Protecting the legal heritage of former Union citizens

Protecting the legal heritage of former Union citizens: *EP v Préfet du Gers*

1. Introduction

Article 20(1) TFEU, reflecting Article 9 TEU, establishes that '[e]very person holding the nationality of a Member State shall be a citizen of the Union'.[1] Union citizenship is therefore a conferred status, in the sense that it cannot be acquired through a direct citizen-to-Union process: to hold the status of Union citizen, a person must either be or become a national of one of the Member States.

Because of that constitutive link, the Court of Justice has established a role for EU law in reviewing Member State processes for acquiring and withdrawing nationality. While 'it is for each Member State…to lay down the conditions for the acquisition and loss of nationality', they must have 'due regard' to EU law when they do so.[2] In *Rottmann*, *Tjebbes*, and *Wiener Landesregierung*, national authorities took decisions in individual cases, under national law, that resulted in either the prospect of losing or the loss already of Member State nationality and therefore also of Union citizenship. The Court found that where a Member State national is 'faced with losing the status conferred by Article 20 TFEU and the rights attaching thereto', their situation 'falls, by reason of its nature and its consequences, within the ambit of EU law'.[3] It recalled 'the importance which primary law attaches to the status of citizen of the Union' to require that 'when examining a decision withdrawing naturalisation it is necessary…to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union'.[4] It emphasised, in particular, taking proportionate decisions in these circumstances,[5] which also entails compliance with the Charter of Fundamental Rights.[6]

Is there any obligation to conduct a similar assessment of individual situations amid the collective loss of Member State nationality produced by a State's withdrawal from the Union? After all, in *Wightman,* the Court acknowledged that 'any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, *inter alia*,

[1] Article 20(1) TFEU – again, similarly to Article 9 TEU – also states (since the Amsterdam Treaty) that Union citizenship is an 'additional' status that does 'not replace national citizenship'.
[2] Case C-369/90 *Micheletti*, EU:C:1992:295, para. 10.
[3] Case C-135/08 *Rottmann*, EU:C:2010:104, para. 56; Case C-221/17 *Tjebbes*, para. 32; Case C-118/20 *Wiener Landesregierung*, para. 44. Note earlier, the ruling in *Kaur*, raising similarly 'the effect of depriving any person who did not satisfy the definition of a national of [a Member State] of rights to which that person might be entitled under Community law' (Case C-192/99 *Kaur*, EU:C:2001:106, para. 25).
[4] Case C-135/08 *Rottmann*, para. 56.
[5] Ibid para. 55; *Tjebbes*, para. 40; *Wiener Landesregierung*, para. 58.
[6] *Tjebbes*, para. 45; *Wiener Landesregierung*, para. 61. To date, the case law has addressed Articles 7 (respect for private and family life) and 24(2) (best interests of the child) CFR.

their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States'.[7] Withdrawal also has consequences for the rights to vote and stand as a candidate in European Parliament elections as well as in municipal elections in a host State following the exercise of freedom of movement, rights protected for Union citizens by Article 22(1) TFEU and Articles 39 and 40 CFR. It might seem strange that, of the many human costs of Brexit,[8] the right of a long-term resident to vote in local elections in her host State produced the first significant judgment from the Court of Justice on the implications of Brexit for Union citizens. But it is not surprising in another way, since both long-term residence and participating in the 'democratic life' (Article 10(3) TEU) of the community where you live go to the heart of what it means to belong there. Moreover, the links that a Union citizen forges with their host State over time are critical in terms of the degree of integration they are deemed to have achieved and therefore the level of protection under EU law that they can benefit from there.[9]

At a general level, the question in *Préfet du Gers* was whether 'British nationals who enjoyed the benefits of Union citizenship retain those advantages following the United Kingdom's withdrawal from the European Union'.[10] More specifically, must denials of voting rights for British nationals who continue to reside in an EU Member State after Brexit be individually examined on proportionality grounds? In his Opinion in *Rottmann*, Advocate General Poiares Maduro had signalled that '[t]he acquisition and loss of Union citizenship are dependent on the acquisition and loss of the nationality of a Member State; Union citizenship presupposes nationality of a Member State'.[11] In its ruling in *Préfet du Gers*, the Court confirmed that there is indeed 'an inseparable and exclusive link between possession of the nationality of a Member State and not only the acquisition, but also the retention, of the status of citizen of the Union'.[12] As a result, the obligations articulated in *Rottmann*, *Tjebbes*, and *Wiener Landesregierung* simply no longer apply. The collective loss of Union citizenship produced by the UK's decision to leave the Union stems from the former's sovereign decision taken 'in accordance with its own constitutional requirements', which is all that Article 50(1) TEU asks.[13] As

[7] Case C-621/18 *Wightman*, EU:C:2018:999, para. 64.
[8] See further, M Dougan, *The UK's Withdrawal from the EU: A Legal Analysis* (OUP, 2021), Chapter 7.
[9] See recitals 17-19 and 23-24 of Directive 2004/38 on the right 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; and Joined Cases C-316/16 and C-424/16 *B and Vomero,* EU:C:2018:256, paras 51-54. See generally, J Shaw 'Citizenship: contrasting dynamics at the interface of integration and constitutionalism' in P Craig and G de Búrca (eds.) *The Evolution of EU Law*, 3rd ed. (OUP, 2021) 608; and S Coutts 'The absence of integration and the responsibilisation of Union citizenship' (2018) 3 *European Papers* 771.
[10] AG Collins in Case C-673/20 *Préfet du Gers*, EU:C:2022:129, para. 1 of the Opinion.
[11] AG Poiares Maduro in Case C-135/08 *Rottmann*, EU:C:2009:588, para. 15 of the Opinion.
[12] Case C-673/20 *Préfet du Gers*, EU:C:2022:449, para. 48.
[13] The irony that the resulting loss of Union citizenship for British nationals was voted for in a referendum has not gone unobserved; see e.g. F Strumia 'Brexiting European citizenship through the voice of others' (2016) 17 *German Law Journal (Brexit Supplement)* 109 at 111: 'for the significant minority that opposed Brexit with their

regards the rights provided for – and those not included – in the Withdrawal Agreement concluded between the EU and the UK, the Court found that there was 'nothing in the documents before the Court to suggest that the European Union, as a contracting party to the Withdrawal Agreement, exceeded the limits of its discretion in the conduct of external relations'.[14]

This annotation first provides an overview of the background to the case (Section 2), the Opinion of Advocate General Collins (Section 3), and the ruling of the Court of Justice (Section 4). It then argues that former Union membership remains legally meaningful for former Member State nationals – but only to a certain extent. In that light, it does not dispute the outcome in *Préfet du Gers* itself, agreeing that the Court reached the 'right' answer to the questions referred to it on both a narrow reading of EU citizenship law and the circumstances of the case (Section 5.1). In *Rottmann,* Advocate General Poiares Maduro seemed to express two different understandings of Union citizenship in the same paragraph when he suggested that it 'assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality'.[15] In *Préfet du Gers,* EP argued that the second part of that line conveys the autonomy of Union citizenship as a status.[16] The ruling of the Court coalesces instead around 'nationality of a Member State [as] a precondition for access to Union citizenship'[17] and the Treaties support that approach.

However, the protection of the individual as a defining feature of the wider system of EU law must be considered too (Section 5.2) and that perspective highlights two points of concern in the reasoning of the Court: first, the extent to which the status and the rights of Union citizenship are fused in the ruling; and second, characterisation of Withdrawal Agreement negotiations as 'the conduct of external relations'.

Most analyses of the fate of British nationals after Brexit draw on the status of Union citizenship to consider the extent to which EU legal protection might be sustained by 'former Union citizens' under Articles 20 and 21 TFEU.[18] However, while Union citizenship may well be 'intended to

vote, it is the voice of others that forces exit'. See differently, emphasising the democratic nature of that decision, S 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/.

[14] *Préfet du Gers*, para. 98. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2019 C 384I/01.

[15] AG Poiares Maduro in *Rottmann*, para. 23 of the Opinion.

[16] For an overview of the decision of an Amsterdam district court aligning with that approach, see AP van der Mei 'Member State nationality, EU citizenship and associate EU citizenship' in N Cambien, D Kochenov and E Muir (eds) *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill | Nijhoff, 2020) 441 at 450-451.

[17] AG Poiares Maduro in *Rottmann*, para. 23 of the Opinion.

[18] E Spaventa 'Mice or horses? British citizens in the EU 27 after Brexit as "former EU citizens"' (2019) 44 EL Rev 589.

be the fundamental status' of Member State nationals,[19] it does not represent the beginning and the end of their protection under EU law. This annotation looks more broadly at the legal order conceived in *Van Gend en Loos*, a critical element of which concerns rights that become part of the 'legal heritage' of Member State nationals.[20] The argument does not go as far as the idea that '[a] further de-coupling of EU citizenship from national membership would allow the Union to replicate the emancipatory move of *Van Gend en Loos* – to liberate individuals from the preferences of their states'.[21] Instead, the point here is to exploit (rather than seek to overcome) the legal connections between the Union, its Member States, and Member State nationals.

