives, but also for momentous legal consequences.<sup>62</sup> In *Baumbast*,<sup>63</sup> it was held that a citizen of the EU could still enjoy the right of residence in their host Member State, on the basis that they were a Union citizen and could directly apply for Article 21 TFEU, albeit no longer enjoying a right of residence as a migrant worker, which meant that they fell outside the scope of Directive 2004/38. The case also elaborated that a directly effective right is being

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<sup>56</sup> Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

<sup>57</sup> Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449.

<sup>58</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

<sup>59</sup> Case C-434/09 *McCarthy* [2011] ECR I-3375.

<sup>60</sup> Case C-34/09 *Zambrano v ONEM* [2011] ECR I-1177.

<sup>61</sup> *Baumbast and R* (n 58), para 94.

<sup>62</sup> *Craig and Búrca* (n 12), 857).

<sup>63</sup> *Baumbast and R* (n 58).

conferred upon the citizens of the Union to reside in another Member State, regardless of whether they fall within any of the existing EU status categories, by virtue of Article 20(1) TFEU.<sup>64</sup> This provides that the limitations and conditions to which such direct effect is subject, according to the Treaty, are to be applied and interpreted in accordance with Union law, whereas such an application must also be proportionate.<sup>65</sup>

Confirming its ruling in *Baumbast*, the CJEU also confirmed in *Chen* that Article 21 TFEU confers a directly effective right of residence on Union citizens, even in cases where the citizens do not fall within any of the existing status categories. The case concerned the granting of certain residence rights to a Chinese mother residing in the United Kingdom, on the basis of her child's Irish, and thus, Member State nationality. Prior to the ratification of the Treaty, it was most often the case for dependent relatives to derive a right of residence through the citizenship status of their provider, as in accordance with Article 2(2)(d) and 7(2) of the Directive 2004/38. Interestingly, in *Chen* this had been reversed, as it was the EU citizen who was depending on the care of a third country relative, in order to reside within the territory of a Member State. Here, the CJEU held that a refusal to grant a right of residence to the third-country national upon whom the EU citizen was dependent "would deprive the child's right of residence of any useful effect".<sup>66</sup>

The case serves as a further confirmation of the ruling provided in *Baumbast*, as it upheld that the rights of movement and residence attached to Union citizenship, as those are afforded by Article 21 TFEU, are directly effective, autonomous, and independent of the possession of a previously recognised EU status category. Furthermore, the ruling highlighted that the limitations and conditions on which the right to freely move and reside within the territory of another Member State are subject to, must be interpreted and applied in a

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<sup>64</sup> *Zhu and Chen* (n 56), para 45.

<sup>65</sup> *Baumbast and R* (n 58), para 94.

<sup>66</sup> *Zhu and Chen* (n 56), para 45.

proportionate fashion, which ensures that the exercise of these rights is not being unjustifiably restricted. As deriving from settled case law, Article 21 TFEU establishes and confers directly effective rights on the citizens of the Union to which they can appeal to. Such directly effective rights expand the existing rights conferred to Union citizens, by allowing for non-economically active persons to also freely move and reside in the territory of another Member State, on the basis of their mere capacity as citizens of the Union. This may be regarded as a significant change of nature of the now-far-from symbolic Union citizenship, towards a less market oriented and inclusive institution, whilst also generally transforming the European project into more social in nature.

### **1.3. Union Citizenship as supplementary to Member State Nationality**

The history of the Union is rather fraught with continuous frictions between the supranational powers of the Union and the sovereignty of the Member States, whereas the former has gained jurisdiction in certain areas of law traditionally belonging to the determination of the latter. However, even in the presence of such tensions, certain legal fields have been repeatedly affirmed as falling under the determination and governance of the Member States, with the most notable examples being those of the acquisition and loss of their nationalities. On this matter, the Treaty of Lisbon, provides that Member State nationalities are to be barely, if at all, governed by the laws of the Union, whereas as already highlighted, the single provision governing the relationship between Union law and the nationalities of the Member States, namely Article 20 TFEU, provides that “every person holding the nationality of a Member State shall be a citizen of the Union”,<sup>67</sup> whilst also providing for the primacy of Member State nationalities. In reality, however, such a relationship is not as straightforward as reading may imply, despite the contingency upon the possession of a Member State nationality.

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<sup>67</sup> Ibid.

A relationship which some referred to as rather “uneasy”.<sup>68</sup> The institution of EU citizenship has transformed from a mere complementary face of national citizenships to an independent source of rights, thus, giving rise to an independent relationship between the Union and nationalities of the Member States. According to case law of the CJEU, it follows that the relationship between national and Union citizenships may not be as straightforward or clear as the wording of the Treaties may suggest. The notion of EU citizenship undoubtedly poses a challenge to certain dimensions of nationality law, including the restrictions on the use of surnames,<sup>69</sup> and certain aspects of dual nationality.<sup>70</sup>

Referring back to the significance of the principle of proportionality, the principle also became apparent in additional case law relating to Union citizenship. The landmark case of *Rottmann*<sup>71</sup> highlighted that the loss or revocation of the nationality of a Member State rests upon the discretion of that particular Member State, provided of course, that the principle of proportionality is observed, and that such revocation serves a legitimate purpose,<sup>72</sup> whilst also being neither arbitrary nor discriminatory.<sup>73</sup> The case concerned an Austrian national by birth, who had moved from Austria to neighbouring Germany, following an investigation which took place in his native Austria in regard to suspected fraudulent activity. His naturalisation in Germany, however, automatically resulted in the loss of his Austrian nationality, in accordance with Austrian nationality law.<sup>74</sup> However, his failure to conceal the fact that serious criminal proceedings against him were pending in Austria, resulted in the revocation of his newly acquired German nationality by means of an administrative decision, as his new found Member State nationality was deemed to have been obtained by deception. The revocation contributed

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<sup>68</sup> Siofra O’Leary, ‘Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows’ (1992) 12(1) *Yearbook of European Law* 353.

<sup>69</sup> Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693.

<sup>70</sup> Dimitry Kochenov, ‘Double Nationality in the EU: An Argument for Tolerance’ [2011] 17 *ELJ* 323.

<sup>71</sup> *Rottmann* (n 57).

<sup>72</sup> *Ibid*, para. 51.

<sup>73</sup> *Ibid*, para 53.

<sup>74</sup> *Ibid*, para 26.

to a rather dramatic change to his legal status, as it also meant the loss of his EU citizenship, leaving him stateless, as a result. In deciding the case, the CJEU had to address two preliminary questions, specifically whether the loss or revocation of a Member State nationality, and thus, Union citizenship, which has been lost as a legal consequence of a naturalisation acquired by intentional deception, as that was provided by the internal laws of a Member States was in fact compliant with Union law; and should that had been the case, which State, the naturalising or Member State of former nationality would be required to modify its nationality laws, so as to avoid such legal consequences and comply with Union law. As already noted, the judgement provided by the CJEU confirmed that Member States are allowed to withdraw their nationalities in cases where those had been granted by way of naturalisation to a Union citizen, who obtained that nationality by intentionally deceptive means, even if such revocation would also imply the loss of citizenship of the Union, as a direct consequence of the individual no longer possessing the nationality of any Member State, provided that the withdrawal decision observed the principle of proportionality,

The particular case has generated an avalanche of academic commentary, with some noting that the ruling was retreating from that provided in *Micheletti*,<sup>75</sup> as it provided that in the exercising of their powers concerning nationality laws, Member States must have due regard to EU law, whilst others hailing the ruling as a seminal case and a generally comprehensive judgement.<sup>76</sup> The ruling highlighted that Member States still have competence on deciding the acquisition or loss of their nationalities, which must respect the principle of proportionality, nonetheless. What this decision basically entailed is that the consequences of such decisions upon both the individuals concerned and their rights as Union citizens, but also the indirect consequences to their extended family members, must be taken into consideration,

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<sup>75</sup> Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239.

<sup>76</sup> Dimitry Kochenov, 'EU Citizenship for Real: Its Hypocrisy, its Randomness, its Price' in Rainer Bauböck (ed.) *Debating Transformations of National Citizenship* (2018 IMISCOE Research Series).

including an assessment as to whether the loss of nationality is proportionate to the gravity of the committed offence. In this case, the CJEU waived the 'exclusive' right of Member States to govern the loss and acquisition of their nationalities, by merely adding the proportionality principle, which essentially amounted that Member States were no longer completely sovereign in applying their nationality laws. The ruling was one which, as already mentioned, has caused widespread controversy. Some Member States argued that the CJEU was actually overstepping its bounds and disregarding the Declarations attached to the Maastricht Treaty which provide that "the question as to whether an individual possesses the nationality of the Member State shall be settled solely by reference to the national law of the Member State concerned".<sup>77</sup> The CJEU has argued that Member States still enjoy the right to shape their own nationality laws, insofar as those are with due regard to Union law and take into account the principle of proportionality. The ruling has underlined, on the one hand, the declining tendency of complete sovereignty enjoyed by the Member States, which no longer enjoy exclusive competence and domain of their nationality matters, and on the other hand, an extension of the remit of EU law. Some could argue that this grants an indirect influence on otherwise reserved nationality matters, whilst also shrinking the domain for Member States.<sup>78</sup>

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<sup>77</sup> Official Journal of the European Communities [1992] OJ No C-191/98 Declaration on nationality of a Member State.

<sup>78</sup> Ulli Jesserun d'Oliveira, '*Janko Rottmann v Freistaat Bayern* ECJ: Decoupling Nationality and Union Citizenship?' (2011) 7(1) European Constitutional Law Review 138, 148.

