THE OPTICIAN'S DILEMMA: CAN ALL THESE LENSES BE POLISHED INTO THE SAME FRAME OR DO WE NEED NEW FRAMES, TOO? − BREXIT: TIME TO REFORM EU CITIZENSHIP?

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ABSTRACT: *The United Kingdom's withdrawal from the EU provides an opportunity for conceptual and substantive reform of EU citizenship. The study purposes of summarizing the changes in the special sui generis status of EU citizenship, which are necessarily affected by the withdrawal. The situation is a paradox, as EU citizenship is arising from a supranational concept, but based on the member states' national laws regulation who is a citizen. Thus, the Treaties ensure acquired rights for the citizens of the member states, but the member states can decide to whom these rights are guaranteed. But the Treaties are silent about a situation as the Brexit is. The issue is particularly complicated, since the opportunity of losing acquired rights may also affect rights and interests related to human rights, too. The question is in my view; whether all the lenses could be fitted into the same old frame, or do we need modern, better-designed frames, too? In other words, has the time come to reform EU citizenship, or harmonize national citizenship rules on a minimum level? At the end of the study, I even formulate my de lege ferenda proposals for regulating citizenship issues.*

KEYWORDS: *Brexit; union citizenshi; acquired rights; human rights*
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1. THE *HEART* OF THE EU: THE MOBILITY FREEDOMS

The Treaty of Rome ensured the mobility of workers. In the context of the economic-incentive targets, it was a Community requirement that Member States' national provisions should give equal treatment to workers from the other Member States with their nationals. The almost 60 years of mobility has encouraged the elaboration and development of − harmonized − legal solutions. Mobility changed Europe in many ways. We can mention several mixed marriages of EU citizens of different nationalities, or the

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consequence of these: multinational children. Problems may arise when two nationals child becomes the citizen of another Member State based on the *ius soli* principle (and loses the opportunity to have his parents' nationality based on *ius sanguinis*).

We can say that the internal market freedoms form a system of unity and indivisibility. The legal interpretation of the European Court of Justice (from now on referred to as CJEU) has also played a major role in solving legal challenges arising from mobility.

Free movement of workers has become a generator for the continuous development of EU law. In addition to the CJEU's interpretation, the directives[1] have made it possible to broaden the right of residence, e.g., for retiring workers and students. The Maastricht Treaty (from now on: MT) placed the phenomenon in a new dimension, creating a legal institution for EU citizenship that has been on the agenda[2] since the 1970s. Directive 2004/38/EC governs the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Its provisions are interpreted continuously by the CJEU (C-246/17., Diallo case, 2018) (C-343/17., Fremoluc case, 2018) (C-230/17., Altiner és Ravn case, 2018), typically extensively.

The Treaty of Lisbon (Conference of the Representatives of the Governments of the Member States, 2007) (hereafter referred to as LT) brought about a single major change in EU citizenship: by placing the Charter of Fundamental Rights[3] (Charter) to a primary level t extended the right to free movement, but did not make it unrestricted.

Strengthening values (Forrester, 2016) aim to deepen integration and develop a common European value system.

Brexit will certainly influence the content and legal assessment of EU citizenship. In my view, the new dimension of EU citizenship may appear during the withdrawal negotiations.

My hypothesis is based on the fact that almost 3.3 million EU citizens live in the UK, while 1.2 million (Office for National Statistics (UK), 2018) British citizens live in the other EU Member States, with a total of about 4.5 million people whose status have to mean a strong reason for the negotiators' intention to find an appropriate solution.

In order to assess the effects of the exit and measure its potential, it is advisable to examine the relationship between EU citizenship and national citizenship. My research focuses on the changes that occur in Union citizenship as a *status civitatis*. It should be noted that there are some aspects of the issue that cannot be addressed in this study (e.g.,

[1] E.g.: Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity. At present, the issue is addressed by the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[2] The first practical steps to drafted after the 1972 Paris Summit that the European identity awareness is needed in order to deepen the integration.
See: European Commission: Bulletin of the European Communities, no. 5., 1975.
Then, at the 1973 Copenhagen Summit, the European Identity Declaration was elaborated, and the importance of citizen involvement was further strengthened at the 1974 Paris Summit. Subsequently, reference to Community (EU) citizenship – as a *status civitatis* − has been repeatedly arised.
For more on the history of EU citizenship see: MINDUS, Patricia: European Citizenship after Brexit, Freedom of Movement and Rights of Residence, Palgrave Pivot, European Union Politics, pp. 8-15.

[3] Charter of fundamental rights of the European Union, OJ 2012/C 326/02

free movement of workers[4], migration[5], changes in EU public service, student mobility[6], etc.).

2. SUBSTANTIVE DIMENSIONS OF EU CITIZENSHIP

The constitutional importance of EU citizenship is reflected in its primary legislation. Under Article 20 of the Treaty on European Union (TEU) and Article 20 of the Treaty on the Functioning of the European Union (TFEU), every citizen of a Member State is a citizen of the Union.[7] Nationality is determined by the national legislation of the Member States. Citizenship of the Union complements but does not replace national citizenship. Citizenship of the Union provides for additional rights and obligations in addition to the rights and obligations arising from the nationality of the Member States.