As a starting point, it is important to remember that the status of Union citizenship and the rights normally associated with it are already disconnected – notably through the EEA Agreement, the preamble of which refers to providing for the 'fullest possible realization of the free movement of…persons…within the whole European Economic Area'.[22] Thus, even if free movement is at the core of Union citizenship,[23] the converse does not follow in legal terms. That disconnection of status and rights is also sanctioned in the Court's case law. To determine the extent to which it is possible in a given situation, what matters is context and, above all, how 'special' the connection is between the Union and/or a given Member State and the third state in question.[24] On what basis can we say that the relationship between the Union and the UK – a State that voluntarily chose to leave – remains 'special' to the extent that (some of) the protection of Union citizenship should sustain even though British nationals no longer hold that status? Fundamentally, it is because membership of the Union has legal meaning – most obviously, as an ongoing relationship,[25] but membership already has legal meaning in preparing for accession. In that context, we know that transitional arrangements can restrict the free movement of persons: even though the status of Union citizen is acquired, that alone

[19] Case C-184/99 *Grzelczyk*, EU:C:2001:458, para. 31.
[20] Case 26/62 *Van Gend en Loos*, EU:C:1963:1.
[21] M Dawson and D Augenstein 'After Brexit: time for a further decoupling of European and national citizenship?', VerfBlog, 2016/7/14, https://verfassungsblog.de/brexit-decoupling-european-national-citizenship/, DOI: 10.17176/20160714-114950. EU law is often framed in terms of emancipation for the relationship between individuals and the State: see further, F de Witte, 'Emancipation through EU law?' in L Azoulai, S Barbou des Places, and E Pataut (eds) *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing, 2016) 15; and G Davies 'The humiliation of the state as a constitutional tactic' in F Amtenbrink and P van den Berg (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press, 2010) 147.
[22] Agreement on the European Economic Area, 1994 OJ L1/3.
[23] E.g. Union citizenship has been described as 'virtually synonymous with freedom of movement' (AG Szpunar in Case C-202/13 *McCarthy II*, EU:C:2014:345, fn23 of the Opinion).
[24] For different but sufficient 'special' links, see Case C-145/04 *Spain v United Kingdom*, EU:C:2006:543 (Section 5.1 below) and Case C-897/19 PPU *Ruska Federacija v IN*, EU:C:2020:262 (Section 5.2 below).
[25] See further, M Cremona and N Nic Shuibhne 'Integration, membership and the EU Neighbourhood' (2022) 50 CML Rev (Special issue) 155.

does not enable enjoyment of all the rights that Member State nationals (should) enjoy within the meaning of the Treaties.[26]

Accession therefore underlines that even if freedom of movement is a core element of Union citizenship, the status and rights associated with its protection can be separated.[27] Drawing from the system of EU law to protect the nationals of a former Member State in certain situations – following a withdrawal process concluded in accordance with the Treaties – takes us to the other end of Union membership's arc. But former membership is still a point on that arc in legal terms and it thus entails legal consequences. It is acknowledged in this paper that withdrawal from the Union dissolves claims to the status of Union citizenship in a formal sense for the nationals of the withdrawing State; that the concept of 'legal heritage' is essentially past-facing and does not require that all associated rights will be protected in the same way in a post-withdrawal setting; and that the EU's institutions do indeed enjoy significant discretion in the conduct of the Union's external relations with third states, which necessarily includes the negotiation of external agreements. Nevertheless, if we take the legal order outlined in *Van Gend en Loos* seriously, then the concept of 'legal heritage' has material implications; a withdrawal agreement is not a 'normal' EU external agreement, given that it is negotiated while the withdrawing State remains a Member State; and the settlement reached in the Agreement between the Union and the UK is not, therefore, untouchable in terms of EU legal review. For former Union citizens, rights are necessarily and significantly changed; but that does not mean that they are entirely erased.

2. Factual and legal background

Préfet du Gers concerns deprivation of voting rights following the UK's withdrawal from the Union and, more specifically, the removal of EP – a British national married to a French citizen who had resided in France since 1984 – from the electoral list of her commune following the entry into force of the Withdrawal Agreement on 1 February 2020. As a result, EP could not participate in municipal

[26] See e.g. M Dougan 'A spectre is haunting Europe ... free movement of persons and the Eastern enlargement' in C Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart Publishing, 2004) 113.

[27] Whether all rights associated with Union citizenship can be separated from that status is returned to in Section 5 below. In its case law on citizenship and accession, the Court has held that current effects of situations that arose before the entry into force of the Treaties can constitute a sufficient connecting factor to EU citizenship law (e.g. Joined Cases *Ziolkowski and Szeja*, EU:C:2011:866, para. 58; Case C-218/15 *Paoletti and Others*, EU:C:2016:748, para. 37; and Case C-85/21 *Steiermärkische Landesregierung*, EU:C:2022:192, para. 24). However, where all such effects concern the pre-accession phase, the situation falls outside the scope of EU law (e.g. Case C-218/15 *Paoletti and Others*, para. 37; Case C-85/21 *Steiermärkische Landesregierung*, para. 25) – including where the person concerned has queried the requirement of a proportionality assessment of revoking their claim to the status of Union citizenship (*Steiermärkische Landesregierung*, paras 28-32).

elections held in March 2020.[28] In October of that year, her application to be re-registered on the special electoral role for (non-French) Union citizens was rejected; she challenged this before the referring court, pointing out that under UK national rules, she was no longer entitled to vote or stand as a candidate in municipal elections there either because she resided abroad for more than 15 years.[29] EP submitted that 'loss of the status of citizen of the Union, enshrined in Article 20 TFEU, cannot be an *automatic* consequence of the United Kingdom's withdrawal from the European Union'[30] and argued infringement of legal certainty and proportionality; discrimination between Union citizens; and infringement of freedom of movement.

For the Prefect of Gers, ratification of the Withdrawal Agreement by both the EU and the UK 'triggered the definitive departure of the United Kingdom from the European Union at midnight on 31 January 2020 and subsequently, for UK nationals in France, the loss of their right to vote and stand as candidates in municipal and European elections'.[31] Under Article 127(1)(b) WA, voting rights enjoyed by Union citizens ceased for British nationals not after the transition period (i.e. 31 December 2020) but at the earlier point of the UK's formal withdrawal (i.e. 1 February 2020).[32] However, the referring court considered that the application of the Withdrawal Agreement in EP's specific situation amounted to a 'disproportionate infringement of [her] fundamental right to vote'.[33] It therefore referred four questions to the Court of Justice under Article 267 TFEU. First, the referring court queried whether Article 50 TEU and the Withdrawal Agreement have the effect of 'revoking the [Union] citizenship of [United Kingdom] nationals who, before the end of the transition period, have exercised their right to freedom of movement and freedom to settle freely in the territory of another Member State, in particular for those who have lived in the territory of another Member State for more than

[28] The UK has negotiated bilateral treaties with some EU Member States with respect to voting and standing as a candidate in local elections; e.g. concerning the UK and Spain, see https://www.gov.uk/government/news/expat-voting-rights-treaty-secured-with-spain.

[29] EP could not therefore vote in the UK in the 2016 referendum or 2019 general election and thus sought to distinguish her situation from that of another British national, HA, in respect of whom a similar action was dismissed by the *Cour de cassation* on the basis that HA's political rights were not disproportionately affected since he was able to vote in both; see *Préfet du Gers*, para. 31; see also, the request for the preliminary ruling submitted by the referring court (the *Tribunal judiciaire d'Auch*), p3.

[30] *Préfet du Gers*, para. 32 (emphasis added).

[31] Ibid (request for a preliminary ruling), p4.

[32] Article 127(1)(b) WA excluded, from 1 February 2020, the application to and in the UK of Article 11(4) TEU, Article 20(2)(b) TFEU, Article 22 TFEU, Article 24(1) TFEU, and Articles 39 and 40 CFR (as well as 'the acts adopted on the basis of those provisions') – i.e. 'namely the provisions of primary EU law relating to the right of Union citizens to vote and to stand as a candidate in elections to the European Parliament and in municipal elections in their Member State of residence' (*Préfet du Gers*, para. 67).

[33] *Préfet du Gers*, para. 36. In *Delvigne*, on deprivation of voting rights in a Union citizen's home State, the Court established that since Article 39(2) CFR 'corresponds to' Article 14(3) TEU, it 'constitutes the expression in the Charter of the right of Union citizens to vote in elections to the European Parliament' (Case C-650/13 *Delvigne*, EU:C:2015:648, paras 41 and 44).

15 years and are subject to the [UK's] 15-year rule, thus depriving them of any right to vote.'[34] Second, if that is the case, 'is the combination of Articles 2, 3, 10, 12 and 127 of the Withdrawal Agreement, recital 6 of its preamble, and Articles 18, 20 and 21 [TFEU] to be regarded as having allowed those [British] nationals to retain, without exception, the rights to EU citizenship which they enjoyed before the withdrawal of their country from the European Union?'[35]

Third, in the event of a negative answer to Question 2, the referring court challenged the validity of the Withdrawal Agreement 'in so far as it infringes the principles underlying EU identity' and, in particular, Articles 18, 20 and 21 TFEU, Articles 39 and 40 CFR, and the principle of proportionality 'in that it contains no provision permitting them to retain those rights without exception'.[36] Finally, fourth, it questioned the validity of Article 127(1)(b) WA more specifically, again with reference to Articles 18, 20 and 21 TFEU and 39 and 40 CFR and with respect to the deprivation of voting rights produced both for Union citizens residing in the UK after Brexit and for British nationals who reside in an EU Member State and are subject to the UK's 15-year rule.

3. Opinion of the Advocate General

The opening paragraphs of the Opinion of Advocate General Collins left little doubt about the conclusions later reached. Locating Union citizenship in the wider Union objective of creating an ever closer union among the peoples of Europe,[37] he characterised how Articles 9 TEU and 20(1) TFEU establish both a link between Member State nationality and Union citizenship and the 'additional' nature of the latter as an 'explicit choice by the Member States [which] not only renders the European Union powerless to create Union citizenship independently from nationality as conferred by the Member States, but also raises a constitutional barrier to such a power being implied under Union law'.[38] He then recalled the ruling in *Wightman* to underline the 'voluntary and unilateral nature' of a

[34] *Préfet du Gers*, para. 37.
[35] Ibid. Articles 2, 3, 10, 12 and 127 WA address, respectively, definitions (and specifically in para. (c), that '"Union citizen" means any person holding the nationality of a Member State'); territorial scope; personal scope; non-discrimination on the grounds of nationality; and the transition period, including, as noted above, the exclusion of voting rights via Art 127(1)(b). Recital 6 recognises that 'it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination'.
[36] *Préfet du Gers*, para. 37.
[37] Referring to the 10th and 13th recitals and Article 1 TEU (AG Collins in *Préfet du Gers*, paras 19 and 20 of the Opinion).
[38] Ibid para. 22 of the Opinion. He also considered that the obligation that Member States must have due regard to EU law when exercising their powers with respect to the acquisition and loss of nationality leaves the underlying division of competence 'unaltered' (para. 23 of the Opinion).