## 2. European Citizenship in light of Brexit

The case of *Rottmann* concerned the national decisions to withdraw the nationality of a Member State and their implications for both EU citizenship and the rights attached to the status as a whole. It is, therefore, plausible that the ruling did not provide for substantial clarification, nor was it intended to apply in situations where the nationality of a Member State, and as a consequence also EU citizenship, are lost as a result of a Member State's decision to withdraw from the Union. The common legal order of the EU, as described in the previous chapter provides that "every person holding the nationality of a Member State shall be a citizen of the Union".<sup>79</sup> Thus, the wording of the provision arguably provides for a fairly simple relationship between Member State nationality and EU citizenship. In mundane language, at first sight it arises from the Treaty text that in order for one to be a citizen of the Union they must be a national of an EU Member State, as Union citizenship can be understood as a status that derives from and is 'parasitic'<sup>80</sup> on national citizenship. Nevertheless, as it has already been observed, substantial CJEU case law appears to suggest that the relationship between Union citizenship and Member State nationality, and the contingency of the former upon the latter, may not be as straightforward as the Treaty text may suggest, despite the confirmation of an exclusive link between the two in the well-known ruling.<sup>81</sup> In fact, such a link may be seen as the confounding element in the relationship between national and Union citizenships, as in its ruling the Court held that before taking decisions to withdraw their nationalities, which could also affect the status of EU citizenship, Member States must take into account the implications of these decisions, especially upon the person concerned and the strip of the rights attached to the status, as either the loss of Union citizenship or hammering of the rights attached

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<sup>79</sup> TFEU, Article 20.

<sup>80</sup> Richard Gordon QC and Rowena Moffatt, *Brexit: The Immediate Legal Consequences* (first published 2016, The Constitution Society) 44, 10 < <https://consoc.org.uk/wp-content/uploads/2016/05/Brexit-PDF.pdf> > accessed 15 July 2022

<sup>81</sup> *Rottmann* (n 57).



thereby may prevent the lawful application of national laws on the deprivation of national citizenship.

In recent years, questions concerning the loss of Member State nationalities and the implications for EU citizenship have increasingly emerged in various contexts,<sup>82</sup> which according to some have transformed the matter into rather practical in nature, than purely theoretical.<sup>83</sup> Nowadays, laws adopted in order to assist the deprivation of nationalities of either suspected or convicted terrorists, or merely aiming to address the increasing waves of migration and the proliferation of multiple nationalities, all serve as prime examples of the increasing questions regarding the implications on EU citizenship, which arise from such deprivation but also due to the dependency of the status upon Member State nationality. The Brexit process clearly constitutes the most current, prominent, and controversial issue relating to the loss of EU citizenship, as the institution of EU citizenship had played a major role in both the debates preceding and following the Brexit referendum. The rights enjoyed by the citizens of other Member States domestically in the United Kingdom, sparked amongst the apparent majority of British voters, a fear of welfare tourism of individuals coming from within the borders of the Union; and a fear of unwanted migration of third-country nationals coming from across the Union's borders, who could potentially threaten the national security system and destabilise Britain's national labour market, as a result.<sup>84</sup> A phenomenon which has given rise to a witnessed 'hostile environment' culture throughout Britain.<sup>85</sup>

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<sup>82</sup> Rainer Bauböck and Vesco Paskalev, 'Citizenship Deprivation – A Normative Analysis' (2015) CEPS Paper in Liberty in Security in Europe 82, 2.

<sup>83</sup> Anne Pieter van der Mei, 'Member State Nationality, EU Citizenship and Associate European Citizenship' in Nathan Cambien and others. (eds.), *European Citizenship under Stress: Social Justice, Brexit and other Challenges* (Brill 2020) 442.

<sup>84</sup> Elise Muir and Nathan Cambien, 'EU Citizenship in times of Brexit' (2018) 3(3) *European Papers* 1289, 1289.

<sup>85</sup> Simon Jenkins, 'The evidence is all around us: life outside the single market is an utter disaster' (The Guardian, 17 February 2022) < <https://www.theguardian.com/commentisfree/2022/feb/17/brexit-life-outside-single-market-utter-disaster> > accessed 27 July 2022.

This section aims to take on the process of Brexit and the challenges imposed against the institutions of European integration, but also the implied loss of EU citizenship. The Brexit process has raised numerous high complex issues, whilst also setting in motion a wide array of complex mechanisms, which challenge both the forward motion of a deeper European integration and wider territorial expansion.<sup>86</sup> This section aims to discuss and critically reflect on the current state of EU law, whilst also discussing some of the notions and arguments which arose during and after the negotiations. The decision of the United Kingdom to withdraw from the Union has clearly triggered extensive discussions concerning the rights and interests of both EU citizens and UK nationals. This chapter aims to cast a light on the discussions concerning the suggested preservation of EU citizenship and the rights associated with, that the nationals of the United Kingdom enjoyed as former EU citizens, as those were afforded by the institution of Union citizenship, whilst also taking into consideration the discussions concerning several theories which arose shortly after the decision of Britain to secede the Union. Predominantly, such discussions concerned the preservation of the rights associated with Union citizenship; and even the introduction of a controversial institution, that of an ‘associate EU citizenship’.

In 2016, the United Kingdom decided to withdraw from the Union, following a referendum which would determine the state’s continuous Membership in the Union, making the country the only sovereign state to have done so in the history of the Union, after forty-seven years of Union membership. Thus, setting the wheels of Article 50 TEU in motion for the very first time. The withdrawal of the United Kingdom has been of seismic significance, as for the first time in the history of the Union, a whole Member State polity marched along the lines of losing the rights that its citizens were deriving from the Union legal order, without

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<sup>86</sup> Oliver Garner, ‘After Brexit: Protecting European Citizens and citizenship from fragmentation’ (2016) EUI Working Paper 2016/22 1, 1.

excluding the status of Union citizenship, whilst also exposing the “uneasy foundations of the status being predicated upon nationality of Member States”.<sup>87</sup>

The reduction in size of the EU legal order represents itself through Union norms ceasing to be enforceable for the citizens of the Union within the terrain of the withdrawing Member State, whilst retrospectively ceasing to apply to the citizens of the former Member State in the territory of the Union, and so does EU citizenship. As already noted, EU citizenship has played a major role in the debates both preceding and following Brexit, as formerly the institution was perceived as a potential threat upon the country’s national security and labour markets, whereas subsequently several despairing arguments were put forward arguing for the retention of the status by UK nationals, irrespectively of Britain’s withdrawal from the Union.<sup>88</sup> However, such arguments have raised numerous questions, whilst also generating even more discussions regarding the consequences for EU citizenship in the event of withdrawal of a Member State. In this context, several concerns were raised, concerning whether the withdrawal of the United Kingdom would lead to the automatic loss of EU citizenship and the elimination of the rights deriving from the status; and whether if this was to be the case, whether certain conditions could be imposed on the preservation of those rights primarily through the introduction of certain associate rights.

## **2.1. Can EU Citizenship be retained for British nationals after Brexit?**

### **2.1.1. The Orthodox Approach**

The developments relating to the constitutional constraints which had been produced by EU citizenship, may be proven to be of great significance in the assessment of the effects of Brexit upon the status of Union citizenship, and its potential post-Brexit retention. The

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<sup>87</sup> Garner, (n 24) 129.

<sup>88</sup> William Thomas Worster, ‘Brexit and the International Law Prohibitions on the Loss of EU Citizenship’ [2018] 15 International Organizations Law Review.

orthodox position based on international law would be that once the United Kingdom officially withdraws from the Union, both the Treaties and the rights and obligations attached to them will cease to apply on the withdrawing Member State. With the official withdrawal of the Member State, its citizens may no longer see their rights being protected under EU law, on the basis that their home state is no longer party to the EU Treaties, and therefore, no longer a Member State of the Union. In essence, this provides that the rights deriving from the Union legal order, as well as the status of EU citizenship, will be lost for the nationals of the withdrawing Member State, under the normative understanding of Article 20 TFEU. Referring to the derivative nature of EU citizenship, which is contingent upon the possession of a Member State nationality, it could be argued that Britain's withdrawal from the EU Treaties will also signify that the British nationality may cease to qualify for EU citizenship, as the former is predicated on Member State nationality, as already noted. It is, therefore, arguable that absent a consensual arrangement under Article 50 TEU, which provides for a comprehensive and self-contained scheme for the voluntary withdrawal of a Member State from the Union, the treatment of those EU citizens residing in Great Britain and the UK nationals residing within the terrain of any other Member State, will be subject to certain national immigration laws.

The de-application of the EU Treaties in the withdrawing Member State will bring the loss of Union citizenship for the citizens of the former Member State, who will also lose the rights they derive from the status. According to this orthodox approach, the de-application of the EU Treaties in the withdrawing Member State will, as an initial point, provide for the loss of the EU citizen status for the citizens of that state, in this case UK nationals, who through the withdrawal will most importantly lose their enjoyed rights to freely move and reside within the territory of the remaining Member States,<sup>89</sup> but also the electoral rights to both vote and stand for election in both the European Parliament and municipal elections in their Member State of

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<sup>89</sup> TFEU, Article 20(a).

residence,<sup>90</sup> the diplomatic right to enjoy the protection of diplomatic and consular authorities of any other Member State within the territory of a third country,<sup>91</sup> and the administrative right to petition the institutions.<sup>92</sup> The EU legal order, as this has been described in the first chapter of this work, with all the benefits of the common legal order, extending in the territory of the Union as a whole, as created by virtue of Article 20 TFEU, will be consequently lost for UK nationals. This essentially provides that the citizens of the withdrawing Member State will not be able to rely on EU law, as already noted. Such a de-application would arguably provide that both the EU legal order and its consequent benefits and rights will be both reduced in size and fragmented.<sup>93</sup>

### **2.1.2. Consequences of Fragmentation for individual rights**

On an individual level, EU citizens benefit from the institution of European integration primarily through the creation of a common legal order extending beyond the territory of the Member State in which they are located.<sup>94</sup> Within this transnational legal construct, Union citizenship gathers all the disparate legal benefits under one overarching legal status. The construction of this common legal order allows for a clear definition as on whom Union law applies to, and also who is eligible to benefit from its guarantees. Should the EU legal order function in a holistically harmonious and internally coherent manner, enforceable guarantees of individuals are being granted to these individuals through the creation of a positive law. This stipulates that EU citizens may rely on such guarantees throughout the community space of the Union, irrespectively of their current Member State of residence.

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<sup>90</sup> Ibid, Article 20(b).

<sup>91</sup> Ibid, 20(c).

<sup>92</sup> Ibid, 20(d).

<sup>93</sup> Garner (n 86), 4.

<sup>94</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/23.