Citizenship of the Union is of constitutional importance, and also, a dynamically developing institution. The exit of a Member State can have a significant impact on EU citizenship. Firstly, the conceptual elements of EU citizenship are at the center of legal and political debates and interpretations; on the other hand, because even Brexit can create a new dimension of EU citizenship. Thirdly, the legal status of union citizens may develop based on the future directions of the EU. If integration moves towards the federal state, EU citizenship may even develop as an alternative to national citizenship; otherwise, its importance may become symbolic. It is certain that the institution cannot be interpreted and placed within the conceptual framework of traditional citizenship; it can be regarded as an *autonomous* – but *dependent* − status.

2.1. The legal nature of EU citizenship

The union citizenship is dependent on national citizenship because the question of being a citizen of a member state is regulated by the national laws[8] of that certain state[9]. This is confirmed already by the CJEU (C-192/99., Kaur case, 2001) (C-171/96., Pereira Roque kontra Lieutenant Governor of Jersey case, 1998) (C-369/90., Micheletti-case,

[4] For more information about the topic, see: DAVIES Gareth: Brexit and the Free Movement of Workers: A Plea for National Legal Assertiveness, European Current Law 2017: Issue 5, pp. 467-477., and DOHERTY Michael: Through the Looking Glass: Brexit, Free Movement and the Future, King's Law Journal, 27:3, 375-386, DEAKIN Simon: Brexit, Labour Rights and Migration: Why Wisbech Matters to Brussels, German Law Journal, Vol. 17. – Brexit Supplement, 2016, pp. 13-20., MCCAULIFF Catherine M. A.: Is Free Movement of Workers a Fundamental Right or Merely the Price for Full Access to the Internal Market of the EU?, German Law Journal, Vol. 17. – Brexit Supplement, 2016, pp. 45-50., DONEGAN Thomas - TEO Ellie: Brexit: free movement of persons, Journal of International Banking Law and Regulation, J.I.B.L.R. 2016, 31(11), 565-571, 2016, etc.

[5] For more information about the topic, see: SHAW Jo: Citizenship, Migration and Free Movement in Brexit Britain, German Law Journal, Vol. 17. – Brexit Supplement, 2016, pp. 99-104.

[6] For more information about the topic, see: CHERRY James: Brexit: What now for Study Mobility between the UK and the EU?, Pécs Journal of International and European Law, 2016/II, pp. 7-20.

[7] According to Mindus, it would be more accurate to formulate EU citizenship as "citizens of the Union are citizens of the Member States for the purposes of EU law". See: MINDUS, P.: quoted above, p. 17.

[8] Within the framework of certain international law and EU law rules.

[9] We also find an example when a Member State deprives its citizens (in mass) of the elements of EU civil status, such as citizens of Faroe Islands, Danish citizens, but not EU citizens. The nationality of the Member State itself is not a straightforward path to the acquisition of EU civil status, but is in itself an inadequate condition.
Protocol no. 2 to the Act of Accession, relating to the Faroe Islands, Article 4, 1972, OJ L 73 163

1992) in several cases. Acquiring EU citizenship through nationality is a one-way process, while the reverse case − that is, a person acquiring citizenship of a particular state through EU citizenship − is not allowed by the treaties. (Asztalos, 2009) According to *Zsófia Asztalos*, "*the attachment of EU citizenship to the nationality of a Member State results in an unequal way of obtaining the former status: generally in countries that apply the ius soli principle (thus until the 2004 amendment in Ireland), it is much easier to obtain this status than in those countries that base their citizenship laws to the ius sanguinis principle."* (Asztalos, 2009) It can be seen that the acquisition of EU citizenship is a subsidiary status depending on the acquisition of the nationality of a Member State, and the rights arising from both citizenships status could be distinguished[10] and complementary to each other. According to *Blutman "EU citizenship is an ancillary status. [...]. This is the only general and formal condition for EU citizenship. It is not possible to lose EU citizenship without losing the nationality of a Member State, and it is not possible to acquire EU citizenship for a person who is not a national of a Member State. This also means that ultimately the Member States will determine who can be an EU citizen […]. Of course, the conditions for acquiring and losing citizenship in the Member States vary considerably. Thus, the existence of EU citizenship related to the nationality status of a Member State is not subject to uniform content conditions established at the EU level."* (Blutman, 2014) It is a fact that Brexit puts both the legislator and the practitioner into a new position, as it has been interpreted so far that EU citizenship can only be lost in the event of the loss of national citizenship, while the withdrawal of a Member State ceases that legal basis, from which the union citizenship originates. Also, Brexit means a collective forfeiture for all British citizens.

The question – in my view – is whether *could there be a circumstance with regard to which the acquired EU citizenship status can be distinguished from the underlying national citizenship status. Or could the withdrawal of a member state − as a completely new situation − justify the reinterpretation of EU citizenship?* I mean, a broad interpretation could allow the British citizens who have become EU citizens before leaving the Union to retain the acquired bundle of rights (Waibel, 2017) (the totality of their union citizenship) or at least some of its parts.

I would add that so far the CJEU has not interpreted the content of EU citizenship in this way. It would be quite a futuristic perspective if we were to allow a larger group of EU citizens to retain their EU citizenship once the Member State of their nationality exited from the EU (so abolished its membership status), but I think it is worthwhile to place the issue on the agenda (in any form) of the EU legislator in the light of the specificities of the Brexit. I think that a member-statehood of 45 years cannot be undone, the *in integrum restitutio* method cannot be applied under EU law. I will take a position on this later.