withdrawal decision under Article 50 TEU.[39] Joining these threads, he considered that, from the moment the Withdrawal Agreement entered into force on 31 January 2020, 'the United Kingdom no longer resolved, *inter alia*, to establish a citizenship common to that of the nationals of EU Member States or to create an ever closer union among the peoples of Europe' and, as a result, '[s]ince the existence of Union citizenship depends upon the acquisition and possession of the nationality of a Member State, and the United Kingdom voluntarily abandoned that status in the manner prescribed by Union law, British nationals ceased to be Union citizens'.[40] Moreover, while the Withdrawal Agreement protects several rights for British nationals who resided in an EU Member State before the end of the transition period, Article 127(1)(b) WA expressly excludes the right to vote and to stand as a candidate in European Parliament and municipal elections.[41]

Turning then to the first question, and whether the status of Union citizenship could be sustained notwithstanding withdrawal from the Union, Advocate General Collins stressed the link with Member State nationality. Through 'its sovereign decision to leave the European Union, the United Kingdom signalled its clear determination to repudiate [its] commitment' to 'construct a new form of civic and political allegiance on a European scale'; in such circumstances, 'an individual cannot seek to rely upon his or her British nationality to assert a claim either to Union citizenship *or to its benefits*'.[42] Thus, 'Article 50 TEU and the Withdrawal Agreement have the effect of terminating, as of midnight (CET) on 31 January 2020, the Union citizenship of British nationals, including those who had, before the end of the transition period, exercised their rights to freedom of movement and to settle freely in the territory of another Member State'.[43] That 'sovereign decision' thus displaced the obligation of proportionality review under which EP's individual circumstances might be assessed under the *Rottmann* case law.[44] The Advocate General acknowledged that EP could, in principle, rely on the principle of non-discrimination on grounds of nationality in Article 18(1) TFEU during the transition period instituted by the Withdrawal Agreement.[45] However, participating in municipal elections was expressly excluded by Article 127(1)(b) WA and that provision concerns British nationals as third-

[39] Ibid para. 27 of the Opinion; referring to *Wightman*, para. 68.
[40] AG Collins in *Préfet du Gers*, para. 28 of the Opinion.
[41] Ibid, paras 29-30 of the Opinion.
[42] Ibid para. 37 of the Opinion (emphasis added); as a result, '[a]ny legal consequences arising from EP's residence outside of the United Kingdom for the exercise of voting rights in that State's elections are a matter between her and the United Kingdom, a third State, and thus fall outside of the jurisdiction of this Court' (para. 55 of the Opinion).
[43] Ibid para. 56 of the Opinion.
[44] Ibid paras 40-42 of the Opinion. Instead, '[a]ny deprivation of [EP's] right to participate in the democratic process as a British national arises exclusively as a consequence of United Kingdom law' (para. 45 of the Opinion).
[45] Ibid, para. 47 of the Opinion; citing Case C-709/20 *CG*, EU:C:2021:602, para. 64.

country nationals, who are not in a comparable position with Member State nationals as regards the exercise of political rights.[46]

Addressing the second question, as to whether British nationals could retain the rights if not the status of Union citizenship enjoyed before the UK's withdrawal, Advocate General Collins identified 'three insuperable obstacles'.[47] First, neither Article 50 TEU nor the Withdrawal Agreement 'contemplate any exception to the rule that, upon its withdrawal from the European Union, the United Kingdom ceased to be a Member State, with all of the consequences that follow for British nationals'.[48] Second, the exercise of rights associated with the status of Union citizenship does not establish a legal basis that distinguishes British nationals residing in an EU Member State from other British nationals: in other words, 'prior to midnight (CET) on 31 January 2020 all British nationals were Union citizens, irrespective of whether they had exercised any of the rights conferred by the latter status'.[49] And in any event, third, Article 127(1)(b) WA expressly mandated that the political rights of Union citizens protected by Articles 20(2)(b) and 22 TFEU (and Article 40 CFR) did not apply during the transition period.

Finally, taking the third and fourth questions together, the Advocate General assessed the compatibility of the Withdrawal Agreement with the Treaties by assessing the validity of Decision 2020/135.[50] Again, the transmutation of the UK from Member State to third state effected by its sovereign decision to leave the Union meant that 'Decision 2020/135 cannot be criticised for not affording British nationals the right to vote and to stand as a candidate in municipal elections in the Member State of their residence either during the transition period or thereafter'.[51] In this part of the Opinion, responding to the referring court's invocation of 'the principles underlying EU identity', Advocate General Collins issued perhaps the harshest part of his assessment:

> Since the United Kingdom's sovereign choice to leave the European Union *amounts to a rejection of the principles underlying the European Union,* and the Withdrawal Agreement is an agreement between the European Union and the United Kingdom to facilitate the latter's orderly withdrawal from the former, the European Union was in no position to insist that the United Kingdom fully adhere to any of the European Union's founding principles. Nor could the European Union secure rights that, in any event, it was not bound to assert on behalf of

[46] AG Collins in *Préfet du Gers*, para. 51 of the Opinion.
[47] Ibid para. 59 of the Opinion.
[48] Ibid para. 60 of the Opinion.
[49] Ibid para. 61 of the Opinion. Expressing this point with reference to the validity of Article 127(1)(b) and distinguishing between British nationals who had exercised free movement rights and those who had not, see also para. 76 of the Opinion.
[50] Ibid para. 66 of the Opinion; referring to Case C-266/16 *Western Sahara Campaign UK*, EU:C:2018:118, paras 50-51. Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2020 OJ L29/1.
[51] AG Collins in *Préfet du Gers*, para. 70 of the Opinion.

> persons who are nationals of a State that has left the European Union and who are therefore no longer Union citizens. Finally, since Union citizenship depends upon the possession of Member State citizenship, no response other than the exclusion of British nationals from the definition of Union citizens was possible whilst remaining within the scope of the Treaties.[52]

More prosaically, he affirmed that 'the EU institutions enjoy a broad discretion in policy decisions adopted in the conduct of external relations'.[53]

4. Judgment of the Court of Justice

In its ruling, the Court joined the first and second questions to establish that the combined effect of Articles 9 and 50 TEU, Articles 20-22 TFEU and the Withdrawal Agreement is that British nationals who resided in an EU Member State before the end of the transition period 'no longer enjoy the status of citizen of the Union, nor, more specifically, by virtue of Article 20(2)(b) TFEU and Article 22 TFEU, the right to vote and to stand as a candidate in municipal elections in their Member State of residence, including where they are also deprived, by virtue of the law of the State of which they are nationals, of the right to vote in elections held by that State'.[54] The Court stated unambiguously that Union citizenship 'requires' the holding of Member State nationality since 'the authors of the Treaties…established an inseparable and exclusive link between possession of the nationality of a Member State *and not only the acquisition, but also the retention*, of the status of citizen of the Union'.[55] It recalled citizenship as the 'fundamental status' of Member State nationals in that context.[56] And it pointed out that Articles 20(2), 21 and 22 TFEU 'attach a series of rights to the status' including the right to vote and to stand as a candidate in municipal elections in a Member State of residence, and that neither these provisions nor Article 40 CFR 'enshrines that right in favour of nationals of a third State'.[57] The Court also found that prior exercise of free movement does not suffice to enable an individual 'to retain the status of citizen of the Union and all the rights attached thereto by the FEU Treaty if, following the withdrawal of his or her State of origin from the European Union, he or she no longer holds the nationality of a Member State'.[58]

[52] Ibid, para. 75 of the Opinion (emphasis added).
[53] Ibid para. 72 of the Opinion. He also pointed out that the UK did not seek to ensure continuing political rights on a reciprocal basis as part of the withdrawal negotiations (para. 73 of the Opinion).
[54] Case C-673/20 *Préfet du Gers*, para. 45.
[55] Ibid para. 48 (emphasis added).
[56] Ibid para. 49.
[57] Ibid para. 50.
[58] Ibid para. 52.

Second, in line with Advocate General Collins, the Court referred to *Wightman* to underline the 'sovereign' nature of a withdrawal decision taken under Article 50(1) TEU.[59] It distinguished three phases of the withdrawal process outlined in Articles 50(2) and 50(3): notification; negotiation and conclusion of a withdrawal agreement; and 'actual withdrawal', after which the Treaties cease to apply to (in the case of Brexit) the United Kingdom: it is then no longer a Member State and its nationals are third state nationals.[60] Since holding Member State nationality 'is an essential condition for a person to be able to acquire and retain the status of citizen of the Union and *to benefit fully* from the rights attaching to that status', loss of such nationality entails 'automatic loss' of the status of Union citizenship.[61] It is in 'those circumstances' that British nationals lost the voting rights conferred on Union citizens by Articles 20(2)(b) and 22 TFEU, irrespective of whether free movement was exercised prior to withdrawal.[62] Addressing the referring court's assertion of disproportionality in EP's specific circumstances, the Court restated that loss of the status of Union citizenship and associated voting rights was 'an automatic consequence of the sole sovereign decision taken by the United Kingdom' and that the 15-year rule was 'a choice of electoral law' made by that former Member State (now a third state); '[i]n those circumstances', neither competent Member State authorities nor national courts are obliged to undertake an individual assessment of proportionality.[63] In contrast, *Rottmann*, *Tjebbes*, and *Wiener Landesregierung* 'concerned specific situations falling within the scope of EU law, where a Member State had withdrawn its nationality from individual persons, pursuant to a legislative measure of that Member State'.[64]

Third, the Court confirmed that no provisions of the Withdrawal Agreement confer voting rights on an individual in EP's situation, since Article 127(1)(b) constitutes a derogation as regards the application of EU law to and in the UK during the transition period.[65] The Court acknowledged that Article 127(1)(b) refers to the territory of the UK and not British nationals *per se*, but found that the exclusion provided for also applies to British nationals who had exercised free movement since Article 127(1)(b) must be read in conjunction with Article 127(6).[66] Thus the Member States were not obliged, since 1 February 2020, to grant to British nationals residing in their territories the right to vote and to stand as a candidate in European Parliament or municipal elections. An alternative interpretation of

[59] Ibid para. 53.
[60] Ibid paras 54-56.
[61] Ibid para. 57 (emphasis added).
[62] Ibid para. 58.
[63] Ibid para. 61.
[64] Ibid para. 62.
[65] Ibid para. 67.
[66] Ibid para. 68. Article 127(6) WA establishes that '[u]nless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom'. Note also, Article 3(1) WA, which refers to 'Union law *made applicable by this Agreement*'.