Contrarily, in the event the law of the Union is not holistically harmonious nor internally coherent, EU citizens shall no longer be able to rely on EU law, which leads to the fragmentation of both the legal order and the rights of the individuals. Such fragmentation of both the legal order and rights of citizens may follow the authorised violations of Union law, such as the failure to implement a Directive or Treaty law on behalf of the Member State;<sup>95</sup> or through other constitutionally authorised derogations from entire sectors of the legal order. Irrespectively of how fragmentation takes place, its main consequence is that the affected EU citizens, in this case Britons, will not be able to rely on the rights conferred to them by the EU legal order nor upon the enforcement of Union law, as opposed to what would be the case in the harmonious and coherent functioning of the EU legal order.<sup>96</sup> It is admittedly plausible that the complete withdrawal of a Member State constitutes the most stark example of fragmentation, which takes place through the complete de-application of all the norms of the EU legal order within the territory of the withdrawing state and to its nationals.

The reduction in size of the EU legal order will render both the move and establishment of UK nationals within the societies of the Member States, and the territory of the Union, in general, even more difficult considering that the treatment of both the EU citizens residing in Britain and the millions of Britons residing in the territory of the Union, will be subject of national immigration laws, conditional only upon certain international human rights obligations. This also appears to suggest that the former EU citizens will no longer be able to invoke Article 21 TFEU. As already mentioned, UK nationals residing in the Union will be subjected to individual limitations and conditions as those are laid down in each individual Member State, and in cases where EU migration laws apply, the protection under the relevant

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<sup>95</sup> Case C-6/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357.

<sup>96</sup> Garner (n 86), 4.

Directive,<sup>97</sup> which harmonises the rights of long-term residence of third-country nationals. Furthermore, the right to enter and exit a Member State and reside for a period of up to three months in the absence of any conditions other than the use of a valid identity card or passport, as those are being laid down in the relevant Directive,<sup>98</sup> will also cease to apply for British citizens.

It is rather obvious that the primary legal consequence of the de-integration of the legal order and the pure withdrawal of a Member State will give rise to additional implications for the citizens of the former Member State, especially in the context of free movement throughout the territory of the EU and the integration within the societies of the other Member States. At the same time, EU citizens will also encounter comparable difficulties, should they seek to move and establish themselves in the territory of the withdrawing state. Nevertheless, it is necessary to note that such a fragmentation may also impact the static citizens of the withdrawing Member State, who may not wish or plan to reside in any of the other Member States, as the de-application of EU law may also render the established conditions for social life even more challenging to maintain domestically.<sup>99</sup> As the withdrawal from the Union will transform such situations into purely internal in nature, and thus, outside the responsibility and jurisdiction of the Union, it will fall under the discretion of the domestic political processes whether or not to preserve these conditions in cases where the de-application of Union law has taken place.

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<sup>97</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/23.

<sup>98</sup> Citizens' Rights Directive (n 53).

<sup>99</sup> Garner (n 86), 7.

## 2.2. Theories for the Preservation of Union Citizenship under International Law

A wide array of theories and notions for both the retention and protection of Union citizenship exist, referring primarily to the preservation and protection of the existing rights of UK nationals that are associated with EU citizenship. Such theories are contrary to the orthodox narrative, as this has been described in the preceding section of this submission, which provides that UK nationals will lose the rights associated with Union citizenship, and the status altogether, following Brexit. However, some have recently argued that UK nationals may, in fact, retain the status on the basis of their understanding of certain international law prohibitions.<sup>100</sup> These arguments are based on the notion that the institution of EU citizenship constitutes a “functionally equivalent legal bond”<sup>101</sup> to nationality of which the laws pertaining with restrict the ability of the states to revoke, whilst also greeting the protection of such a legal bond as of paramount importance. According to these arguments, the status that is being granted through Union citizenship constitutes a legal bond between the individual and a political entity, which is protectable under international law. As such a protection is generally understood to cover nationality, according to these theories, it may also be understood so as to apply to EU citizenship as well, whereas the same international rules prohibit the arbitrary withdrawal of the legal bond a person has with the political entity.

At the core of these theories lay the citizens themselves and their respective relationship with the source from which they derive their rights. Notably, in the case of the withdrawal of the United Kingdom from the Union, such theories are not necessarily concerned nor are they contending the preservation of the EU Treaties on behalf of the United Kingdom as a state, but rather the continual enjoyment of the status of EU citizenship on behalf of UK nationals, on the basis of certain human rights relating to their citizenship. According to such theories, whilst

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<sup>100</sup> Worster (n 88).

<sup>101</sup> Ibid, 343.



a state's membership in an international organisation such as the EU, produces certain benefits and rights for the citizens of the particular state, it acts as a mere mediator between the citizens and the granting of the rights or status in that organisation, whereas contrarily in the case of the EU, the nationals of the Member States are emplaced into a direct legal relationship with the Union itself, from which certain rights are being derived. Therefore, as the Member State has served its function as the 'gatekeeper'<sup>102</sup> for the acquisition of the status, it no longer serves as an intermediary for the status of the citizens, whereas in the event of withdrawal from the Union, the EU essentially continues to possess the capability of maintaining its legal bond with the people of the former Member State. Case law of the CJEU, which has highlighted that EU citizenship constitutes a status,<sup>103</sup> instead of a mere bundle of economic rights., which is expressive of a social role in the Union,<sup>104</sup> serves as the basis of this direct legal relationship between the EU and the Member States' citizens.

In this regard, it is being argued that EU citizenship cannot be understood to be nationality in the ordinary understanding of the term, whilst it cannot be understood to constitute a citizenship either, as the status is reserved exclusively for the legal bond with a state polity. Whereas despite the fact that the Union has occasionally enjoyed state-like features,<sup>105</sup> such as possessing Union territory,<sup>106</sup> the combination of the rights that the Union grants to its citizens and the statehood-like features it has enjoyed over time, probably provide that one of these state-like aspects that the EU possesses is also the formation of an identical state-like legal bond directly with the individuals, which is functionally equivalent to the one arising from nationality.

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<sup>102</sup> Ibid, 357.

<sup>103</sup> Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-02691.

<sup>104</sup> Craig and de Búrca (n 12), 706.

<sup>105</sup> Teija Tiilikainen, 'To be or not to be? An Analysis of the Legal and Political Elements of Statehood in the EU's External Identity' (2001) 6(2) *European Foreign Affairs Review* 223, 228.

<sup>106</sup> Case C-256/11 *Murat Dereci and others v Bundesministerium für Inneres* [2011] ECR 2011 I-11315, para 66.

On this basis, it has been argued that the narrative of Brexit may not be simply based upon the interpretation of the wording of the EU Treaties, but that it must also consider certain questions and prohibitions of human rights law.<sup>107</sup> In this regard, the pure application of the abovementioned orthodox narrative would be somewhat problematic, as in the context of Brexit, not only the laws of international organisations and Treaty laws are to be referred to in order to address the questions relating to Britain's withdrawal, but also those concerning the rights of human beings are also to be taken into consideration and addressed. By overlooking the rights that UK citizens enjoy as human beings, it is being asserted that the respective rights and relationships among and between the organisation, the state, and the individuals themselves, may actually fragment.

In interpreting the national laws pertaining to nationality, such rather overly generous and liberal claims argue that the key aspect for their conclusions constitutes the notion that despite the fact that the institution of EU citizenship does not necessarily amount to nationality, as already mentioned, it may be understood so as to constitute an equivalent legal bond capable of triggering the application of international laws on nationality. In this context, it has been argued that although in the granting and acquisition of nationality, international law confers a wide degree of discretion upon the states,<sup>108</sup> its unilateral revocation remains substantively and procedurally prohibited, nonetheless.<sup>109</sup> In this regard, it has been argued that whilst the acquisition of EU citizenship is clearly dependent upon the possession of a Member State nationality, as this has already been explained, the status that the citizens derive by virtue of their EU citizenship remains otherwise largely independent, and has progressed beyond Member State nationalities.<sup>110</sup> On this matter, in his publication, Worster has also made

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<sup>107</sup> Worster (n 88), 343.

<sup>108</sup> Manley Hudson, 'Nationality, Including Statelessness' (1952) 3 Yearbook of the International Law Commission 10.

<sup>109</sup> Worster (n 88), 345.

<sup>110</sup> Ibid, 356.

reference to the prevention of statelessness and the right of all persons to a nationality from which a right against either the discriminatory or arbitrary withdrawal of such nationality derives.<sup>111</sup> Worster also went on to take note that for a revocation to be lawful, it must have a procedural legal basis, whilst also being reasonable.<sup>112</sup>

The key aspect for the conclusion of these theories is clearly the parallelism between the terms ‘nationality’ and ‘citizenship’, and the creation of functionally equivalent legal bonds which constitute the product of an interpretation of the two terms and the importance of the relationships that the citizens have with international laws, by virtue of their possessed nationalities and citizenships. On this matter, it has been noted that for the purposes of diplomatic protection international law may define nationality as 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”,<sup>113</sup> whilst the term ‘citizenship’ merely refers to an aspect of nationality, as the two key terms are often interchangeably used with the same meaning, whilst the words used rely primarily on the same concept.<sup>114</sup> Whilst, on the one hand, in the absence of the use of any alternative or interchangeable terms, citizenship may be understood to grant an additional status, this may serve as an indication that Member State nationality and EU citizenship were actually intended to generate the same type of status. In the absence of any apparent differences as to the legal meaning of the terms, these theories claim that even if any differences whatsoever exist, they would still be rather insignificant.<sup>115</sup>

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<sup>111</sup> Ibid, 345.

<sup>112</sup> Ibid, 346.

<sup>113</sup> Albrecht Randelzhofer, ‘Nationality’ in Rudolf Bernhardt (ed.) *Encyclopaedia of Public International Law* (Elsevier, 1985) 416-424, 417.

<sup>114</sup> Gerard-Rene de Groot, ‘Towards a European Nationality Law’ (2004) 8(3) *Electronic Journal of Comparative Law* 1, 3.

<sup>115</sup> Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff and Noordhoff 1979) 4.