It is a paradoxical phenomenon that EU citizenship is governed by the most important EU constitutional laws, while the legal basis depends on the national citizenship of a Member State. The paradox derives from the fact that *supranational citizenship* is based on a *national factor*. Of course, this contradictory duality characterizes the whole of the Union, as the elements of sovereignty transferred by the Member States to the EU also give that supranational character by which the EU exercises its powers. The *EU ensures*

[10] I will explain this later.

the supranationality or transnationality (Olsen, 2012) character of union citizenship as it guarantees the rights of the EU citizens on a primary[11] level (by the treaties). This special legal status is a very powerful *symbol* that transforms the rights of individuals in the long run, creating the legal concept of *Europeanity*. (Shaw, 2011) The territorial nature of certain sub-rights of EU citizenship is linked to supranationality (e.g., the right to vote at European Parliament elections and municipal elections in the Member State of residence).

EU citizenship is becoming a *supranational* concept beyond the nation. Supranationality[12] puts the nationalist approach of purely nation-based citizenship systems on the sidelines. (Kostakopoulou, 2018)

The concept of supranational citizenship has already appeared in CJEU's case law. In C-413/99. *Baumbast*-case (C-413/99., Baumbast case, 2002) the CJEU found that EU citizens had the right to reside in the host state, irrespective of their economic activity. Thus, the right of the EU citizen to free movement and residence is conceptually separated from the purely economic mobility of the worker. For the first time in 1990, the so-called Dandy-directive[13] declared the general right of residence - irrespectively to employment or study relationship with the host state - purely with sufficient financial resources and health insurance.

In my view, the above points out the constitutional (Spaventa, 2008) dimension of EU citizenship. This is borne out by the *Grzelczyk* judgment (C-184/99., Grzelczyk case, 2000) in which the CJEU stated that EU citizenship was intended to guarantee the fundamental status[14] of nationals of the Member States, but not unlimitedly.

For a long time, EU citizenship has been interpreted in the dimension of free movement. That is why EU citizenship was characterized by *incubating, latent* (Asztalos, 2009) attributives. The rights deriving from EU citizenship also apply to 'staying' citizens, even if they are not exercising their legal rights (but also active[15] at home) in their daily activities. Active entitlements in your own Member State also reflect the supranational approach of EU citizenship.

The nature of EU citizenship is not a subjective right, but many authors compare it to subjective rights. *Éva Lukács* remarks, "*everyone who has declared the exclusive ideological (political, symbolic) significance of EU citizenship and who have been emphasized to those who have emphasized the fundamentally subjective nature of the law, have brought revolutionary changes ten years after the establishment of the legal*

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[11] It is worth mentioning the rules and standards of labor law (social policy issues), some of which the EU has the power to determine, while other issues remain within the competence of the Member States and the EU has only supporting and complementary powers.
Rights that are at the core of labor law have been regulated within the EU legal framework - eg. working conditions, entitlement to paid leave, protection of the health and safety of workers, equal treatment, common rules for brokers, fixed-term workers, etc. TFEU. Article 153 (5) explicitly states on which issues the EU has no competence: remuneration, the right of association, the right to strike or the right to exclude.

[12] The supranational nature of a citizenship is not alien, see for example the status of the citizens of the Commonwealth.

[13] Council Directive 90/364/EEC on the right of residence.

[14] The C-184/99., *Grzelczyk*-judgement point 31 says: "*Citizenship of the Union is intended to have the fundamental status of nationals of the Member States, allowing those in the same situation to enjoy the same legal treatment irrespective of their nationality and without prejudice to the exceptions expressly provided for in this respect."*

[15] If there is an EU element, this is the right of complaint to the Ombudsman and the right of petition to the European Parliament.

institution." (Gellérné Lukács, 2004) It is important that Union citizenship establishes real rights that are comparable to subjective rights, which, as *Elsmore, Starup* (Elsmore & Starup, 2008) and *Shaw* (Shaw, 1998) admit, have filled the concept with true content thanks to CJEU practice.

2.2. Extensions and dimensions of EU citizenship

On the basis of the above, in agreement with the definition of Zsófia Asztalos, "*union citizenship is a special status, the acquisition and loss of which, while respecting Community law, falls within the competence of the Member States, while at the same time ensuring economic and political rights based on the prohibition of non-discrimination, which can be enforced against the Member States by the citizens.*" (Asztalos, 2009) In the following, I will examine who can benefit from EU citizenship rights − e.g., derived from the right of the Union citizen. Then I analyze the possible additional elements and independent dimensions of EU citizenship.

Directive 2004/38/EC lays down the conditions for the exercise of the right of free movement, residence and long-term residence by Union citizens and their family members in the territory of the Member States. The directive's definition for "union citizen" is the same as the Treaty definition mentioned above. However, the directive allows third country family members of an EU citizen to enjoy EU citizenship rights if the Union citizen exercises[16] his right to free movement.

The Directive, therefore, provides family members from third countries a part of EU citizenship rights' arising from the EU citizen's derivative rights. This already means an extension of EU citizenship, on the condition that the third country national family member of an EU citizen may *lose* the right to exercise a status comparable to that of EU citizens. For example, if the EU citizen terminates his marriage to a third-country spouse, the former spouse[17] may not exercise his or her EU citizenship rights.