Article 127(1)(b) 'would create an asymmetry between the rights conferred by that agreement on United Kingdom nationals and Union citizens', which 'would be contrary to the purpose of that agreement, set out in the sixth paragraph of the preamble thereto, which is to ensure mutual protection for citizens of the Union and for United Kingdom nationals who exercised their respective rights of free movement before the end of the transition period'.[67] Article 127(1)(b) therefore distinguishes voting rights from rights protected 'on a reciprocal and equal basis' by Part Two WA more generally,[68] and supersedes the prohibition on nationality discrimination in Article 12 WA. The Court reaffirmed established case law that precludes third-country nationals from relying on Article 18(1) TFEU.[69] However, it remains within the competence of a Member State 'to grant, under conditions which they lay down in their national law, a right to vote and to stand as a candidate to nationals of a third State residing in their territory'.[70]

Finally, addressing the third and fourth questions together, the Court considered the validity of the Withdrawal Agreement and, more specifically, Decision 2020/135. Restating that the relevant provisions of the TFEU and the Charter apply to Union citizens only, the Court found no point of invalidity through the fact that voting rights were not conferred on the nationals of a third state. Like Advocate General Collins, it emphasised that 'the EU institutions enjoy broad discretion in policy decisions *in the conduct of external relations*' and that 'those institutions may enter into international agreements based, *inter alia,* on the principle of reciprocity and mutual advantages. Thus, they are not required to grant, unilaterally, third-country nationals rights such as the right to vote and to stand as a candidate in municipal elections in the Member State of residence, which, moreover, is reserved solely to Union citizens, under Article 20(2)(b) TFEU, Article 22 TFEU and Article 40 of the Charter'.[71] In that light, adopting the same language as the Advocate General, 'the Council cannot be criticised for having approved the Withdrawal Agreement by Decision 2020/135, when that agreement does not confer on United Kingdom nationals the right to vote and to stand as a candidate in municipal elections in their Member State of residence, either during the transition period or subsequently'.[72] The Court also agreed that the deprivation of voting rights faced by EP under the UK's 15-year rule 'arises solely from a legislative provision of a third State, and not from EU law', rendering it 'not relevant for the purposes of assessing the validity of Decision 2020/135'.[73]

[67] *Préfet du Gers*, para. 72.
[68] Ibid para. 73.
[69] Ibid para. 78; referring to *Ruska Federacija v IN*, para. 40.
[70] *Préfet du Gers*, para. 82. The Court did not refer to previous case law on this point but see esp. Case C-145/04 *Spain v United Kingdom*, EU:C:2006:543, discussed in Section 5.1 below.
[71] *Préfet du Gers*, para. 99 (emphasis added).
[72] Ibid para. 100.
[73] Ibid para. 101.

5. Comment

On one view, *Préfet du Gers* extinguished any fragile glimmers of lingering hope that Brexit might not necessarily mean Brexit for all British nationals. The tone of the Court's ruling might be softer than that of the Advocate General's Opinion but the conclusions are no less equivocal: if a sovereign state chooses to withdraw from the EU, its nationals become third state nationals with no apparent claim to either the status of or the voting rights conferred by Union citizenship. This annotation first considers that ruling with respect to EU citizenship law (Section 5.1), addressing the limits of the *Rottmann* obligation as well as the extendibility of the voting rights conferred on Union citizens. It also reflects on a possible tension between lines of case law that posit host State naturalisation as both opportunity and obligation in the exercise of free movement.

However, it is then argued that, in a broader sense, the Opinion and the ruling in *Préfet du Gers* conflate too narrowly the status and the protection of Union citizenship (Section 5.2).[74] Rather than seeking all legal answers in Articles 9 TEU or 20-22 TFEU, the protection of the individual in the wider system of EU law is considered, drawing, in particular, on the *Van Gend en Loos* concept of rights that become part of the 'legal heritage' of Member State nationals. That discussion raises, first, questions about how the Union should relate to Member States and to Member State nationals respectively in the very particular context of an EU membership ended voluntarily and in full accordance with Article 50 TEU: to what extent should the individual's legal heritage subsist after their Member State becomes a third state? It also asks us, second, to reconsider how much political leeway a withdrawal negotiation should entail.

5.1 *Préfet du Gers* and the law of Union citizenship

Three questions are examined in this Section: what the ruling in *Préfet du Gers* adds to EU citizenship law with respect to losing, and acquiring, Union citizenship (Section 5.1.1); the voting rights conferred on Union citizens yet extendable to third state nationals in certain circumstances (Section 5.1.2); and the relationship between Union citizenship and host State naturalisation (Section 5.1.3).

5.1.1. Union citizenship and Member State nationality

[74] Examining the relationship between the status and the rights of Union citizenship more generally, with respect to its functioning rather than its loss, see D Kochenov 'Ius tractum of many faces: European citizenship and the difficult relationship between status and rights' (2009) 15 Colum J Eur L 169.

There is no doubting the Court's position on *who* is a Union citizen: '[b]y Article 9 TEU and Article 20 TFEU, the authors of the Treaties…established an *inseparable and exclusive link* between possession of the nationality of a Member State and not only the acquisition, but also the retention, of the status of citizen of the Union'.[75] On one view, these provisions refer only to how the status of Union citizenship is acquired and do not directly address the situation of losing it.[76] However, Article 50 TEU makes no reference at all to the position of Union citizens with respect to Member State withdrawal: according to Article 50(3), the Treaties – and therefore the provisions conferring Union citizenship – simply 'cease to apply' either when a withdrawal agreement enters into force or even in the more drastic scenario where no such agreement could be concluded. The interconnectedness of acquisition and loss of Member State nationality was already implicit in *Rottmann* and developed further in *Wiener Landesregierung*.[77] *Préfet du Gers* is even more explicit: since Member State nationality is 'an essential condition for a person to be able to acquire and retain the status of citizen of the Union and to benefit fully from the rights attaching to that status', losing that nationality 'therefore entails, for the person concerned, the *automatic* loss of his or her status as a citizen of the Union'.[78] For British nationals, that occurred on 1 February 2020 and previous exercise of free movement is 'irrelevant'.[79] In those circumstances, the importance of coordinating national decision-making across different Member States, highlighted in *Wiener Landesregierung,*[80] falls away too: the withdrawing State 'is not required to take its decision in concert with the other Member States or with the EU institutions' since a withdrawal decision 'is for that Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice'.[81]

[75] *Préfet du Gers*, para. 48 (emphasis added).
[76] E.g. V Roeben, P Minnerop, J Snell and P Telles 'Revisiting Union citizenship from a fundamental rights perspective in the time of Brexit' (2018) 5 *European Human Rights Law Review* 450 at 467.
[77] Case C-118/20 *Wiener Landesregierung,* esp. paras 36 ('the purpose of the application for dissolution of the bond of nationality with the Member State of which that person is a national is to enable that person to fulfil a condition for the acquisition of that nationality and, once obtained, to continue to enjoy the status of citizen of the Union and the rights attaching thereto') and 39 ('[w]here, in the context of a naturalisation procedure, the competent authorities of the host Member State revoke the assurance as to the grant of nationality of that State, the person concerned who was a national of one other Member State only and renounced his or her original nationality in order to comply with the requirements of that procedure is in a situation in which it is impossible for that person to continue to assert the rights arising from the status of citizen of the Union').
[78] *Préfet du Gers*, para. 57 (emphasis added).
[79] Ibid para. 58. AG Collins agreed that '[t]he exercise of rights conferred by Union law does not furnish any legal basis upon which an individual's *status* as a Union citizen falls to be determined', adding that 'the integration of third-country nationals into the societies of the Member States is not among the goals furthered by Union citizenship' (paras 61 and 34 of the Opinion, emphasis added). Criticising this logic *inter alia* through the significance of legitimate expectation and legal certainty in the Court's case law, see Spaventa, n18.
[80] *Wiener Landesregierung*, paras 49-51.
[81] *Préfet du Gers*, para. 53; referring to *Wightman*, para. 50.

The Court distinguished withdrawal from the Union from the situations where *Rottmann* proportionality review[82] is required i.e. 'where a Member State had withdrawn its nationality *from individual persons*, pursuant to a legislative measure of that Member State'.[83] Whether that means that *any* systemic approach to Member State nationality – i.e. challenging a scheme *per se* rather than an individual decision taken under it – are beyond the reach of EU law has resonance at present for challenges to investor citizenship. The Commission defines investor citizenship schemes as those 'where citizenship is granted under less stringent conditions than under ordinary naturalisation regimes, in particular without effective prior residence in the country concerned'[84] – in effect, schemes that enable the grant of nationality on the basis of payment or investment, supplanting processes seeking to establish genuine links in other ways and over a longer period of time.[85] The Commission also highlights that '[i]t is precisely the benefits of Union citizenship, notably free movement rights, that are often advertised as the main attractive features of such schemes'.[86] In October 2020, it opened infringement proceedings against Cyprus and Malta on the basis that 'the granting by these Member States of their nationality – and thereby EU citizenship – in exchange for a pre-determined payment or investment and without a genuine link with the Member States concerned, is not compatible with the principle of sincere cooperation enshrined in Article 4(3) [TEU]' and 'undermines the integrity of the status of EU citizenship provided for in Article 20 [TFEU]'.[87] In April 2022, while indicating that it was 'carefully assessing the situation in Cyprus before deciding on the next steps' following a reasoned opinion sent in June 2021, the Commission sent a reasoned opinion to Malta since its investor citizenship scheme had been suspended only for Russian and Belarusian nationals following Russia's invasion of Ukraine.[88]

Applying the *Rottmann* case law should any of these infringements proceed to the judicial stage would require significant progression of the law as developed to date. A starting point comes from *Micheletti* – that Member States must be mindful of their obligations under EU law when they

[82] i.e. 'the obligation to carry out an individual examination of the proportionality of the consequences of the loss of Union citizenship' (*Préfet du Gers*, para. 62).
[83] Ibid (emphasis added).
[84] European Commission, Investor Citizenship and Residence Schemes in the European Union, COM(2019) 12 final, 1, observing risks to, *inter alia*, security, money laundering and tax evasion, and highlighting the schemes operated by Bulgaria, Cyprus and Malta. Note also the distinction between investor citizenship ('golden passport') and investor residence ('golden visa') schemes.
[85] Commission Recommendation of 28.3.2022 on immediate steps in the context of the Russian invasion of Ukraine in relation to investor citizenship schemes and investor residence schemes, C(2022) 2028 final, para. 1.
[86] Ibid, recital 2.
[87] European Commission Press Release, 20 October 2020, IP/20/1925, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925. The Commission noted that it was also, at that time, in correspondence with Bulgaria to obtain further information about an investor citizenship scheme that, in March 2022, the Bulgarian Parliament agreed to end.
[88] European Commission Press Release, 6 April 2022, IP/22/2068, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2068.