In regard to other possible law protections of the rights associated with EU citizenship following Brexit which may be afforded under international law, some have also stated that the UK nationals already residing or hoping to do so, in the territory of any other Member State “have nothing to fear”.<sup>116</sup> Such rather rushed statements have probably been made based on the idea that European citizenship rights would have been protected under Article 70(1)(b) VCLT, which provides that the termination of an international Treaty, like the EU Treaties, “does not affect any right, obligation or legal situation of the parties created through the execution of the Treaty prior to its termination”.<sup>117</sup> However, academics and lawmakers have concluded that the reference that the Convention makes to the parties concerned, refers to the state parties and not the citizens themselves.<sup>118</sup> Following such interpretations, it is clearly the case that individual citizens do not acquire any protected rights under the particular Convention. As the referral to the termination of a Treaty, in the context of Brexit, refers to the obligations of the state alone, it provides that upon the termination of the Treaty the “legal situation of individuals and companies who were previously affected by the Treaty”<sup>119</sup> is no longer being regulated, as the Convention is not in any way concerned with the matter of “‘vested interests’ of individuals”.<sup>120</sup>

In this context, some commentators have cited the example of Greenland as a possible precedent for the preservation of the rights associated with Union citizenship, even where a territory exits from the Union; or as a precedent for a form of an ‘associate EU citizen’ status.<sup>121</sup>

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<sup>116</sup> John Moyihan and others, ‘Emigration: Why British expats have nothing to fear from Brexit’ (The Telegraph, 25 June 2015) < <https://www.telegraph.co.uk/news/newstoppers/eureferendum/11698875/Emigration-Why-British-expats-have-nothing-to-fear-from-Brexit.html> > accessed 09 July 2022.

<sup>117</sup> Vienna Convention on the Law of Treaties 1969, Article 70(1)(b).

<sup>118</sup> Sionaid Douglas-Scott, ‘What Happens to ‘Acquired Rights’ in the Event of Brexit?’ (UK Constitutional Law Association Blog, 16 May 2016) < <https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexit/> > accessed 09 July 2022.

<sup>119</sup> House of Lords, European Union Committee, Brexit: acquired rights (2016) HL Paper 82, para 59.

<sup>120</sup> International Law Commission, ‘Draft Articles on the Law of Treaties with commentaries’ (Yearbook of the International Law Commission, Vol II (1966), Draft Article 66, commentary para 3.

<sup>121</sup> Worster (n 88), 359.

Although, it is generally understandable for one to bring up the example of Greenland and its withdrawal from the EU as an analogy to the Brexit debate, on the basis that its inhabitants indeed retained their status as Union citizens, such parallelism is rather inaccurate. The territorial differences between Greenland and Britain do not set for a relevant precedent which could potentially apply in analogy with the Brexit process of the latter. Although the citizenship rights of the inhabitants of Greenland were indeed protected under international law, their rights were protected on the basis of Greenland constituting a constituent and autonomous part of the Kingdom of Denmark,<sup>122</sup> a continuing EU Member State.<sup>123</sup> Furthermore, Greenland arguably did not leave the Union but had merely altered its status in relation to the EU,<sup>124</sup> which amounted to a mere “reduction of the territorial jurisdiction of the Treaties”,<sup>125</sup> which still continue to apply.

Some have argued that “there is room for decoupling the concepts of nationality and Union citizenship: by maintaining Union citizenship in the case of loss of Member State nationality under certain circumstances”,<sup>126</sup> and that should the Union actually treat EU citizenship as the ‘fundamental status’ of its citizens, then it may determine that certain groups of individuals may remain Union citizens, irrespectively of the loss of their Member State nationality.<sup>127</sup> Putting aside the risks of introducing a rather unjustified distinction between the cases concerning the loss and those concerning the acquisition of EU citizenship, it is irrefutable that there have been voices in favour of decoupling Member State nationality and Union citizenship, even since the inception of the status. Normatively, it has been argued that

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<sup>122</sup> European Commission, ‘Status of Greenland’ (Supplement 1/83 Commission opinion 2 February 1983) Annex A.

<sup>123</sup> Ibid.

<sup>124</sup> Herbert Smith Freehills, ‘Brexit: Charting a New Course’ (2016) Herbert Smith Freehills Legal Guide, 8.

<sup>125</sup> Dimitry Kochenov, ‘EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights’ in Carlos Closa (ed.), *Secession from a Member State and Withdrawal from the Union: Troubled Membership* (Cambridge University Press 2017).

<sup>126</sup> d’Oliveira, (n 78), 149.

<sup>127</sup> Ibid.

also third country nationals who have established themselves in the Union should also be equipped with EU citizenship, as opposed to only the citizens of the Member States.<sup>128</sup> the political legitimacy of such decoupling would rely primarily on the fact that for the first time in the history of the European integration, the Union citizens who had automatically acquired their EU citizenship by the Maastricht Treaty, have raised their political voice in order to state that they wish to remain EU citizens.

The decoupling of the notions of Member State nationality and EU citizenship appears to be inherent in the debate concerning post-Brexit rights for UK nationals. Brexit has given rise not only to a generally unparalleled civic mobilisation regarding the protection of the acquired rights, but also to the appreciation of EU citizenship status as a freestanding one, which may be acceded to other notions than through the nationalities of the EU Member States. In this regard, such claims have been primarily based upon the notion that whilst the acquisition of Union citizenship is clearly dependent upon the possession of a Member State nationality, it remains otherwise largely independent.<sup>129</sup> The decoupling of national and EU citizenships has also floated the idea of introduction of a ‘European associate citizenship’ status, the primary aim of which would be to safeguard certain post-Brexit rights for British citizens. Nevertheless, primarily due to its divisive logic, the idea has generated extensive discussions. The arguments for and against the introduction of an ‘associate EU citizen’ status will be presented and discussed in the following part of this submission, whereas as the reader will soon realise, both the aforementioned arguments based on international law norms, as well as the proposed introduction of an associate EU citizenship, remain both slightly delusional and deeply concerning.

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<sup>128</sup> Andreas Føllesdal, ‘Third Country Nationals as Euro-Citizens: The Case Defended’ in Dennis Smith and Sue Wright (eds.), *Whose Europe? The Turn Towards Democracy* (Blackwell 1993).

<sup>129</sup> Worster (n 88), 356.

### 3. Associate European Citizenship

The literature on the relationship of Union citizenship and Member State nationality has indeed, over time, yielded numerous proposals to de-link nationality from EU citizenship. On this matter, it has been argued that “nationality is the legal category of demarcating nationals from aliens”,<sup>130</sup> whereas citizenship “is a set of entitlements conferred or denied often irrespective of nationality”,<sup>131</sup> which gives rise to the assumption that the two are not inextricably linked. Yet, even though the debate concerning the derivative nature of citizenship has lately experienced a relatively dormant period, the Brexit process has resuscitated such discussions and for obvious reasons, as it constitutes the first *en masse* stripping of EU citizenship in the history of the EU. As it has already been noted, the outcome of the Brexit referendum has produced considerable uncertainty for both the EU citizens residing in Britain,<sup>132</sup> and the UK nationals residing in the EU,<sup>133</sup> as it is clear that especially for the latter group, Brexit will bring about a significant reduction, or even erosion of the rights associated with the status of Union citizenship.<sup>134</sup> Several commentators have promoted the idea of the preservation of certain rights attached to EU citizenship through the introduction of an associate citizenship for UK nationals, notwithstanding the fact that the EU citizenship *acquis* will cease to apply and be inevitably lost for Britons, following the withdrawal of the United Kingdom from the Union.<sup>135</sup> Such arguments have been primarily based on the idea that UK nationals

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<sup>130</sup> Kochenov (n 49), 180.

<sup>131</sup> *Ibid.*

<sup>132</sup> Lisa O’Carroll, ‘Dutch Woman with Two British Children Told to Leave UK after 24 Years’ (The Guardian, 28 December 2016) < <https://www.theguardian.com/politics/2016/dec/28/dutch-woman-with-two-british-children-told-to-leave-uk-after-24-years> > accessed 02 July 2022.

<sup>133</sup> Daniel Boffey, ‘Britons living in the EU face Brexit backlash leaked paper warns’ (The Guardian, 13 February 2017) < <https://www.theguardian.com/politics/2017/feb/13/uk-treatment-of-eu-nationals-could-lead-to-backlash-against-britons-living-in-the-eu> > accessed 02 July 2022.

<sup>134</sup> Kochenov (n 125).

<sup>135</sup> Gordon QC and Moffatt, ‘Brexit: The Immediate Legal Consequences’ (n 80), 68.

shall “never be the victims of Brexit”,<sup>136</sup> whilst at the same time receiving significant political and academic attention.<sup>137</sup>

The idea of an introduction of a so-called ‘associate EU citizen’ status was championed by the European Parliament Brexit coordinator, Guy Verhofstadt, whilst also receiving further support by MEP, Charles Goerens.<sup>138</sup> The insertion of a “European associate citizenship for those who feel and wish to be part of the European project”<sup>139</sup> would most likely bring about the preservation of the mobility rights that UK nationals enjoyed as former EU citizens, and in particular “for those citizens who on an individual basis are requesting it”<sup>140</sup> referring specifically to the rights to freely live, work and travel within the EU, whilst also incorporating the possibility of participating in the European elections. The idea of associate EU citizenship aimed to allow UK nationals to hold certain rights associated with Union citizenship in return of a fee of a yet unspecified amount. Nevertheless, the reader would be forgiven for thinking that the idea of the granting EU citizenship status, in one form or another, acquired by monetary means, is a rather novel invention. The notion of associate citizenship is most likely, or at least partially, inspired by the ‘citizenship-by-investment’ schemes that Member States like Cyprus, Malta, and the Netherlands, have employed. Perhaps ironically, however, especially

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<sup>136</sup> Jonathan Reed, ‘EU figurehead backs calls to offer Brits ‘associate’ EU citizenship after Brexit’ (The New European, 19 December 2019) < <https://www.theneweuropean.co.uk/brexit-news-petition-for-brits-to-receive-associate-eu-citizenship-66432/> > accessed 02 July 2022.

<sup>137</sup> Georgia Austin-Greenall and Sylwia Lipinska, ‘Brexit and Loss of EU Citizenship: Cases, Options, Perceptions’ (2017) 10 ECAS Brussels, 6.

<sup>138</sup> Charles Goerens, ‘European Associate Citizenship’ (Renew Europe, 14 February 2017) < <https://charlesgoerens.eu/blog-charles/european-associate-citizenship/> > accessed 03 July 2022.