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[16] In this connection, it is interesting to examine C-673/16, Coman-judgement (ECLI: EU: C: 2018: 385) in which the CJEU stated that it should be possible to exercise the right of free movement and residence as a spouse of an EU citizen on a derivative basis, if the spouse of the EU citizen is from a third state and the union citizen wishes to stay in the Member State of origin. The CJEU - on the base of Article 21 TFEU - did not require the cross-border element to exercise the right, as it is necessary according to the directive 2004/38/EC. According to Article 21 "*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."* This includes the Member State of nationality. The piquancy of the case is that, when recognizing the free movement and residence of the spouse, it was necessary to interpret the extension of the concept of spouse to marriage of the same sex. Mr Coman married in the United States with Mr Hamilton, then Mr Coman wanted to continue his family life in his home state, Romania. The Romanian authorities, under Romanian law, considered that since same-sex marriages are not recognized in Romania, Mr Hamilton should not be entitled to a long-term residence (as he is not a spouse under Romanian law), only a three-month stay. Mr Coman and Mr Hamilton brought an action against the authorities before the Romanian court for the establishment of discrimination based on sexual orientation as regards the exercise of the right to free movement within the Union.
For more about the constitutional aspects of the case, see: SULYOK Márton: „Une photo de famille", Pillanatkép a családi élet és a házastársfogalom Európai Unió Bírósága általi elemzéséről; Európai Tükör, 2018/3., pp.117-131.

[17] See, *inter alia*, C-218/14., *Singh and Others v Minister for Justice and Equality* (ECLI: EU: C: 2015: 476) judgement, in which the CJEU stated that "*an EU citizen's former spouse who is a national of a third country,*

Extending the scope of EU law personnel have limited application. In the *Lounes*-case (C-165/16., Lounes-case, 2017) CJEU stated the inapplicability of Directive 2004/38/EC, since *Ormazabal*, the Spanish national at issue in the main proceedings, is not entitled to reside in the United Kingdom as he is already a British national and as a citizen of the host state his residence is not covered by the Directive anymore. The legal problem was that *Ormazabal* had married *Lounes*, who was not an EU citizen, and they wanted to exercise their right to free residence on a derivative base. The CJEU – similarly to *Coman* case (C-673/16., Coman-case, 2018) − concluded that *Lounes* could be entitled to a residency right in the UK under Article 21 of the Treaty. (Lehoczki, 2017)

3. THE RELATIONSHIP BETWEEN EU AND NATIONAL CITIZENSHIP

To illustrate the relationship between the two statuses, I consider it appropriate to start with the concept of citizenship. The delineation of nationality is complicated by the fact that it is not uniform in the literature as to whether it is a public or a private law institution. The natural law school is placed among the civil law (see the *Code Napoleon*), while the Hungarian legal scholars (*Concha Győző, Szalay László, Polner Ödön)* were considered a public origin. (Tóth, 2004) I think that it is mainly regarded as public law because citizenship means a relationship between the state and the individual. However, we have to take into account the subjective legal nature of citizenship, too.

Like a nationality linked to a state, EU citizenship serves to define the relationship between citizens and the EU. This relationship is intended to bridge the gap between Community measures that have an increasing impact on citizens' lives, and, on the one hand, and the exercise of (fundamental) rights, duties and participation in the democratic process almost exclusively on the national level.

Citizenship of the Union is not comparable[18] to national citizenship because of their different functions. In addition to the Member States, the Commission (European Commission, 2001) also takes this view. On the other hand, *La Torre* argues (La Torre, 1998) that, in political and constitutional terms, EU citizenship can be considered citizenship, as it gives power to the individual who can participate in the legislation and can hold office.

In my view, over time, there may be a kind of change in European integration that could theoretically underpin the further development of the citizenship of the Union and its resemblance to citizenship, but this would presuppose the Member States' intention to do so, which is currently not on the agenda.

It is a fact that Brexit is a major change in the history of the EU, which does not mean moving towards *ever closer Union* with the remaining 27 Member States, but it puts the re-interpretation of the concept of EU citizenship on the agenda. Millions of individuals

[…] cannot retain his or her right of residence in that Member State if the EU citizen's spouse has left that Member State prior to the commencement of the divorce proceedings".

[18] About the relationship of EU and national citizenship, see: OLSEN, Espen D. H.: quoted above; ROSTEK, Karolina - DAVIES, Gareth: The impact of Union citizenship on national citizenship policies, Issue 5 Vol. 10, 2006; GOUDAPPEL, Flora: From National Citizenship to European Union Citizenship -The Re-Invention of Citizenship?, European Review of Public Law, 2007 / Vol. 19, No. 3, (63); ASZTALOS Zs.: quoted above, pp. 38-55., etc.

based their lives on decisive decisions on their EU citizenship, including the question of in which Member State to live.

Advocate General *Maduro* in the *Rottman*-case (C-135/08, Rottmann-case, 2009) delivered a milestone analysis on the distinction between the content of EU citizenship and national citizenship. The Advocate General explained, "*Those are two concepts which are both inextricably linked and independent. Union citizenship assumes the nationality of a Member State, but it is also a legal and political concept independent of that of nationality. The nationality of a Member State not only provides access to enjoyment of the rights conferred by Community law; it also makes us citizens of the Union. […] European citizenship presupposes the existence of a political relationship between European citizens, although it is not a relationship of belonging to a people. […]It is based on their mutual commitment to open their respective bodies politic to other European citizens and to construct a new form of civic and political allegiance on a European scale. […] It does not require the existence of a people, but is founded on the existence of a European political area from which rights and duties emerge. In so far as it does not imply the existence of a European people, citizenship is conceptually the product of decoupling from nationality."* (C-135/08, Rottmann-case, 2009)