'lay down the conditions for the acquisition and loss' of nationality.[89] However, while the circumstances in all three cases differed, *Rottmann*, *Tjebbes* and *Wiener Landesregierung* each affirmed an obligation of proportionality review where decisions taken by national authorities had implications for the loss of Union citizenship in individual cases.[90] Would the Court approach review of a Member State system for acquiring nationality in the same way? In *Préfet du Gers*, it emphasised that its previous case law could not be applied 'to a situation such as that in the main proceedings'.[91] But that point most likely links back to the first part of the same paragraph i.e. loss of Union citizenship as 'the automatic result of a sovereign decision made by a former Member State, under Article 50(1) TEU, to withdraw from the European Union'.[92] It was not, in other words, about the collective or systemic nature of the claim alone.[93]

Nevertheless, while the Commission's work on investor citizenship has already produced change at national level, its assertions about the reach of EU citizenship law have been challenged.[94] The Commission's stance also seems to depart from the general tenor of case law on the degree of discretion that Member States retain about how their nationality is acquired, even if that space is not an entirely EU law-free zone.[95] Both the monetisation of nationality and the genuineness of links come in many forms across the Member States, and it is not clear that the 'intrinsic connection with the freedom of movement and residence of a Union citizen'[96] that Member State nationality opens up does enough work here. A successful case would mean a shift from the necessary connection to EU law being located in the *loss* of something to being located in the *gain* of something. It would entail going beyond accepting that Member States have a legitimate interest in 'protect[ing] the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality'[97] towards significantly more intrusive assessment of *how* they do it.[98] What the Commission proposes therefore goes beyond how the Court

[89] Case C-369/90 *Micheletti*, EU:C:1992:295, para. 10.
[90] *Rottmann*, para. 56; *Tjebbes*, para. 44; *Wiener Landesregierung,* para. 59.
[91] *Préfet du Gers*, para. 62.
[92] Ibid. See similarly, AG Collins, para. 42 of the Opinion.
[93] As Swider underlines, '[t]esting proportionality of effects of general rules on individual cases is not a remedy for the structural problems with those rules. An individualized proportionality test is essentially a fail-safe mechanism – it cannot replace a solid legislative foundation of general application that should in principle lead to coherent, legitimate, and proportionate outcomes' (K Swider 'Legitimizing precarity of EU citizenship: *Tjebbes*' (2020) 57 CML Rev 1163 at 1180).
[94] E.g. M van den Brink 'Revising citizenship within the European Union: is a genuine link requirement the way forward?' (2022) 23 *German Law Journal* 79; HU Jessurun d'Oliveira 'Union citizenship and beyond', Law 2018/15, EUI Working Papers, http://hdl.handle.net/1814/58164.
[95] See e.g. AG Sharpston in Case C-34/09 *Ruiz Zambrano*, EU:C:2010:560, paras 114-115 of the Opinion; referring to Case C-200/02 *Zhu and Chen*, EU:C:2004:639.
[96] Case C-165/14 *Rendón Marín*, EU:C:2016:675, para. 75.
[97] *Rottmann*, para. 51.
[98] In support, AG Poiares Maduro had speculated that the principle of sincere cooperation 'could be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass

has thus far acknowledged the legitimacy of Member State processes that evaluate genuine links.[99] It would require the Court to articulate what the objective of reviewing the *possibility* – and not (as to date) the *impossibility* – of enjoying the rights conferred by Union citizenship actually is so that, 'by reason of its nature and its consequences', the necessary connecting factor to EU law would be persuasively established.

As a final point, it can also be recalled that ideas about direct citizenship pathways for third state nationals who can demonstrate a sufficient degree of connection to the Union, especially through long-term residence in its territory, have long been debated outside the situation of Member State withdrawal from the Union.[100] These questions are returned to in Section 5.2 below; but for present purposes, had the Court of Justice characterised Union citizenship as an autonomous status in *Préfet du Gers*, sidestepping the understanding that Member State nationality is a precondition set by Articles 9 TEU and 20 TFEU, it would have 'gone beyond judicial activism into the realms of constituent power through the transformative reconstruction of EU citizenship from a set of disparate political and economic rights into a fundamental constituent status'.[101] That is not the task of the Court of Justice.[102] At the same time, the patchy protection of third-country nationals who reside lawfully in an EU Member State should be better addressed.[103] The legal inclusion reflected and entrenched by

naturalisation of nationals of non-member States' (*Rottmann*, para. 30 of the Opinion). Another avenue to consider is the ECtHR's concern for both proportionality *and* arbitrariness in its assessment of conditions for acquisition as well as loss of nationality; see further, S O'Leary 'Nationality and citizenship: integration and rights-based perspectives' in K Lenaerts, J Bonichot, H Kanninen, C Naômé and P Pohjankosi (eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing, 2019) 51 at 53-58.

[99] Case C-221/17 *Tjebbes*, paras 35-38. Note the caution expressed by AG Mengozzi with respect the *Union* potentially breaching its responsibilities under Article 4(2) TEU, which include an obligation to respect the national identities of the Member States, should it venture too deeply into an assessment of choices made by national legislatures (EU:C:2018:572, paras 104-107 of the Opinion).

[100] See e.g. C Closa 'Citizenship of the Union and nationality of the Member States' (1995) 32 CML Rev 487; and D O'Keeffe 'Union citizenship' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley, 1994) 87. Considering these questions with respect to Brexit, see O 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.

[101] O Garner, 'Does Member State Withdrawal Automatically Extinguish EU Citizenship?' in D Kostakopoulou and D Thym (eds.), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar, 2022), 201 at 221.

[102] On the limits of case law for transforming the EU constitutional framework, see AG Sharpston in *Ruiz Zambrano*, paras 172-177 of the Opinion.

[103] Article 79(1) TFEU establishes 'fair treatment of third-country nationals residing legally in Member States' as one of the aims of the Union's common immigration policy. Article 79(2) empowers the European Parliament and Council to adopt measures in several areas, on *inter alia* 'the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification' (Article 79(2)(a)) and 'the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States' (Article 79(2)(b)). In 2020, the Commission confirmed that it would 'propose a number of measures on legal migration, which will include…a revision of the long-term residents Directive' (COM(2020) 690 final, para. 2.5). It published its proposal for a recast directive in April 2022 (COM(2022) 650 final), with the

Union citizenship sits uneasily alongside the extent of exclusion of lawfully resident third-country nationals, observing especially the limited opportunities they have to participate fully in the internal market in which they live. However, as affirmed in *Préfet du Gers*, Article 18 TFEU 'is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of third countries'.[104] The Court has also confirmed that Article 21(2) CFR, which 'corresponds to' Article 18 TFEU, 'is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of third countries'.[105]

Reflecting on the claim to EU legal protection that former Union citizens might still enjoy does not have to come at the expense of also pursuing better protection for long-term resident third-country nationals who exemplify '*present* social membership, that is, actual social ties with EU Member States'.[106] Moreover, it is already the case that not all third-country nationals are excluded equally. Different circumstances are regulated by different EU legislative measures, establishing different levels of protection within the framework of Title V TFEU.[107] A gradation of privilege also emerges from agreements that the Union has entered into with third states. Historically, for example, decisions taken by the Association Council under the EU-Turkey Association Agreement extended significant protection to Turkish nationals lawfully resident in an EU Member State,[108] producing in some circumstances the application of EU free movement law by analogy – though that approach reached limits with respect to rights connected more centrally to Union citizenship.[109] The Court has also referred to the criteria of proximity, long-standing common values and European identity

aim of reforming Directive 2003/109, 2003 OJ L16/44. For critique of the limited protection provided by that measure, see K Hamenstädt 'Expulsion and "legal otherness" in times of growing nationalism' (2020) 45 EL Rev 452; D Kochenov and M van den Brink, 'Pretending there is no Union: non-derivative quasi-citizenship rights of third-country nationals in the EU' in D Thym and M Zoeteweij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill, 2015) 65; and A Wiesbrock 'Free movement of third-country nationals in the European Union: the illusion of inclusion' (2010) 35 EL Rev 455.

[104] Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344, para. 52; confirmed in e.g. Case C-490/20 *VMA v Stolichna obshtina, rayon 'Pancharevo'*, EU:C:2021:1008.

[105] Case C-930/19 *X v Belgian State*, EU:C:2021:657, paras 50-51.

[106] M van den Brink 'The relationship between national and EU citizenship: what is it and what should it be?' in Kostakopoulou and Thym (eds.), n101, 100 at 109 (emphasis added).

[107] In particular, Article 14 of Directive 2003/109 provides for limited rights to reside in (though not to move to) another Member State. See also, the limited rights to move provided for in Article 18 of the EU Blue Card Directive (Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 2009 OJ L155/17, to be replaced from November 2023 by Directive 2021/1883/EU, 2021 OJ L382/1 and see esp. Articles 20-23 of the new measure); and Articles 21 and 22 of Directive 2014/66/ EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, 2014 OJ L157/1. See more generally, Directive 2016/801/EU on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, 2016 OJ L132/21.