<sup>139</sup> Press Association, ‘EU will offer “associate citizenship” to Britons who “feel and wish to be part of the European project”’ (The Courier, 09 December 2016) < <https://www.thecourier.co.uk/fp/politics/uk-politics/325826/eu-will-offer-associate-citizenship-britons-feel-wish-part-european-project/> > accessed 03 July 2022.

<sup>140</sup> Alice Ross and Jennifer Rankin, ‘European Parliament Brexit Chief: ‘Let Britons keep freedom of movement’ (The Guardian, 10 March 2017) < <https://www.theguardian.com/politics/2017/mar/10/let-britons-keep-freedom-of-movement-says-eus-brexit-negotiator> > accessed 03 July 2022.



considering the attention paid to the idea of associate citizenship, such programs are being strongly discouraged by the European Commission.<sup>141</sup>

### 3.1. The Case for Associate European Citizenship

As it has already been noted, the proposal for the introduction of an ‘associate EU citizen’ status has received considerable political support. In the context of the Brexit negotiations, it had been stated that associate citizenship had “become a very important issue that cannot await Treaty change”,<sup>142</sup> whilst a Draft Resolution from the European Parliament also acknowledged that it took “note that many citizens in the United Kingdom have expressed strong opposition to losing the rights they currently enjoy pursuant to Article 20 TFEU”,<sup>143</sup> and proposing that the EU-27 would examine how to mitigate such opposition “within the limits of Union primary law”.<sup>144</sup> Additional support may also be found outside the political scene, as the idea of an associate EU citizenship has garnered support by academics as well.<sup>145</sup>

Most predominantly, Professor Dora Kostakopoulou has argued in favour of the introduction of a ‘special EU protected citizen status’,<sup>146</sup> which would ensure the post-Brexit preservation of the rights deriving from the EU citizen status, primarily for the Britons living in the territory of any other Member States. In her article, Kostakopoulou argues that both the historical trajectory of the Union citizenship and its formal establishment, which arguably

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<sup>141</sup> Personnel Today, ‘Could “associate EU citizenship” become a worthwhile employee perk?’ (Personnel Today, 13 January 2017) < <https://www.personneltoday.com/hr/could-associate-eu-citizenship-become-a-worthwhile-employee-perk/> > accessed 03 July 2022.

<sup>142</sup> Joe Watts, ‘Brexit: Theresa May would consider ‘associate European citizenship’ for British people’ (The Independent, 12 December 2016) < <https://www.independent.co.uk/news/uk/politics/eu-citizenship-britons-uk-brexit-deal-theresa-may-downing-street-latest-a7469911.html> > accessed 03 July 2022.

<sup>143</sup> European Parliament, ‘European Parliament resolution on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union’ (European Parliament Resolution, 2017/2593 (RSP)), Principle 27.

<sup>144</sup> Ibid.

<sup>145</sup> Dora Kostakopoulou, ‘Scala Civium: Citizenship Templates Post-Brexit and the European Union’s Duty to Protect EU Citizens’ [2018] 56(4) Journal of Common Market Studies.

<sup>146</sup> Ibid, 856.

intended to grant the citizens of the Member States certain special rights, rather than expediting their naturalisation, in fact, manifest the existence of Union citizenship as a special status which must be preserved even after the withdrawal of Britain from the EU.<sup>147</sup> In an attempt to provide for a legal justification for the introduction of such status, Kostakopoulou argues that the ruling of the CJEU in *Grzelczyk*,<sup>148</sup> in which the Court recognised Union citizenship as the ‘fundamental status’ of all the nationals of the Member States and the direct effect of Article 21 TFEU, has also given birth to a normative form of EU citizenship, which both national and European authorities ought to respect. According to Kostakopoulou, such a respect could come into the form of the subjection of denationalisation decisions in the protection of the rights relating to residence, non-discrimination; and so on and so forth, of both EU citizens and UK nationals, in the cases where the decisions strip EU citizens of the substance of their rights associating with EU citizenship.<sup>149</sup> Kostakopoulou argues that whichever post-Brexit Union citizenship rights would actually transform the status into a contingent one, primarily due to its arguable fundamentality, and thus, compliant with the EU citizenship norms.<sup>150</sup>

Furthermore, in her publication Kostakopoulou also underpins the aforesaid theory of the retention of the rights attached to EU citizenship on behalf of UK nationals, based on the asserted direct legal bond between the individuals and the Union legal order.<sup>151</sup> In contrast with other scholars,<sup>152</sup> Kostakopoulou argues that as the Brexit process has directly interfered with the legal position of the citizens and their free movement and residence rights at the EU level, the Union is under a duty to protect these citizens, who should not be the subjects of the individual discretion or consent of the Member States.<sup>153</sup> Under this argument, the EU is

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<sup>147</sup> *Ibid*, 863.

<sup>148</sup> *Grzelczyk* (n 50).

<sup>149</sup> *Zambrano* (n 60).

<sup>150</sup> Kostakopoulou (n 145), 865.

<sup>151</sup> *Ibid*.

<sup>152</sup> Francesca Sturmia, ‘Looking for Substance at the Boundaries, European Citizenship and Mutual Recognition of Belonging’ [2013] 32(1) *Yearbook of European Law*.

<sup>153</sup> Kostakopoulou (n 145), 865.

supposedly under the obligation to prevent the unilateral and arbitrary loss of the Union citizenship of UK nationals, on the basis of a slim majority affecting the overall result of the referendum, as EU law has been the source of their rights. On this basis, the adoption of an associate EU citizen status would act as a gatekeeper in the safeguarding of the position of both the EU citizens residing in Britain and the UK nationals living in the other Member States, whilst supposedly also eliminating the possibility of these citizens becoming the objects of the political negotiations between the EU and the United Kingdom.<sup>154</sup>

In regard to the insertion of an associate citizenship aiming to facilitate the preservation of the rights of the nationals of former Member States, the incremental development of EU citizenship, primarily through the creation of such status, could represent a watershed moment as it would comprise the primary example of the disconnection of EU citizenship from the nationalities of the Member States.<sup>155</sup> It has been argued that such a disconnection not only would provide for the ultimate and uttermost protection of both the status of EU citizenship and the rights associated thereby, as it would insulate the benefits from the majority decisions taken through the democratic procedures of the Member States, Brexit being of course one of them, but it would also arguably comprise the step towards the destiny of the Union citizenship into truly becoming the ‘fundamental status’ of the nationals of the Member States, as possibly envisaged by the CJEU.<sup>156</sup>

On this matter, it has also been argued that the cleavages that the Brexit referendum has caused could potentially be heralding a rather differentiated development of the Union citizenship status.<sup>157</sup> Such a transformative development would reflect the arguments for a

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<sup>154</sup> Ibid, 866.

<sup>155</sup> Mark Dawson and Daniel Augenstein, ‘After Brexit: Time for a further Decoupling of European and National Citizenship?’ (Verfassungblog, 14 July 2016) < <https://verfassungsblog.de/brexit-decoupling-european-national-citizenship/> > accessed 03 July 2022.

<sup>156</sup> Garner (n 86), 20.

<sup>157</sup> Ibid.

‘core Europe’,<sup>158</sup> which would compose a vanguard of states pushing forward with integration, the subjects of which would be the citizens rather than the states, as those are generally most receptive to integration, due to their reliance on the guarantees that EU law provides in order to vindicate their pursuit of fulfilment. This subject shift would contestably reflect on the true attitudinal differences between the European integration observed in the EU Member States, and the notion that actually no Member State polities are currently completely committed to European integration,<sup>159</sup> which in its current form, only provides for the attitudinal differences based upon the differences relating to the mobility and engagement of European integration within the various societies. Furthermore, the insertion of the option for one to become; or in the case of UK nationals to remain citizens of the Union, would also constitute the “ultimate vindication of the direct link between European individuals and the European Union, that was introduced by the creation of EU citizenship at Maastricht”.<sup>160</sup>

The option to choose to become a European citizen by means of the insertion of the possibility to acquire associate European citizenship for UK nationals, would contestably insulate the status of European individuals from the fragmentation arising from the decisions made by their Member States, in this case to withdraw from the Union altogether, and facilitate the preservation of their enjoyed rights. Despite the fact that the advocates of such ideas indeed appreciate the probable strains of the introduction of the status, one of which being the representation of the candidate associate European citizen in the European institutions and the determination as to whom EU law would apply in this differentiated EU, they argue that the prospect of a massive deprivation of the rights that an entire Member State polity derives from the status of Union citizenship, as contestably occurred as a direct consequence of Britain’s

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<sup>158</sup> Jean-Claude Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2012), 106.

<sup>159</sup> European Commission, ‘Public Opinion in the European Union’ (Standard Eurobarometer 83, Spring 2015) < <https://europa.eu/eurobarometer/surveys/detail/2099> > accessed 25 July 2022.

<sup>160</sup> Garner (n 86), 20.

decision to withdraw from the Union, has opened the gates for consideration of identically radical future developments.<sup>161</sup> Proponents also argue that such developments are actually necessary, and therefore, justifiable. The basis of such claims is that such developments are required in order to insulate the rights and status of all EU citizens, from prospectively similar fragmentations that may take place in the future. Nevertheless, as it will be illustrated in the following section of this submission, such ideas not only misrepresent the core foundations of the EU citizenship status, but also offer a deeply unattractive prospect of what the status could potentially transform into. As identically the exponents of an autonomous EU citizenship status, the proponents of the introduction of an associate European citizenship, also clearly seek to disconnect the status from national citizenship, the concerns raised over the notion of associate European citizenship, correspondingly apply to the proposals for an autonomous citizenship status, as well.

### **3.2. The Case against Associate European Citizenship**

Despite the fact that the idea of an associate European citizenship may at first sight seem to be rather sympathetic, several objections may be made which suggest that the concept is a rather ‘utopian’ one,<sup>162</sup> and also undesirable.<sup>163</sup> Several academics have strongly opposed moving towards this particular direction based on multiple grounds, both normative and pragmatic,<sup>164</sup> whilst also arguing that the concept may be opposed based on several democratic grounds as well. Additionally, in this section the author also attempts to go beyond the mere implications and threats for EU citizenship, by also putting forward manifested and concrete arguments according to which the introduction of an associate citizenship may also bring the

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<sup>161</sup> Ibid.