We accept that the EU and national citizenship are two, mutually based-on-each-other concepts, which are becoming more independent continuously. Is it possible – at least in theory – to separate EU citizenship from the national one, having special regard to Brexit? Whether currently union citizen British may keep their EU citizenship − as an independent, autonomous *status civitatis* − after Brexit? This would mean that EU citizenship would *grant secondary citizenship* to existing citizenship, which is currently conceptually excluded. In addition, Advocate General *Maduro* records that "*the radically innovative character of the concept of European citizenship lies in the fact that 'the Union belongs to, is composed of, citizens who by definition do not share the same nationality.*

On the contrary, by making nationality of a Member State a condition for being a European citizen, the Member States intended to show that this new form of citizenship does not put in question our first allegiance to our national bodies politic. In that way, that relationship with the nationality of the individual Member States constitutes recognition of the fact that there can exist (in fact, does exist) citizenship which is not determined by nationality. That is the miracle of Union citizenship: it strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond our States). Access to European citizenship is gained through nationality of a Member State, which is regulated by national law, but, […] it forms the basis of a new political area from which rights and duties emerge, which are laid down by Community law and do not depend on the State. […] Although it is true that nationality of a Member State is a precondition for access to Union citizenship, it is equally true that the body of rights and obligations associated with the latter cannot be limited in an unjustified manner by the former." (C-135/08, Rottmann-case, 2009) According to the facts of the case, *Mr. Rottman* was an Austrian national who acquired German nationality, as a result of which the Republic of Austria, who did not have dual nationality, was deprived of his nationality.

Meanwhile, it was proved that he had obtained German citizenship fraudulently and that he had been withdrawn and that he had become stateless and therefore lost his EU

citizenship. In its judgment, the CJEU stated that, while respecting the principle of proportionality, it would not be contrary to EU law if a Member State revoked nationality acquired through naturalization if it had been fraudulently obtained. The requirement of proportionality, therefore, protects EU citizenship, too.

The question is, what has the institution changed over the past decade, what tendencies can be observed in European integration. Could there be a circumstance under which the transnational citizenship may mean the citizenship of the Union, and thus the rights and obligations arising from EU citizenship (which are independent of the Member State) may become independent regardless to the Member States' intention?

Until now, questions of interpretation of EU citizenship have arisen in individual cases, and there is no example of collective redundancy. In contrast, the acquisition of EU civil status may have been massive with the accession of a particular state. Is mass disqualification sufficient to give the theoretical space to reinterpret the concept?

There are three factors to consider here. First of all, the Member States have a legal relationship with the EU. This is a contractual, horizontal relationship. Secondly, EU citizenship is a right for all citizens of the Member States by virtue of the Treaties, which gives the institution a supranational character. This is a vertical relationship between the Union and the individual in which the Member State is an *intermediary channel*. Thirdly, EU citizenship has a similar nature to subjective rights. There is, therefore, a horizontal link (the legal relationship between the Member States), and two vertical links (EU citizenship guaranteed by the EU and national citizenship guaranteed by the Member State) and these two statuses include subjective legal links.

The two-dimensional (Mindus, 2017) nature of EU citizenship (first dimension: the acquirement of the rights arising from the Treaties, thus the rights are supranational; while the status directly derived from national citizenship; second dimension: the content of the status) is the problem associated with the possible loss of acquired rights. From a legal point of view, I consider the loss of the right to free movement and residence the most problematic − since without the legal status of a Member State, entitlement to other EU citizenship rights' would be eliminated. The question is if we confront the membership status (the legal relationship between a Member State and an international organization, namely the EU), and an EU citizenship status (which is a personal bond between the Union and the individual), which one can have priority and protection against the other. It is certain that millions of people's daily lives (and their status) cannot become insecure due to the termination of a contractual relationship of their state, independently of them.

From Advocate General *Maduro*, it can be clearly perceived that EU citizenship is a set of legal conditions (a bundle of rights), which assumes that the member state of nationality has a legal relationship (namely the membership) with the EU. However, citizenship cannot constitute an unjustified restriction on the exercise of EU citizenship rights. Only if the Member States would decide to transform the Union into a federal state − for example by adopting a "*Doing Much More Together*" strategy (European Commission, 2017) − would this be the answer to the question of the legality of EU citizenship and the rights deriving from the attachment of citizenship to the nationality of the Member States, but this would mean that EU citizenship would have *autonomous status*. Thus the EU would have its own *(state) citizens*, which would necessarily call into question the sovereignty of the Member States. I believe that integration is not ripe at this stage to move towards a federation, so radical transformation of citizenship in *secondary*

citizenship not win even a welcome reception. *Zsófia Asztalos* stated in 2009 that this was too early (Asztalos, 2009), maybe this is still the case unless it is too late.

Without taking under the scope of the EU to create the unified conditions and definitions for citizenship, the question arises how could we establish a system from which all benefits, but sovereignty is not compromised. Based on the dynamic (evolutive) nature of EU citizenship, it can theoretically be further developed. According to *Zsófia Asztalos*, "*the legal basis for the future development of EU citizenship is laid down in Article 22 TEC [currently: Article 25 TFEU], the second paragraph. On this basis, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to strengthen and extend the rights of EU citizens, which the Member States recommend to adopt in accordance with their constitutional requirements."* (Asztalos, 2009) As far as the exit from the Member States is concerned, it is an important aspect of the EU's political will to settle EU citizenship for British citizens. Studies on the future of EU citizenship are in a difficult situation, as it is almost impossible to disregard the process of the current exit negotiations, the draft exit agreement (Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made, 2018).