[108] Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963) 1977 OJ L361/28.

[109] E.g. preserving Directive 2004/38's enhanced protection against expulsion from a Member State for Union citizens, Case C-371/08 *Ziebell*, EU:C:2011:809.

expressed in the preamble to the EEA Agreement to underline 'the special relationship between the European Union, its Member States and the EFTA States'.[110] Can the relationship between the Union and the UK be conceived as *differently* 'special' post-membership? This question is picked up in Section 5.2 below.

5.1.2. Union citizenship and voting rights

Article 127(1)(b) WA established that the voting rights conferred on Union citizens ceased for British nationals at the point of the UK's formal withdrawal from the Union on 1 February 2020. How does the situation in which EP thus found herself relate to previous case law on how national electorates are defined by the Member States?

First, *Préfet du Gers* differs from the ruling in *Delvigne*. In that case, the Court held that since Article 39(2) CFR 'corresponds to' Article 14(3) TEU, it 'constitutes the expression in the Charter of the right of Union citizens to vote in elections to the European Parliament in accordance with Article 14(3) TEU and Article 1(3) of the 1976 Act'.[111] However, since EP resided in a host State, the right to vote at issue in *Delvigne* was not directly relevant: both because freedom of movement *had* been exercised; and because the 15-year rule in the UK was classed in *Préfet du Gers* as, after 1 February 2020, a non-reviewable third state (rather than a reviewable Member State) measure.[112]

Second, with respect to non-discrimination on grounds of nationality, we saw in Section 5.1.1 that the Court affirmed in *Préfet du Gers* that Article 18 TFEU 'is not intended to apply in the case of a possible difference in treatment between nationals of Member States and nationals of third States',[113] thus providing a material distinction from the circumstances in *Eman and Sevinger*. That case concerned entitlement to compensation because of the Netherlands' refusal to include the applicants on its register of electors for the European Parliament because they resided in Aruba – which, for the purposes of EU law, appears in the list of 'overseas countries and territories' (OCTs) annexed to the TFEU. The Court confirmed that 'the OCTs are subject to the special association arrangements set out in Part Four of the Treaty (Articles [198-204 TFEU]) with the result that, failing express reference, the

[110] *Ruska Federacija v IN*, para. 50.
[111] Case C-650/13 *Delvigne*, paras 41 and 44.
[112] Remembering that the national restrictions challenged in *Devigne* were in any event considered to be proportionate by the Court of Justice (ibid, paras 46 ff.), the 15-year rule would not necessarily have been reviewed any differently had it been challenged pre-Brexit; especially as it already survived Strasbourg review (*Shindler v United Kingdom* (2013) 58 EHHR 9) with respect to Article 3 of Protocol No 1 ECHR, which provides that '[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.
[113] *Préfet du Gers*, para. 78.

general provisions of the Treaty do not apply to them'.[114] For that reason, Member States 'are not required to hold elections to the European Parliament there' and neither Article 22(2) TFEU nor the measures adopted to implement it 'apply to a citizen of the Union residing in an OCT who wishes to exercise his right to vote in the Member State of which he is a national'.[115]

The Court further confirmed that since the Treaty provisions on Union citizenship 'do not confer on citizens of the Union an *unconditional* right to vote and to stand as a candidate in elections to the European Parliament', a residence criterion 'does not appear, in principle, to be inappropriate to determine who has th[at] right' within a Member State.[116] Such conditions must be assessed in light of 'the principle of equal treatment or non-discrimination, which is one of the general principles of [Union] law, requir[ing] that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'.[117] Most importantly for present purposes, the relevant comparison in *Eman and Sevinger* was between a Netherlands national residing in Aruba and a Netherlands national 'residing in a non-member country. They have in common that they are Netherlands nationals who do not reside in the Netherlands. Yet there is a difference in treatment between the two, the latter having the right to vote and to stand as a candidate in elections to the European Parliament held in the Netherlands whereas the former has no such right', meaning that '[s]uch a difference in treatment must be objectively justified'.[118] As a result, EU equal treatment review was applied to a difference in treatment not between Member State nationals and third state nationals; but between two cohorts of one Member State's own nationals. The case therefore represents an application of EU equal treatment law within a Member State beyond the typical differentiating factor of having exercised free movement.[119] In that sense, *Eman and Sevinger* foreshadowed *Rottmann* and *Ruiz Zambrano*. However, it also highlights that non-discrimination only goes so far: in common with determination of nationality and thus access to Union citizenship in the first place, *Eman and Sevinger* shows that significant differences are actively tolerated *across* the Member States in EU citizenship law.[120]

However, the Court also recalled in *Préfet du Gers* 'the *right* of Member States to grant, under conditions which they lay down in their national law, a right to vote and to stand as a candidate to

[114] Case C-300/04 *Eman and Sevinger*, EU:C:2006:545, para. 46.
[115] Ibid paras 47 and 53.
[116] Ibid paras 52 and 55 (emphasis added).
[117] Ibid para. 57.
[118] Ibid para. 58.
[119] Like the equal treatment analysis applied to the static (but dual national) children in Case C-148/02 *Garcia Avello*, EU:C:2003:539.
[120] i.e. 'the question of who is considered a citizen enjoying the democratic political right to vote is answered differently from one Member State to another' (L Besselink '*Spain v UK, Eman and Sevinger, Sevinger and Eman v Netherlands*' (case comment) (2008) 45 CML Rev 787 at 801).

nationals of a third State residing in their territory'.[121] *Préfet du Gers* thus doubled down on the oddly discordant note added to EU citizenship law by *Spain v UK* when the language in which the 'inseparable and exclusive link' between Member State nationality and Union citizenship was expressed, on the one hand, is compared with the fact that Member States are free to extend a right that is strongly associated with Union citizenship to certain third-country nationals, on the other. The circumstances of *Spain v UK* – to which the Court did not refer in *Préfet du Gers* – were admittedly highly specific given the UK's relationship to Gibraltar and the ECtHR judgment in *Matthews v UK* compelling the UK to expand its electorate.[122] Even so, the openness of the Court of Justice to voters other than Union citizens participating in European Parliament elections was pretty remarkable: in particular, the finding that 'while citizenship of the Union is destined to be the fundamental status of nationals of the Member States…*that statement does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union*'.[123]

The key condition then follows i.e. 'certain persons who have *a close link* with [the Member State in question] without however being nationals of that State or another Member State'.[124] In this way, the Court decoupled the *status* and *rights* associated with Union citizenship, 'making the notion of citizenship in a *substantive* sense independent from the *formal qualification* of nationality'.[125] Notwithstanding the 'late colonial' and 'imperial' context of *Eman and Sevinger* and *Spain v UK*, Besselink nevertheless framed the reasoning of the Court in more general terms, highlighting that '[t]he special links which certain residents have with a Member State can be a legitimate justification to extend political rights to non-nationals'.[126] So, yes, *Spain v UK* concerned very specific circumstances and relationships. But so does former membership of the Union. This argument is taken further in Section 5.2 below.

5.1.3. Union citizenship and host State naturalisation

A basic objective – and significant achievement – of Union citizenship is that it displaces the impetus towards naturalisation in a host State in order to be appropriately integrated and protected there.

[121] *Préfet du Gers*, para. 82 (emphasis added).
[122] *Matthews v UK* (1999) 28 EHRR 361. Whether *Spain v UK* remains good law following the Lisbon Treaty's addition that '[c]itizens are directly represented at Union level in the European Parliament' (Article 10(2) TEU) might also be considered: see further, M Dougan 'The Treaty of Lisbon: winning minds, not hearts' (2008) 45 CML Rev 617 at 634-635.
[123] *Spain v United Kingdom*, EU:C:2006:543, para. 74 (emphasis added). For Besselink, this dimension of the case means that 'the Court had to qualify its eschatological doctrinal formula of EU citizenship as "destined to be the fundamental status of nationals of the Member States"' (n120, 804).
[124] *Spain v United Kingdom*, para. 76 (emphasis added).
[125] Besselink, n120, 804 (emphasis added).
[126] Ibid 804-805, emphasis added.

Not in every respect: to participate in national elections, naturalisation in a host State is often the only real option that a resident Union citizen has. However, the Commission has strongly resisted this perspective on the basis that 'promoting naturalisation in the host country as a means of increasing political rights would be at odds with the role of EU citizenship as the primary vehicle for promoting respect for national identity and diversity, and ensuring equality of treatment irrespective of nationality'.[127] It has also stressed that naturalisation 'disregards the complexity of intra-EU mobility. Individuals may reside in several countries for longer or shorter periods— eventually even returning to their home country. They could not be expected to acquire multiple or successive nationalities solely to maintain political rights'.[128]

A note of disparity arguably emerges from *Lounes*, however, where the Court held that 'the situation of a national of one Member State…who has exercised her freedom of movement by going to and residing legally in another Member State, cannot be treated in the same way as a purely domestic situation merely because the person concerned has, while resident in the host Member State, acquired the nationality of that State in addition to her nationality of origin'.[129] It considered that to deprive a Union citizen of their rights under Article 21 TFEU in such a situation would undermine that provision's effectiveness.[130] Host State naturalisation was characterised as the pinnacle of successful free movement in the sense that Union citizens who acquire the nationality of the host State 'intend to become permanently integrated' there.[131] It would therefore be 'contrary to the underlying logic of gradual integration that informs Article 21(1) TFEU to hold that such citizens, *who have acquired rights under that provision as a result of having exercised their freedom of movement*, must *forego* those rights – in particular the right to family life in the host Member State – because they have sought, by becoming naturalised in that Member State, *to become more deeply integrated* in the society of that State'.[132]

The applicant in *Lounes* retained the nationality of her Member State of origin and it is not clear whether her continuing dual nationality shaped the conclusion that a Union citizen in her situation 'must be able to continue to enjoy, in the host Member State, the rights arising under that provision, after they have acquired the nationality of that Member State in addition to their nationality