<sup>162</sup> Jo Shaw, ‘EU citizenship: Still a Fundamental Status?’ in Rainer Bauböck (ed.) *Debating European Citizenship* (IMISCOE Research Series 2019), 14.

<sup>163</sup> Ibid.

<sup>164</sup> Martijn van den Brink and Dimitry Kochenov, ‘A Critical Perspective on Associate EU Citizenship after Brexit’ (2018) DCU Brexit Institute Working Paper 5-2018, 16.

exacerbation of the social divisions, as those currently stand in the United Kingdom. The aim of this section is to present and analyse these arguments, which according to the author provide for a more practical and convincing approach in the debate concerning the rights associated with EU citizenship for the citizens of the post-Brexit United Kingdom.

At this point it is necessary, however, to stress that the arguments which are to be presented in this section only apply in the context of the introduction of an associate European citizenship for Britons following Brexit. The author both fully understands and clearly acknowledges that the Brexit process has given rise to numerous legal and political issues relating to the rights of UK nationals, especially for those who still find themselves within the terrain of the EU. It is, of course, implied that the future relations between the EU and the United Kingdom should undoubtedly offer substantial legal protections to the citizens of both entities. However, what not only the author, but also several academics are opposing in this particular context, is the affording of such legal protections in any form of EU citizenship. As Union citizenship comprises the ‘fundamental status’ of the citizens of the EU, to reference the CJEU once more, it should clearly only be reserved for the nationals of the Member States and it should not be afforded to the nationals of a country, even those of a former Member State like the United Kingdom, who have collectively expressed their desire not to partake in the core components of the European project, especially given that the status was clearly not deemed to be sufficiently important to them, in the first place, if we are to take the apparent outcome of the referendum into consideration, but also the views of some Britons regarding the project, in general.<sup>165</sup>

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<sup>165</sup> Natalie Crookham, “Moving forward! UK urged to not overturn Brexit in ‘foolish’ rejoin EU bid” (Express, 23 June 2022) < <https://www.express.co.uk/news/politics/1630271/brexit-britain-rejoin-european-union-undo-rejoiners-poll-results-spt> > accessed 30 July 2022.

### 3.2.1. Practical Grounds for Rejecting the notion of ‘associate EU citizen’

Despite the fact that some critics of the notions have argued that it virtually remains a legally impossible one, it is contestable that such arguments are not exactly accurate.<sup>166</sup> It is indeed the case that Article 20 TFEU provides for EU citizenship in the form of a co-citizenship, in which the citizenship of a Member State remains pre-eminent, rendering the individual citizen both citizen of their respective home state and the Union, as already noted. Nevertheless, this does not appear to constitute an intractable barrier for the introduction of associate EU citizenship, as it may as well be contended that associate citizens could retain the nationality of the United Kingdom, as well as their EU citizenship, thus, remaining co-citizens of both the EU and Britain. However, to reference Verhofstadt’s statements, the necessity of a Treaty change may constitute a substantially starker challenge, especially considering that such a Treaty change would require the unanimous consent of all the remaining EU Member States, provided of course that there is reciprocity. As it is the case that EU law is to be based on the powers as conferred in the EU Treaties, Article 20 TFEU does not *prima facie* appear to confer the power to create this novel ‘associate citizen’ status. It is, however, arguable that such a power could be implied, as Article 20 TFEU does not explicitly rule out the possibility of an associate citizenship, as other Treaty Articles empower the European Commission to confer passports,<sup>167</sup> among other legislative powers conferred upon both the European Parliament and the European Commission.<sup>168</sup> The combination of these power could potentially form the basis for the argument that the Union is already authorised to create the status through the existing legislative processes. However, it is not the aim of the author to provide for a clear solution on this particular matter, as such a prospective should be the subject of further legal analysis and

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<sup>166</sup> The Economist, ‘Can Britons keep their EU citizenship after Brexit?’ (The Economist, 12 April 2017) < <https://www.economist.com/britain/2017/04/12/can-britons-keep-their-eu-citizenship-after-brexite> > accessed 04 July 2022.

<sup>167</sup> TFEU, Article 77.

<sup>168</sup> TFEU, Articles 223-234 and 314.

is clearly a topic that requires more attention than the one which the author could possibly provide here. Nevertheless, this could also serve as an indication of the immaturity of the concept and the arguments favouring it. On a practical note, the EU-27 would need to agree on the implementation of this proposal, as already noted, which may be proven to be a rather difficult task, especially if we are to consider the current political climate. It is highly doubtful that an ‘appetite’ for the rewriting of the Treaties among the 27 Member States will be observed, either in the short or medium term, especially considering the hostile attitude of the British government towards the free movement of EU citizens wishing to work and live in the United Kingdom.<sup>169</sup>

As it has been repeatedly noted in numerous parts of this work, the CJEU has declared that the citizenship of the EU constitutes the ‘fundamental status’ of the Member States’ nationals. On this matter, as it has already been observed, several proponents of the notion of associate citizenship argue that the current readings and discussions of the Treaties provide for the fertile ground for the realisation of the associate citizen status,<sup>170</sup> whilst simultaneously questioning the actual fundamentality of EU citizenship, especially considering that “all UK citizens will be stripped of their EU citizenship following Brexit”.<sup>171</sup> Despite some opponents of the status greeting their questions as ‘understandable’,<sup>172</sup> they argue that such statements do not, in fact, constitute incontestable proof for the realisation of associate European citizenship, in the absence, of course, of Treaty change. Where such a Treaty change would be somewhat difficult, on the basis of the aforementioned reasons, it is argued that the CJEU did not actually intend for EU citizenship to be fundamental in this particular sense. As the Court’s

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<sup>169</sup> Rafael Behr, ‘EU citizens made Britain their home – now they face a hostile environment’ (The Guardian, 18 May 2021) < [https://www.theguardian.com/commentisfree/2021/may/18/eu-citizens-made-britain-home-hostile-environment-home-office?CMP=fb\\_cif](https://www.theguardian.com/commentisfree/2021/may/18/eu-citizens-made-britain-home-hostile-environment-home-office?CMP=fb_cif) > accessed 30 July 2022.

<sup>170</sup> Volker Roeben and others, ‘The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit: A study for Jull Evans MEP’ (Swansea University 2017) 6.

<sup>171</sup> Dawson and Augenstein (n 155).

<sup>172</sup> Martijn van den Brink and Dimitry Kochenov, ‘Against Associate EU Citizenship’ (2019) 57(6) *Journal of Common Market Studies* 1366, 1372.



understanding of Union citizenship has always been rather hard to square within the text formulation, teleology, and legislative theory of the EU Treaties,<sup>173</sup> this serves as a confirmation of the contingency and parasitic nature of EU citizenship on Member State nationality when it comes not only to its acquisition and enjoyment, but also to its loss. On the interpretation of the Treaty texts, it has been argued that it is apparent that EU citizenship was in fact “never supposed to acquire a meaning that allowed for questioning a collective democratic decision”,<sup>174</sup> like Brexit.

Notwithstanding the fact that Article 20 TFEU does not explicitly makes reference to either the introduction or prohibition of associate citizenship, it makes patently clear that the status is derivative in nature and contingent to the nationalities of the Member States. In this context, neither *Rottmann* nor any other CJEU ruling has cut through the exclusive and outright link between EU citizenship and Member State nationality. It is, of course, the case that several Britons would have hoped for the CJEU to conduct some sort of ‘judicial activism’<sup>175</sup> which would indicate that the Court would be willing to change its position, as some have argued that the CJEU, if asked, could indeed find that it would be disproportionate to deprive the entirety of the British population of the rights associated with EU citizenship.<sup>176</sup> No sound reasons exist, however, as to why the Court would or should have done so, as it is the contrary that rather holds true.<sup>177</sup> Should the CJEU actually accept that the UK nationals may retain their status as EU citizens even after Brexit, it would act contrary to the wishes and intentions of the drafters of the EU Treaties,<sup>178</sup> whereas “even if a proportionality analysis were to be engaged upon, the

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<sup>173</sup> Dimitry Kochenov and Richard Plender, ‘EU Citizenship: From an incipient Form to an Incipient Substance? The Discovery of the Treaty Text’ (2012) 37 *European Law Review* 369, 373.

<sup>174</sup> Van den Brink and Kochenov (n 172), 1372.

<sup>175</sup> Shaw (n 162), 17.

<sup>176</sup> Dawson and Augenstein (n 155).

<sup>177</sup> van der Mei, ‘Member State Nationality, EU Citizenship and Associate European Citizenship’ (n 83), 451.

<sup>178</sup> *Ibid.*

need to defer to a majority decision in a national referendum would surely weigh heavily with the Court”.<sup>179</sup>

### **3.2.2. Respect for Britain’s democratic values and sovereignty**

First and foremost, it is arguable that the proponents of the status have been perhaps somewhat deliberately ignorant of the latent democratic implications that the implementation of the status could arguably bring, whilst also being seemingly extremely hostile towards the notions of democratic decision-making.<sup>180</sup> Proponents of the status have argued that the Union is under a duty to “prevent the unilateral erasure of EU citizenship by a transient and slim majority”,<sup>181</sup> and that it remains somewhat unclear as to why “a decision of the UK government should bind those UK nationals who wish to retain their European citizenship”.<sup>182</sup> Therefore, such views appear to suggest that the democratic and sovereign decision of the United Kingdom to withdraw from the Union, utterly compliant and in full harmonisation with their democratic values and conventions, remains unjustifiable for those who had not given their consent or had voted for their country to remain an EU Member State. Some have referred to such disputes as a concern of a ‘majoritarian tyranny’<sup>183</sup> towards the principles of which such arguments are perhaps rather hostile. It is patently clear, however, that should the EU intervene on this matter, in order to supposedly safeguard “the rights of individuals in the UK that are being dragged from the Union and denied Union citizenship against their will, would amount to an argument that the United Kingdom, acting under Article 50 TEU is not competent as a

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<sup>179</sup> Ronan McCrea, ‘Brexit EU Citizenship Rights of UK Nationals and the Court of Justice’ (Constitutional Law Blog, 08 February 2018) < <https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice/> > accessed 05 July 2022.