The focus of my research is on the effects of Brexit on the legal nature of EU citizenship.

4. THE TIME HAS COME: BREXIT AND THE NEED TO REFORM EU CITIZENSHIP

The lawmakers have to find a solution to the problems arising from the withdrawal of the UK, for example, when the acquired rights of British residing in the EU27 and of EU citizens living in the UK (nearly 3.4 million) may become uncertain from a day to another.

4.1. The need to harmonize national citizenship rules at a minimum level

Respecting the sovereignty of Member States, I consider that 28 different ways to get EU citizenship status are unsustainable in the future. Think about what would happen if Denmark said it to its ex-colonial citizens − rest of who are Danish citizens and their home state are autonomous states by today, e.g., Greenland, the Faroe Islands − to ensure EU citizenship status automatically? The Dutch could do the same with the citizens of Suriname. What could have been the consequence of vetoing the accession of Cyprus, and yet the Greeks would have had guaranteed the EU citizenship to the Greek origin Cypriots? Or the British for the citizens of the Channel and Man Islands'.[19] All of these uncertainties could be avoided by a general EU provision that would give the common essence of the nationality of the Member States, on which condition the EU citizenship is based.

Member States should be based on possible common rules, individually consider the *granting* of EU citizenship status in the specific cases described above. Since the Faroe

[19] The scope of the Treaty is limited to the Channel Isle and Isle of Man. As regards those two islands, Article 2 of Annex 3 to the 1972 Act of Accession of the United Kingdom excludes the right of free movement being exercised by British nationals residing there.

Island's population is about 51,000 people and approximately half a million people live in Suriname, this measure would not be an extraordinary administrative burden for the Member States concerned but would give the other Member States security and transparency with regard to free movement. In my view, the system of common conditions for EU citizenship is in the interest of the Member States and should not be interpreted as a limitation of their sovereignty. As the Union guarantees the additional rights deriving from citizenship of the Union, there is a strong interest in having a clear (or minimally uniform) process of acquiring citizenship. The Brexit makes this renegotiation is possible.

In my view − even if it could be evaluated as the forefront of federalization − due to the Brexit, the time has come to draw a *common European minimum standard of citizenship*. I think it would be time to recognize the institution of dual[20] or even multiple citizenships in all Member States. The several Member States, such as Austria and Germany[21], Estonia, Lithuania, Netherlands, Slovakia do not recognize dual citizenship. This fact can cause practical disruption, e.g., a situation in which a person acquires the nationality of a Member State on the basis of the *ius soli* principle, but his parents are of different nationality and that State does not recognize the acquisition of citizenship on the basis of *ius sanguinis* − or the dual nationality with which the child would have access to both civil status.

This is of particular interest if the acquisition of *ius soli* takes place in an EU Member State[22], so that the child is automatically an EU citizen, while his parents can only be a derivative of his right in that Member State, given that parents are not EU citizens (C-200/02., Zhu and Chen case, 2002) (C-34/09., Zambrano case, 2011). It may also be that a person has acquired British citizenship but has lost his / her original − , eg. Austrian − citizenship, and thus, thanks to Brexit, he is now losing his EU citizenship − which he could *retain* as an Austrian-British dual citizen. The primary reform would be to recognize dual citizenship in all Member States. This would allow *transnational lifestyles*, *cross-border family relationships* created by mobility over the past decades to *remain undisturbed* after Brexit. At this point, human rights such as the right to an 'undisturbed family life'[23] could be linked to the question. These – given the fact that the United Kingdom is a party to the European Convention on Human Rights (ECHR) – will necessarily prevail after leaving. The exit of a Member State may, therefore, give rise to rights in the context of human rights, which may justify the European Court of Human Rights (ECHR) proceedings. I understand under this such a broad application of the *Kurič*[24] doctrine. (Mindus, 2017) Applying the doctrine − as *Mindus* puts it − would

[20] Dual citizenship is recognized: Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Finland, France, Greece, Croatia, Ireland, Poland, Latvia, Luxembourg, Hungary, Malta, Germany (subject to the following footnote), Italy, Portugal, Romania, Spain, Sweden, Slovenia . Switzerland is not a Member State, but I am referring to its specific economic relationship with the EU.

[21] In both states, the other nationality can be retained in special cases, but in the case of Germany only with another EU Member State, but it is necessary to apply. There may be another problem with German-British dual citizens.

[22] Member States that recognize the *ius soli* principle: Austria, Belgium, Bulgaria, Czech Republic, France, Greece, Netherlands, Croatia, Ireland, Italy, Portugal, Romania, Slovakia, Slovenia, Spain.

[23] As well as the related precedent established by judgments of the ECtHR. See e.g. next footnote.

[24] The *Kurič doctrine* was elaborated by the ECtHR in case 26828/06., *Kurič v Slovenia*. The right to respect the private and family life within the meaning of Article 8 (1) of the ECHR may be violated by a State that makes a

concretize the rights of residence, but would not allow the extension of the scope of EU law in the Member State that has already left. In other words, the right of residence[25] would apply to the British in the Member State where it was acquired, and would not make it mobile − as that is guaranteed under EU law. That would mean protection also for the EU27 citizens, within the UK's territory.[26] The draft withdrawal agreement aims this, too.