[127] Communication from the Commission addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement, COM(2014) 33 final, para. 5.1
[128] Ibid.
[129] Case C-165/16 *Lounes*, EU:C:2017:862, para. 49.
[130] Ibid para. 53; in AG Bot's words, it would 'would annihilate the effectiveness of the rights which she derives from Article 21(1) TFEU' (EU:C:2017:407, para. 86 of the Opinion).
[131] *Lounes*, para. 57. AG Bot described the acquisition of host State nationality as taking 'integration in the host Member State to its logical conclusion' (para. 85 of the Opinion). See further, V Reveillere 'Family rights for naturalised EU citizens: *Lounes*' (2018) 55 CML Rev 1855 at 1870-1874; adding, however, that '[t]his Europeanization is nonetheless limited' since the Court 'does not recognize a right to be naturalized' (1873).
[132] *Lounes*, para. 58 (emphasis added).

of origin and, in particular, must be able to build a family life with their third-country-national spouse'.[133] The judgment does seem more concerned, in a broader sense, with recognising – with rewarding – a citizen's naturalisation in the host State by preserving for her the benefit of rights she 'acquired' there beforehand.[134] EP did not become a French national notwithstanding decades of living there,[135] raising the question of how her integration in the host State should be evaluated. The Court was brief on this point, just observing very factually that EP had 'not applied for or obtained French nationality'.[136] There is no reference to integration in the host State – either with respect to EP's integration specifically or as an element of EU citizenship law generally. In contrast, Advocate General Collins highlighted the naturalisation pathway should EP wish to recover rights lost after Brexit:

> EP appears to assert that the links that she forged with France at a time when she was a Member State national prevent her from being deprived of Union citizenship. However, … notwithstanding her long residence in France and her marriage to a French national, EP has chosen not to acquire French nationality. According to the French Government, EP could apply to do so as she is married to a French national. EP need thus do no more than make the requisite application to the French authorities to acquire French nationality, which would automatically confer Union citizenship upon her. It is, to say the least, paradoxical that whilst EP relies exclusively upon her links with France in order to sustain her claim that she is entitled to retain Union citizenship, she simultaneously declines to take the one step that could lead to her retaining her Union citizenship, namely the submission of an application for French nationality.[137]

That cool assessment captures something vital about Union citizenship that only comes properly into focus when it is lost: that it renders, in large part, decisions about changing nationality as a *choice* – as an opportunity or privilege rather than as an obligation or necessity.[138] But that understanding, shared by the Commission with respect to voting in national elections, stands then in contrast to the

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[133] Ibid, para. 60.

[134] As Reveillere puts it, conceiving naturalisation 'as the prolongation of free movement' (n131, 1877). However, O'Leary draws attention to the less appealing side of the Court's approach, since the judgment 'could be read as reducing EU citizenship to a mere vehicle for the protection of the rights of "free movers"' (n98, 62).

[135] Considering some time ago the case for naturalisation process reforms to be adapted specifically for the nationals of other EU Member States, see A Evans 'Nationality law and European integration' (1991) 16 EL Rev 190; and Closa, n100. In the context of Brexit specifically, see D Kostakopoulou '*Scala civium*: citizenship templates post-Brexit and the European Union's duty to protect EU citizens' (2018) 56 *Journal of Common Market Studies* 854 at 859-862.

[136] *Préfet du Gers*, para. 25.

[137] AG Collins in *Préfet du Gers*, para. 33 of the Opinion.

[138] See F Strumia 'Individual rights, interstate equality, state autonomy: European horizontal citizenship and its (lonely) playground from a Trans-Atlantic perspective, in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP, 2017), 615 at 632: '[a]s a result of EU citizenship, nationals of an EU Member State continue to belong to their Member State of nationality even when, in their capacity as European citizens, they begin to partake in belonging to a different Member State of transit or permanent residence through the guarantee of non-discrimination'. See also, S Coutts 'Citizens of elsewhere, everywhere and ... nowhere? Rethinking Union citizenship in light of Brexit' (2018) 69 N Ir Legal Q 231.

ethos of *Lounes* in the sense that *choosing* naturalisation, the ultimate expression of host State integration, secures continuing protection – beyond that extended to other host State nationals.[139]

Advocate General Collins did refer briefly to the order for reference, which indicated that EP had 'not acquired French nationality by marriage because, as a former official in the then Foreign and Commonwealth Office of the United Kingdom, she took an oath of allegiance to the Queen of England'.[140] Whatever the constraints on EP in terms of acquiring French nationality, the tension between conceiving of naturalisation as both overcome by and, at the same time, a significant protective catalyst of Union citizenship rights will need to be confronted, especially when it is remembered that – as illustrated so sharply by the circumstances in *Rottmann* and *Wiener Landesregierung* – acquiring the nationality of a Member State can still demand leaving other nationalities behind and even temporary statelessness. The Court of Justice has accepted the legitimacy of protecting the special relationship signified by Member State nationality and therefore of 'tak[ing] the view that the undesirable consequences of one person having multiple nationalities should be avoided'.[141] However, discussing the same point with respect to *Tjebbes,* O'Leary challenges the Court's acceptance of that objective 'without probing further' since it is 'slightly odd that a judgement on EU citizenship does not recognise that one of the products of the free movement of Union citizens in an area of freedom, security and justice may be precisely a generation of Union citizens with multiple nationalities, allegiances and genuine links. While such EU citizens are not the norm, they are a reality'.[142]

5.2 *Préfet du Gers* and the status of Union citizenship

One of the problems with confining the questions that *Préfet du Gers* provoked within the boundaries of Union citizenship is that it is too easy to have recourse to the narrow approach taken in the case itself: to emphasise the constitutive link between Member State nationality and Union citizenship and leave it at that. The Opinion and the ruling of the Court can be disagreed with in terms of the narrow conception of Union citizenship suggested, but they are not 'wrong' in a technical sense. There are some incomplete and therefore tenuous passages – for example, not distinguishing the implications

[139] Contra AG Poiares Maduro's depiction of the 'miracle' of Union citizenship in para. 23 of his Opinion in *Rottmann*: that 'there can exist (in fact, does exist) a 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)'.
[140] AG Collins in *Préfet du Gers*, para. 14 of the Opinion.
[141] *Wiener Landesregierung*, para. 54.
[142] O'Leary, n98, 78 at fn93. See also, Swider, n93, 1171-1173.

of *Spain v UK* when declaring that voting rights are 'reserved solely to Union citizens, under Article 20(2)(b) TFEU, Article 22 TFEU and Article 40 of the Charter'.[143] More generally, though, much more was expected, especially in light of the Court's recognition in *Wightman* that 'since citizenship of the Union is intended to be the fundamental status of nationals of the Member States… any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens'.[144] Brexit thus rightly stimulated intensive reflection on what Union citizenship is – and what it should be.[145] For some, it provided an opportunity for the Court to proclaim Union citizenship as an autonomous status;[146] exploiting how the Treaty expresses it as an 'additional' citizenship, for example,[147] or by conceiving it as a fundamental right.[148] The Union generally and/or the Court more specifically could, alternatively, have attributed at least some degree of autonomy by developing a citizenship-adjunct status for Brexit-specific protection.[149] And even if is accepted that Union citizenship is indeed conferred on Member State nationals only,[150] it has been argued that it could nevertheless have rationalised post-membership protection of rights for British nationals already residing in EU27 as 'former Union citizens', irrespective of what was agreed under the Withdrawal Agreement or the Trade and Cooperation Agreement;[151] potentially framed around protection of minority rights.[152]

[143] *Préfet du Gers*, para. 99.
[144] *Wightman*, para. 64.
[145] '[A]fter all, what is the value of a status which can be erased, literally, at the stroke of a pen?' (Spaventa, n18, 589).
[146] Debating the interconnectedness of Member State nationality and Union citizenship, see the range of views collected in L Orgad and J Lepoutre (eds) 'Should EU citizenship be disentangled from Member State nationality?', RSCAS 2019/24, EUI Working Papers, http://hdl.handle.net/1814/62229; advancing an argument about 'Eurozenship' in that collection, see D Kostakopoulou 'Who should be a citizen of the Union? Toward an autonomous European Union citizenship'.
[147] E.g. CM Rieder 'The withdrawal clause of the Lisbon Treaty in the light of EU citizenship: between disintegration and integration' (2013) 37 Fordham Int'l LJ 147.
[148] E.g. Roeben et al, n76.
[149] E.g. advocating a 'a special EU protected citizen status', see Kostakopoulou, n135. Discussing various calls for a status of 'associate citizenship', see van der Mei, n16, 452-455; and M van den Brink and D Kochenov 'Against associate EU citizenship' (2019) 57 *Journal of Common Market Studies* 1366. Some (unsuccessful) European Citizens' Initiatives raised similar ideas: see Garner, n101, 209-210.
[150] E.g. van der Mei, n16; van den Brink, n106; and Garner, n101. See earlier e.g. HU Jessurun d'Oliveira 'Nationality and the European Union after Amsterdam' in O'Keeffe and Twomey, (eds) n101, 395.
[151] Spaventa, n18, arguing in a nuanced way that Union citizenship 'is a status that might be lost upon withdrawal of the Member State of nationality, but it is a status that will remain relevant to those citizens who have exercised their Treaty rights before withdrawal' (604). Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ 2020 L444/14.
[152] Strumia, n13, esp. at 114: '[o]f course, this does not mean that the EU could ever contradict or disregard the results of a national political consultation, or the ensuing position of the relevant Member State. But it may mean that in shaping its negotiation with a withdrawing Member State it has to internalize the interests of its unwillingly exiting citizens'.