<sup>180</sup> Van den Brink and Kochenov (n 172), 1376.

<sup>181</sup> Kostakopoulou (n 145), 865.

<sup>182</sup> Dawson and Augenstein (n 155).

<sup>183</sup> Van den Brink and Kochenov (n 172), 1376.

democratic political community to bind its own minority”.<sup>184</sup> It would undeniably be ideal to differentiate towards a substantive version of democracy in which individual rights would be respected, instead of the procedural concerns and majoritarian decision-making.<sup>185</sup> However, such a democracy accommodating substantive outcomes over procedural issues, may arguably provide for a “flatly antidemocratic justification for guardianship”.<sup>186</sup> It is, therefore, evident that the decision of a Member State to withdraw from the Union and to cease to be a part of the European integration is to be respected, instead of relying on such misinterpreting and dubious readings of Union citizenship in order to justify and facilitate such incomplete notions. In simpler terms, it is the case that the minority in the United Kingdom should simply accept the outcome of the referendum, which at the end of the day has been the product of the exercising of the state’s democratic and sovereign rules. It would be both unlikely and highly discouraged for the CJEU to intervene in certain national matters, as it is doubtful that domestic nationality and electoral laws actually fall within the scope of its jurisdiction, whereas by doing so, it would clearly go beyond its defined powers.

### **3.2.3. The decoupling of EU citizenship and Member State nationality as a justification for the introduction of associate citizenship**

The proposed introduction of an ‘associate EU citizen’ status and other similar notions, impose certain threats, referring particularly to the permanent exclusion of segregated minorities. However, it is arguable that the threats imposed by the decision-making process of a majoritarian democratic self-government are once again being exaggerated in this particular

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<sup>184</sup> Stephen Coutts, ‘Brexit and Citizenship: The Past, Present and Future of Free Movement (DELI Blog, 12 September 2016) < <https://delilawblog.wordpress.com/2016/09/12/stephen-coutts-brexit-and-citizenship-the-past-present-and-future-of-free-movement/> > accessed 05 July 2022.

<sup>185</sup> Martijn Van den Brink, ‘EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems’ (2019) 25(1) *European Law Journal* 21, 34.

<sup>186</sup> Robert A Dahl, *Democracy and Its Critics* (Yale University Press 1991) 163.

context.<sup>187</sup> As both political entities have already expressed their intention to adequately safeguard the interests of both EU citizens and UK nationals, it is the latter group that is of particular interest here. As it has been expressed that the Union intends to safeguard the rights of the Britons residing within the territory of the other Member States, it provides that no UK nationals will be left stateless, following Britain's withdrawal from the Union and the consequential loss of their EU citizenship. It may, therefore, be argued that the loss of EU citizenship within the context of the collective and democratic decision of a Member State to withdraw from the Union, does not fall under the scope of the Court's ruling in *Rottmann*, whilst also serving as a reminder that EU citizenship and nationalities should remain paralleled. Contrarily, CJEU case law clearly indicates that Union citizenship is dependent on national citizenship, and it may even become meaningless if you wish, should it be de-coupled from the nationality of the Member States. The proportionality principle that the Member States must abide to in the exercising of their powers on matters relating to nationality, as that has been highlighted in both *Micheletti* and *Rottmann*, serves as an additional indication that Union citizenship requires and depends on the nationality of a Member State of the Union.

Under this understanding, as EU law provides for no terms regarding the loss of EU citizenship, contrarily to what it is the case with its acquisition, it could be reasoned that the status of Union citizenship, that being linked to Member State nationality only for the purposes of acquisition, the individual to whom the status is being granted to both acquires and retains it for so long as they retain the nationality of an EU Member State;<sup>188</sup> or as long as their state retains its membership in the Union. Nevertheless, despite the fact that some may argue that such a failure to include terms on the loss of Union citizenship in the EU Treaties may justify

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<sup>187</sup> Martijn Van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union' (2019) 82(2) *The Modern Law Review* 293, 298.

<sup>188</sup> Kay Hailbronner, 'Nationality in Public International Law and European Law' in Rainer Bauböck (ed.) *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* (Amsterdam University Press 2006) 37.

the decoupling of nationality and EU citizenship in this context,<sup>189</sup> it is once again apparent that such theories rely solely upon unconvincing interpretations of what EU citizenship should ideally be like, aiming to accommodate the requests and wishes of an apparent minority, whilst also arguably categorising the British people, in general.<sup>190</sup>

It could indeed be the case that Article 20 TFEU “precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance”<sup>191</sup> of the rights enshrined in their EU citizenship. However, even by interpreting that Article 20 TFEU indeed implies that the Member States only enjoy discretion in regard to the granting and acquisition of their nationalities and that they cannot decide on the withdrawal of Union citizenship, no conclusion in relation to the claimed retention of EU citizenship, which would also justify the decoupling of the status from Member State nationality, may be drawn; and in particular in the context of a Member State withdrawal from the Union, rather quite the contrary. CJEU case law serves as an indication that EU citizenship is clearly dependent upon and derivative of the nationalities of Member States.<sup>192</sup> As the CJEU in *Rottmann* clearly geared its ruling towards the individual situations concerning the deprivation of the status of a single EU citizen, extending the reasoning so as to cover a polity’s complete withdrawal from the Union, would be rather preposterous, especially considering that the withdrawal of Member State nationality of individuals and the withdrawal of an entire Member State polity from the Union, which would obviously affect the millions of its citizens, are not in any serious manner comparable.<sup>193</sup>

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<sup>189</sup> Worster (n 88), 357.

<sup>190</sup> Sue Wilson, ‘OPINION: We shouldn’t expect special treatment from EU just because we’re British’ (The Local, 20 January 2020) < <https://www.thelocal.com/20200120/opinion-why-associate-eu-citizenship-isnt-the-answer-to-our-brexite-woes/> > accessed 10 July 2022.

<sup>191</sup> *Zambrano* (n 60), para 43.

<sup>192</sup> *Micheletti* (n 75).

<sup>193</sup> Van der Mei (n 83), 451.

The extension of the scope of *Rottmann* so as to also cover the decision of a Member State to withdraw from the Union as a result of a collective decision which was fully compliant with the polity's democratic rules, would only raise additional questions. Even if we were to accept the absurdity of such claims, we would also have to provide for a clear answer so as to whether in taking the decision to withdraw from the Union and, thus, trigger Article 50 TEU, a Member State must cohere to the proportionality rules, as provided in the ruling. The wording of the Treaty clearly provides that the Member States, rather than the Union itself, decide who is to hold EU citizenship through the possession of their respective nationalities. Furthermore, both the insertion and entire structure of Article 50 TEU, imply that Member States may secede from the Union in whichever manner and for whatever reason they see fit, as nowhere in EU law any limitations as to the reasons and manner in which the decision had been taken, are imposed. It is, therefore, clear that Member States are perfectly entitled to both withdraw from the Union; and also deprive their nationals of their EU citizenship, should they wish to do so.<sup>194</sup>

By compelling the EU to interfere with the Britain's sovereign and free majoritarian decision to secede the Union, would perhaps constitute a form of "colonisation of the UK constitutional space",<sup>195</sup> whilst also undermining the result of the Brexit referendum altogether, as already noted in the preceding section of this work.<sup>196</sup> The decision of the United Kingdom to secede the Union, and the inevitable consequences of allowing certain local interests to trump the rights associated with the status of Union citizenship, are clearly to be respected irrespectively of how they are received from both the British and foreign publics. By interfering with a free majoritarian decision to withdraw from the Union of whichever state which already has or may do so in the future, the EU would openly violate the very democratic rules it has

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<sup>194</sup> Ibid, 452.

<sup>195</sup> Van den Brink and Kochenov (n 172), 1368.

<sup>196</sup> Manuel Müller, 'Luxembourg MEP: Associate citizenship for Brits is 'an offer, not an obligation'' (Euractiv, 01 December 2016) < <https://www.euractiv.com/section/economy-jobs/interview/charles-goerens-associate-citizenship-for-brits-is-an-offer-not-an-obligation/> > accessed 05 July 2022.

sworn to respect, whilst also undermining the powers conferred upon the Member States to leave the Union, by virtue of Article 50 TEU.

#### **3.2.4. Associate EU Citizenship and the classification of both UK nationals and EU citizens**

Another question that arises in regard to the introduction of this associate EU citizen status, relates to who the exact beneficiaries of such status would actually be. In the case of Brexit, will the status only be granted to the UK nationals who have moved to another Member States where they have lived for a certain period of time and, thus, triggering their eligibility and right, or at least be given the option, to become associate EU citizens? Such a question is utterly crucial as it also gives rise to another question regarding the actual aim of associate citizenship and whether the proponents of the status intend it to serve as a means of ensuring the preservation of the rights of UK nationals living in the Union; or whether the status has another intrinsic aim.<sup>197</sup> However, should the former be the case, it is still unclear as to why sedentary Britons, still residing in the United Kingdom, shall be given access to or granted any of the rights promoted by such ideas.

It is, therefore, contestable, even self-evident perhaps, that even the advocates of associate EU citizenship themselves do not actually fully comprehend the lurking implications of such proposals nor they fully know what they are actually proposing, especially considering that the introduction of this status will undoubtedly lead to the sub-classification of more than just EU citizens.<sup>198</sup> The introduction of associate citizenship not only would be contrary to the normative values of EU citizenship, but it could also arguably lead to the creation of two classes

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<sup>197</sup> Van der Mei (n 83), 454.