4.2. Reinterpreting the acquisition and loss of EU citizenship

As far as the acquisition of EU citizenship is concerned − in the 1970s when the concept emerged − different attitudes emerged.

The Maastricht Treaty recognizes the derivative approach, which left the Member States to acquire EU citizenship based on their nationality. There was also an attempt to obtain EU citizenship based on the *ius soli* principle. (Sica, 1979) According to this, persons born on the territory of the Member States would automatically have acquired EU citizenship. In Europe, the *ius sanguinis* principle prevailed, and besides, this theory would have allowed EU citizenship to be an *alternative* to national citizenship. Member States did not consider this desirable. This would have accepted the application of the *ius soli* principle by all Member States since the citizens of the Member States are EU citizens and *vica versa* an EU citizen is a citizen of a member state. The concept would have been an enormous extension and would have allowed access to extra privileges without Member State control. A similar option would exist if, for example, citizens of non-European countries[27] (population of the ex-colonies) would be eligible for EU citizenship by an extension decision of a Member State. In my view, this can also be a matter of concern for the common security policy.[28] I raised the *common frames of the acquisition of EU citizenship* to highlight to question of the "*collective loss*" of it. Thus, there could be harmonized rules for the loss of EU citizenship − beyond that we get there through the interpretation of EU law, that the termination of a membership relationship of a state or the citizenship relationship of a person automatically mean that the person loses the EU citizenship status.

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decision on immigration. In connection with the case (in which the ex-Yugoslav citizen lost his right to reside in Slovenia), *Mr. Vidmar* stated: "once you have lawfully acquired the right of residence, you can keep it, even if the legal status of your host country or your country of origin has changed and due to the change, your status will change as well, and, as a result, your new status alone would not provide you the right to reside there ".
See: VIDMAR, J.: The Scottish Independence Referendum in an International Context, 51 Canadian Yearbook of International Law, pp. 259-288.
For an extended application of the Kurič doctrine, see: GONZÁLEZ G.M.: BREXIT: Consequences for Citizenship of the Union and Residence Rights, Maastricht Journal of European and Comparative Law, 23 MJ 5 (2016), pp.796-811.

[25] For an extension of the right of residence, see: RYAN B.: Negotiating the right to remain after Brexit, Immigration, Asylum and Nationality Law, J.I.A.N.L. 2017, 31(3), , 2017, pp. 197-226. és HUGHES, K.: Brexit and the right to remain of EU nationals, Public Law, P.L. 2017, Nov Supp (Brexit Special Extra Issue 2017), pp. 94-116

[26] The doctrine would only solve the right of free residence.

[27] E.g.: Suriname.

[28] Spain is a good example of extremely specific citizenship regulation. A person who has never been to Spain, but his parents were born in Spain, may claim Spanish nationality. Thus, using De Groot's example: Fidel Castro could be a citizen of the EU without leaving Havana. See: DE GROOT, Gerard-René.: Towards a European Nationality Law, 8 Electronic Journal of Comparative Law

Based on the Italian proposal of the 1970s, given Brexit's extraordinary circumstances, the question arises as to whether the approach can work the other way around. I mean that if a person ever became a citizen of the Union with regard to the membership of the Member State of his / her nationality, then, given the subjective legal nature of the EU citizenship, this status could be granted to the individual until the end of his or her life – with no respect to the legal status of his / her home Member State. This is more than the abovementioned content of the so-called *Kurić doctrine*, which grants the right of residence based on the international[29] legal grounds.

The suggestion may seem steep, but if it worthed a debate in the 1970s whether to provide EU citizenship based on the *ius soli* principle, then in 2018, at this deep level of integration, why cannot we raise the debate to ensure acquired rights for those, who has already acquired, and make possible to keep that within their lives?! Adding to the foregoing, I would grant EU citizen status to persons who become the national citizens of the exiting Member State by the time of the withdrawal. Thus, I would not grant to those, who become British citizens after the date of exit. Therefore, there would be a transitional period for EU citizenship, too. This citizenship would open up a *new dimension*, which would result in *transitory citizenship from an EU perspective*, but *for the individuals concerned are eternal*. I would particularly like this to be a good solution, because it would create legal certainty for EU citizens in the precarious situation that has arisen, living anywhere in the EU. On the other hand, it would also be a guarantee for the EU because it would be a temporary solution from the EU point of view, not to mention that the Union could fulfill its duty to protect its citizens from legal uncertainty.

5. *DE LEGE FERENDA* PROPOSALS FOR CITIZENSHIP ISSUES

Brexit stands for the *ex lege* form of loss of EU citizenship, which is automatic if any Member State exits. Article 50 of the TEU – indirectly − allows for the loss of EU citizenship status under EU law, while the acquisition of EU citizenship status is governed by national law. From a legal perspective, that means an unintentional loss of acquired rights. From a political point of view, 48% of the voters at Brexit-referendum voted[30] in favor of remaining in the EU, in particular, the majority of the voters from Northern Ireland and Scotland. The above-mentioned draft withdrawal agreement states that the right of permanent residence acquired under Directive 2004/38/EC *will not be lost after the transitional period*.