<sup>198</sup> The Economist, 'Can Britons keep their EU citizenship after Brexit?' (The Economist, 12 April 2017) < <https://www.economist.com/britain/2017/04/12/can-britons-keep-their-eu-citizenship-after-brexite> > accessed 04 July 2022.

of British citizens; namely those who can simply afford to purchase and enjoy the bundle of rights associated with Union citizenship; and those whose income is not high enough, and therefore, unable to reap the benefits.<sup>199</sup> As all the proposals so far incorporate the payment of an unspecified fee in order to ‘purchase’ associate citizenship, it is inevitable that the move will be disadvantageous to those who simply cannot afford to pay such a fee.<sup>200</sup> Despite the fact that if the proposal was to be implemented having an attached fee to the rights would indeed be understandable, as the United Kingdom will cease to be party to the EU Treaties. It is, therefore, evident that the introduction of any kind of fee-for-rights arrangement is destined to be proven to be rather risky in nature. Should any form of monetary acquisition of Union citizenship be introduced which would grant the EU Member States individual discretion in establishing their own fees, it would bear an inherent danger of inequality, as citizens who do not have access to the same funding will not be granted feasible access to this option, as it has already been noted. This provides that such option would obviously be realistic only for wealthier individuals. The traditional naturalisation process which usually involves five years of residence in most countries, with such requirements varying from one country to another, subject to domestic laws; remains justifiable, as it ensures that the individual has a true connection with their naturalising state, often through its language and society. Nevertheless, should a monetary price be emplaced upon Union citizenship, it would clearly transform the status into a mere commodity, the acquisition of which could not be justified. On an EU level, this is bound to be proven even more problematic, as Union citizenship allows access to all the EU-27, as opposed to what would be the case with the citizenship of a non-EU Member State.

Furthermore, should such a fee be set too low it could potentially encourage other Member States to secede the Union as well altogether, and seek to obtain similar deals.<sup>201</sup> If

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<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> Austin-Greenall and Lipinska (n 137), 25.



the introduction of associate EU citizen status was to be seriously taken into consideration and eventually implemented, it would arguably encourage other EU Member States to withdraw from the Union, as the knowledge that the rights of their nationals would be safeguarded regardless, in the absence of need for EU membership, could incentivise Member States to consider their respective withdrawals, thus, leaning towards the invocation of Article 50 TEU. This constitutes another serious flaw of the notion of associate citizenship and comparable ideas, as the selling of watered-down European citizenship rights otherwise reserved for those who hold Union citizenship clearly goes against both the rule of law and values of democracy, the implications of which remain highly alarming.

Such proposals are clearly humiliating all the Europeans in the United Kingdom and beyond. Even if such notions were to be implemented, they would merely signify that by speaking of associate citizenship rights for the British citizens as former EU citizens, who have exercised their right to leave, are for some reason more vulnerable in the eyes of the law and in need of more protection, than all the other groups of European minorities who have not been granted EU citizenship. But even if we were to accept such proposals and introduce an associate EU citizenship, it may as well be to the creation of another category of second-class EU citizens. As associate EU citizens will clearly not possess the nationality of any Member State of the Union, they will not, and should not, enjoy any electoral rights in their respective Member State of residence.<sup>202</sup> Should Union citizenship be de-coupled from the nationalities of the Member States, a notion pursued not only by those defending its standing as an autonomous status and its holistic reconstruction;<sup>203</sup> but also the advocates of associate European citizenship, it could lead to a sub-category of EU citizens, who will not be included in the indirect channels of political representation of the Union. Therefore, it is clearly the case that even proponents

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<sup>202</sup> Federico Fabbrini, 'The Political Side of EU Citizenship in the Context of EU Federalism' in Dimitry Kochenov (ed.) *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2015).

<sup>203</sup> Garner (n 24), 142.

themselves do not wish for associate citizens to bear such clearly mutually unwanted implications, as those individuals will be denied the imperative rights of political representation at the EU level.

#### **4. Conclusion**

The Treaty text on Union citizenship clearly provides that the status is a contingent one, of which the UK nationals will be deprived of, in some instances even against their will. The concerns and intentions of those advocating the introduction of an associate European citizen status aiming to prevent this from happening and seeking to protect at least the particular part of UK citizenry, often on the basis of a decoupling between Union citizenship and Member State nationality, are indeed understandable. Nevertheless, the introduction of associate citizenship by virtue of an apparent defiance of the clear wording of Article 20 TFEU, does not constitute an appropriate nor desirable response to the Brexit dilemma. Furthermore, nor it is recommended that the implications to which the Brexit process has given rise to, should be exaggerated in this context, and therefore, suggesting that everything will be consequentially lost. Such an exaggeration may itself give rise, as it has already done so, to desperate and unjustifiable solutions, clearly disregarding the interests of both the Union and its citizens, which, as already illustrated, remain unjustifiable on multiple grounds, and primarily democratic. As already explained, the desirability of the ‘associate EU citizen’ status remains questionable, depending on the specific template of associate Union citizenship which would be introduced. However, all the proposals for the introduction of an associate European citizenship bear inevitable shortcomings and deficiencies, which provide that should they be implemented, they would realise a form of second-class Union citizenry, whereby such associate citizens would be denied certain important rights, especially those of political representation. It is, therefore, arguable that instead of taking such rather extreme positions together with their undesirable and inherent implications, the loss of Union citizenship for the nationals of the United Kingdom, and any other potentially withdrawing Member State for that matter, would constitute a more fruitful initial position.

All of the aforementioned theories and varying arguments unfortunately only remind us of the apparent divisive nature of the Brexit process for both sides of the UK borders. It is indeed very sad for the Britons who feel and have the same attachment as many of their fellow European citizens to their Union citizenship. However, as it has been indicated in this submission, the appropriate place for these UK nationals who feel more European, despite the apparent majority of their fellow citizens who may identify otherwise,<sup>204</sup> would be to channel their feelings into the political arena. Irrespectively of the progress made by the institution of European integration, we live largely in an era of national democracies, which provides that the UK citizens who wish to retain their European citizenship, still remain bound by the decisions of a majority, even an awkwardly slim one, by their fellow citizens. Should the CJEU intervene in any of the ways that it has been asked to do so by those favouring the retainment of Union citizenship for Britons, even after Brexit, would constitute a major error, however terrible the loss of rights by the UK nationals is bound to be.

At the time of writing and following the completion of the negotiations between the EU and UK polities, the notion of associate citizenship has not been on the table of the European Parliament. As in this submission, we have attempted to dismiss the adoption of the notion, it is actually a good thing that it was eventually not included. From the starting position supported, under which it is accepted that EU citizenship is terminated for Britons, we may proceed so as to engage in further debates regarding what the future position of those individuals should be. We of course make the case for a Treaty between Britain and the EU which not only will offer substantial mobility rights to both UK nationals and EU citizens alike, something that the advocates of associate European citizenship seek to accomplish, but it may also assist in avoiding the evident calamities and undermining of the status of EU citizenship

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<sup>204</sup> Lisa O'Carroll and Caelainn Barr, 'Half of young adults in the UK do not feel European, poll reveals' (The Guardian, 11 April 2017) < <https://www.theguardian.com/society/2017/apr/11/half-of-young-adults-in-the-uk-do-not-feel-european-demos-survey> > accessed 30 July 2022.

and its transformation into a mere commodity, which is inherent in the adoption of such untenable positions.

Speaking of mobility rights and the exaggeration of the implications of the Brexit process, it is arguable that in the long run, the citizenship of the EU may be affected more by the ongoing Covid-19 pandemic, rather than by the Brexit process, irrespectively of the ongoing uncertainty regarding the necessary negotiations post-Brexit. Without even considering the possibility of a referendum regarding the independence of Scotland, or a vote for the reunification of Ireland; but also, other large-scale political geographic developments, the possibility of which has increased dramatically as a result of the Brexit process. The relationship of the United Kingdom with the Union may very well follow the precursors such as the relationships already established with other non-Member States with which the EU has close ties, such as Norway and Switzerland. Maybe this relationship may chart a new path which will recognise the existing integration of the millions of the citizens of the other Member States in the United Kingdom and the millions of Britons in the EU alike. A lasting impact of the departure of Britain from the EU is the absence of British decision-makers in the deciding of the future developments of Union citizenship. Although clearly traumatic, the ongoing Brexit process clearly is not, and should not be able for that matter, to fundamentally alter either the legal status or the clear meaning of the Treaty texts. The historical experience indicates that successive UK governments were, in fact, among the most reluctant and resistant in developing the rights associated with EU citizenship. The absence of the UK decision-makers, however, may signify a lean towards a more integrative approach in the coming years, in which common EU rights may develop in importance. Complicating such predictions, however, is the ongoing pandemic, as it has apparently caused unanticipated migratory, demographic, and political effects. It remains to be seen whether both the pandemic and Brexit induced demographic effects will be actually lasting.

As it has already been noted, despite the fact that the Brexit process has affected EU citizenship rights, especially that of free movement; it is contestable that the impact of the Covid-19 pandemic may be far more reaching and consequential, at least in the short term. Free movement of people and the drive for certain common rights comprise the central elements of the project of European integration ever since its inception, whereas Brexit does not fundamentally alter this fact. As it has already been suggested, the newly developing status of the United Kingdom has many precursors to rely on. The Covid-19 pandemic, on the other hand, constitutes an unprecedented situation, which may have significant and lasting effects on both the politics of citizenship and internal migration. In time of writing, the pandemic has disrupted transportation and travel networks, whilst it may also alter the nature of cross-border work, and eventually force the reassessment of the previously open borders between the Member States. The overall conclusion is that despite the considerable uncertainty in regard to the ongoing negotiations required by Brexit, it is clear that those should be based upon the precursors already afforded. Therefore, no reasons exist as to why the Treaties should be altered, in order for the Britons to maintain their rights which could be ensured by means of bilateral negotiations, whilst unprecedented public health emergencies may affect the institution of EU citizenship more substantially. In the meantime, the absence of the United Kingdom from the decision-making bodies of the Union may render integration-minded decisions regarding citizenship even more probable, including other issues and challenges that require political attention. Nevertheless, whether the EU will now focus on tackling the disruptions of free movement and consolidating democracy in its remaining Member States; and successfully combat the evolving public opinions and generational changes in countries like Hungary and Poland, and the citizens who have gradually gotten used to their rights as European citizens, only time will tell. It remains to be seen as to whether Brexit will be the first and only of several nationalist retreats, which may move away from the promised supranational

Europe, which in paraphrasing the ECSC Treaty, has promised to “substitute for age-old rivalries the emerging of essential interests and lead to a broad and independent community among people with a destiny henceforward shared”.<sup>205</sup>

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<sup>205</sup> Willem Maas, ‘European citizenship and free movement after Brexit’ in Scott Greer and Janet Laible (eds.) *The European Union after Brexit* (Manchester University Press 2020), 106.

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