Nevertheless, the future of EU citizens still seem uncertain, even though the European Commission sets out the principles regarding the personal and material scope, the way of enforcement and execution of the EU Citizenship in its position paper (European Commission, 2017) of 12 June 2017 on "Essential Principles on Citizens' Rights". There is a risk that 'ex EU citizens' with permanent residency status may turn to simple "immigrants" or "workers with visa", etc., due to the withdrawal. This affects, in particular, those who trusted their right to move and reside freely within the Union when

[29] For more information on the protection of legal status based on international law, see: GARNER Oliver: After Brexit: Protecting European citizens and citizenship from fragmentation, EUI Working Paper LAW 2016/22

[30] See more about this: STRUMIA Francesca: Brexiting European Citizenship through the Voice of Others. Some Initial Thoughts on Legal and Democratic Implications, German Law Journal, Vol. 17. – Brexit Supplement, 2016, pp. 109-116.

they planned their life. This is like a special kind of encouragement damage from their perspective. The EU encourages its citizens to move, be mobile, do cross-border activities, and then, a *vis maior* comes, the home state or the host state of the persons concerned decides to withdraw, and by an involuntary act, the citizens' lives turn to be disasters with much uncertainty. Who is liable and for what is that liability subjects? What are the responsibilities of the EU and the member states in this situation?

In my view − in agreement with *Mindus* (Mindus, 2017) − citizenship of the Union is a *sui generis status* which supranational and transnational elements are giving its characteristics. It might be possible to improve EU citizenship a partially self-sufficient institution. EU citizenship seems to be ready to cut it partially down from the national citizenship of the Member State on which it is based, especially about the citizens of an exiting state.

My *de lege ferenda* proposals could be summarized as follows:

- Providing an EU citizen status for British citizens born before the exit period, or on the day of the exit, ensuring their acquired rights as a *pack of a life-long bundle of rights*. This would, on the other hand, provide a *transitional period for the EU* from the citizenship aspect as a lifetime is not long from a state/organization perspective.
- Minimum harmonization of citizens' rules (while respecting sovereignty). In particular, the recognition of dual citizenship would be necessary for all Member States. On the other hand, the adoption of one of the basic principles of acquiring citizenship - *ius sanguinis* or *ius soli* - or even the introduction of both - in all Member States. This would resolve the contradiction in situations where a person would be entitled to acquire another nationality at birth on the basis of the two principles, but the legal system of that state does not recognize dual nationality, so that the child's guardian must decide whether the child is getting the parents' nationality or place of births' citizenship. It is not an ideal situation, and it can even lead to a lot of tension. Thus, it would be time to reform citizenship in nowadays Europe, that encourages mobility above everything. Of course, there is no need to abolish the member states' competence to accept who is a citizen on a national level.
- In accordance with the draft withdrawal agreement, I propose the continuity of residence. By that, the British, who have acquired a long-term right of residence in the EU27 under Directive 2004/38/EC, could maintain this right under the same conditions. This would mean a limited (reduced) level of EU citizenship to them, though at least the most important sub-license would remain − only territorially, for that state. In practice, this could be enforced based on the *Kurič doctrine* − at least before the ECtHR – in case the withdrawal agreement will not be signed.
- In order to deal with the *reduced EU citizen status* proposed in the previous point, I would recommend, within the framework of an official procedure, the issuance of an EU citizen (long-term) card, which would function as an "*EU passport*" for British citizens living in the EU27 and EU27 citizens resident in the UK. Thus, equal treatment of EU citizens, at least as far as the right of permanent residence would be concerned forever. Of course, in the case of a EU27-UK mixed marriage, the person would be able to exercise those rights based on his or her spouse's legal status, even in the event of divorce. (After the 5-year residency – required to obtain a long-term residence right – had been spent in that state.) Equal treatment is a universal requirement, independent of Brexit, and should be enforced afterward. I have to add, that the withdrawal agreement contains

regulations on the "Right of exit and of entry" of union citizens after the transition period. However, due to that "*Five years after the end of the transition period, the host State may decide no longer to accept national identity cards for the purposes of entry to or exit from its territory if such cards do not include a chip that complies with the applicable International Civil Aviation Organisation standards related to biometric identification.*"[31] My proposal is to issue a special kind of passport for the British who might lose their union citizenship. That passport could ensure the life-long version of residency for them in the host state.

- Related to the abovementioned, the judgment of the *Nottebohm* case could be implemented into the British living in EU27. In that case, the ICJ (Nottebohm case, 1955) analyzed the *real relationship that ties between a citizen and the state of nationality* as a base. Who has a real relationship with the state in which he has acquired a long-term residence − , e.g., employment relationship, marriage (even after divorce), family relationships, etc. − could maintain its EU citizen status, not only in terms of residence but in respect of all its sub-rights.

The changes that will occur after the exit will certainly be worked out by both legal science and practice. Unfortunately, the question cannot be examined clearly through the glasses of law, because it depends almost exclusively on political intentions, both for the Union and for the United Kingdom. In my view, both negotiators have to adopt a reassuring solution to protect the interests of citizens.[32] We should not forget that the *in integrum restitutio* cannot be applied in a post-Brexit era. We cannot delete and redone 46 years of membership because it is simply impossible. I aimed to re-interpret the regulation of EU citizenship, which should be taken on the agenda as a result of the United Kingdom's withdrawal. It is obvious that the new lens cannot be involved in the same old frames. We need to create brand new frames or renovate the old to be able to encase our new glasses. All in all; there is a place for institutional reform – regardless of the result of the Brexit – in order to deepen European integration and continue the way on a road of an *ever-closer Union*.

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[32] *Kostakopoulou* recommends creating a protected status: KOSTAKOPOULOU Theodora: ScalaCivium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens, Journal of Common Market Studies, 2018

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