Union citizenship could, in other words, have played a greater part in animating legal dimensions of the 'legacy' of the UK's membership of the Union.[153] But it is just as important to ask: can that legal legacy be animated *only* through Union citizenship? Both the Withdrawal Agreement and the Court of Justice in *Préfet du Gers* ultimately upheld the primacy of the connection between Member State nationality and Union citizenship as a status – depicted so strikingly in a heading used by Advocate General Collins in his Opinion: 'Citizenship – a Member State competence'. Articles 9 TEU and 20 TFEU do not really allow for any other interpretation as regards the holding of the status *per se*. It is also important to acknowledge once again that neither Article 50 TEU nor the Withdrawal Agreement 'contemplate[s] any exception to the rule that, upon its withdrawal from the European Union, the United Kingdom ceased to be a Member State, with all of the consequences that follow for British nationals'.[154]

In terms of lessons that can be learned from Brexit with respect to the Union's protection of its own former citizens, adjustments to the Article 50 process might need to be considered – drawing inspiration, for example, from the rule of law process in Article 7(3) TEU, which requires that 'the Council shall take into account the possible consequences of such a suspension [of voting rights in the Council] on the rights and obligations of natural and legal persons'. Such a requirement would not disturb the privilege accorded to political negotiation across the Article 50 TEU process – it would leave intact, for example, the possibility of a withdrawal not premised on an agreement between the Union and the withdrawing State. But it would, at least, amplify the basic importance of consideration of and accountability to Union citizens in such circumstances.

Short of Treaty amendment, the wider problem is that the legal implications – and responsibilities – flowing from a State's withdrawal from the Union are so much more complex than the formalistic reasoning in *Préfet du Gers* suggests. In what follows, deeper legal responsibilities are developed, first, by returning in more detail to how the status and the protection of Union citizenship are already severed in the case law (Section 5.2.1); second, through the requirement of a close or special relationship for that purpose and an argument that (former) Union membership establishes necessary special-ness (Section 5.2.2); and third, by reflecting on the extent to which the 'legal heritage' that *Van Gend en Loos* constructed should be protected within the Article 50 TEU process (Section 5.2.3).

[153] Editorial Comments, 'Polar exploration: Brexit and the emerging frontiers of EU law' (2018) 55 CML Rev 1 at 15, developing the idea of 'binding legal legacy effects' produced by a Member State's membership of – and sustaining after its withdrawal from – the Union.

[154] AG Collins in *Préfet du Gers*, para. 60 of the Opinion. See similarly, para. 75 of the Opinion ('no response other than the exclusion of British nationals from the definition of Union citizens was possible whilst remaining within the scope of the Treaties').

5.2.1. Disconnecting the status and the rights of Union citizenship

For Advocate General Collins in *Préfet du Gers*, the status of Union citizenship seems *constitutively* connected to the rights it confers since he considered that 'an individual cannot seek to rely upon his or her British nationality to assert a claim *either to Union citizenship or to its benefits*'.[155] In the judgment of the Court, however, while loss of voting rights was deemed an 'automatic' consequence of the UK's sovereign decision to leave the EU, that outcome was attributed in large part to the express terms of Articles 20(2)(b) and 22 TFEU (which confer the right on Union citizens) and the Withdrawal Agreement.[156] In its more general remarks, the Court was nuanced, stating that 'possession of the nationality of a Member State is an essential condition for a person to be able to acquire and retain *the status* of citizen of the Union and *to benefit fully* from the rights attaching to that status'.[157]

The fact that a former Union citizen does not benefit *fully* from the rights attached to the status of Union citizenship enables still benefitting from them *to some extent* – as represented by the rights protected in the Withdrawal Agreement itself. Severability of status and rights was introduced in Section 5.1.2 above since voting rights – even for European Parliament elections – can be conferred on third-country nationals who have close links with an EU Member State: in other words, they are not 'reserved'[158] for Union citizens even if *conferred* on Union citizens by the TFEU. In *Spain v UK*, conferring voting rights on third-country nationals was permitted as an option, not conceived as an *obligation*. Can such an obligation be extracted from the close links that British nationals residing in a host State had forged before Brexit? And even if an obligation cannot be established for voting rights specifically, are other aspects of the Brexit settlement vulnerable to legal challenge on this basis?

5.2.2. Different dimensions of 'special' links and relationships

No conception of acquired rights or legitimate expectations has been recognised in Brexit-relevant case law to date.[159] But I would argue that the ecosystem framed by and realised through EU law

[155] Ibid para. 37 of the Opinion (emphasis added).
[156] *Préfet du Gers*, para. 63 ('it must be pointed out that there is nothing in that agreement to suggest that it confers such a right on those nationals').
[157] Ibid para. 57 (emphasis added; and confining, in the same paragraph, the implications of the loss of Member State nationality to 'the automatic loss of his or her *status as a citizen* of the Union').
[158] Ibid para. 70.
[159] In *Préfet du Gers,* AG Collins dismissed this possibility abruptly: '[a]ny breach of legitimate expectations that EP may wish to ventilate concerning her status as a Union citizen is to be addressed to the United Kingdom, which has withdrawn from the European Union, and not to either the French authorities or to the European Union' (para. 44 of the Opinion). While not in the context of withdrawal from the Union, note more generally AG Tanchez in *TopFit and Biffi* on the theme of 'the general principle of respect for acquired rights' (Case C-22/18, EU:C:2019:181, paras 81ff. of the Opinion). Cf. explicit provisions on acquired rights in other

demands deeper reflection on how and the extent to which former Member State nationals should be protected than we can derive from Union citizenship and the legal bases of Articles 9 TEU and 20 and 21 TFEU in isolation, given the formalism of *Préfet du Gers*.

In that light, it is especially significant that the Court of Justice has recognised that the situation of Icelandic nationals is '*objectively comparable with* that of an EU citizen' in certain circumstances.[160] That finding underlines the extent to which the protection, if not the status, of Union citizenship is extend-able beyond Member State nationality.[161] Specifically, *IN* extended the *Petruhhin* case law, which is built on Article 21 TFEU, to Icelandic nationals in the context of the Agreement on surrender concluded between the EU, Iceland and Norway.[162] The preliminary reference – sent by a Croatian court following the arrest of a dual Icelandic and Russian national, subject to an international wanted persons notice issued by Russian authorities, at the border between Croatia and Slovenia – asked whether the presumption in favour of utilising a European arrest warrant over extradition to a third State developed in *Petruhhin* could be extended to Icelandic nationals via the Agreement on surrender.[163] Notwithstanding the view of Advocate General Tanchev that 'the principle of mutual trust, as it has come to evolve in the European Union since the Lisbon Treaty of 2007, has no application in EEA law',[164] the Court drew from the criteria of proximity, long-standing common values and European identity in the EEA Agreement's preamble to underline 'the special relationship between the European Union, its Member States and the EFTA States'.[165]

On the 'special relationship' between Iceland and the Union specifically, which 'goes beyond economic and commercial cooperation', the Court observed that Iceland is a party to the EEA Agreement, applies the Schengen *acquis*, participates in the common European asylum system, and is a party to the Agreement on surrender with the Union.[166] That is why the situation of an Icelandic national is '*objectively comparable with* that of an EU citizen';[167] and since the provisions of the Agreement on surrender 'are very similar to the corresponding provisions' of the Framework Decision on the European arrest warrant, relevant Union citizenship case law '*must* be applied' to Icelandic

agreements e.g. Article 23 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, 2009 OJ L353/71.

[160] *Ruska Federacija v IN*, para. 58 (emphasis added).

[161] See generally, CNK Franklin and HH Fredriksen 'Differentiated citizenship in the European Economic Area' in Kostakopoulou and Thym (eds), n101, 297.

[162] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, OJ 2006 L292/2. Case C-182/15 *Petruhhin*, EU:C:2016:630.

[163] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, 2002 OJ L190/1.

[164] AG Tanchev in *Ruska Federacija v IN*, EU:C:2020:128, para. 97 of the Opinion.

[165] *Ruska Federacija v IN*, para. 50.

[166] Ibid. para. 44.

[167] Ibid para. 58 (emphasis added).

nationals 'by analogy'.[168] Fredriksen and Hillion have thus argued that the Court created a new 'fundamental status' in EU law – not the fundamental status of Union citizenship, which is inherently tied to Member State nationality,[169] but one conceived for EEA relations specifically and premised on extending the internal market 'in the most complete way possible'.[170] Conversely, the *IN* ruling provokes us to ask what remains *particularly* special about and therefore reserved for Union citizenship[171] – and, on the other hand, what can be extended 'by analogy' to the nationals of third states with special connections to the Union.

In the first instance, it must be accepted that the current relationship between the EU and the UK captured by the TCA bears little resemblance to the template for specialness outlined in *IN* with respect to Iceland.[172] So we must look elsewhere for a special connection between British nationals and the Union. To find it, I would invoke 'the very specialness of EU law, and the corollary specialness of having been, once, a committed part of the EU's distinctive legal structure'.[173] In that light, because of the emphasis in *Van Gend en Loos* on individuals as well as States and the fact that rights extended to the former 'become part of their legal heritage', it can be argued that the EU legal order requires – on its own terms and irrespective of Union citizenship as a status[174] – richer consideration of the

[168] Ibid. paras 74-75 (emphasis added).
[169] Beginning with *Grzelczyk*, para. 31.
[170] HH Fredriksen and C Hillion 'The 'special relationship' between the EU and the EEA EFTA States – free movement of EEA citizens in an extended area of freedom, security and justice: Case C-897/19 PPU, *Ruska Federacija v. I.N*.' (2021) 58 CML Rev 851 at 869-870. They point out, though, that it is not clear whether Schengen and/or the surrender Agreement were equally important in the Court's reasoning.
[171] Anticipating this three decades ago, see Evans, n135, 214-215: '[t]he need for a more liberal approach to conferment of the rights of Community citizenship is rendered all the more pressing by developments concerning the European Economic Space, which envisage extension of freedom of movement and the prohibition of discrimination to benefit nationals of EFTA countries. Implementation of such plans would mean that persons lacking the nationality of a Member State of the Community would enjoy the protection of the very principles which lie at the heart of Community citizenship'.
[172] Cf. the preamble to the EEA Agreement ('Reaffirming the high priority attached to the privileged relationship between the European Community, its Member States and the EFTA States, which is based on proximity, long-standing common values and European identity; … Considering the objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties; Determined to provide for the fullest possible realization of the free movement of goods, persons, services and capital within the whole European Economic Area, as well as for strengthened and broadened cooperation in flanking and horizontal policies') with the preamble to the TCA ('Recognising the importance of global cooperation to address issues of shared interest, … seeking to establish clear and mutually advantageous rules governing trade and investment between the Parties, … Considering that in order to guarantee the efficient management and correct interpretation and application of this Agreement…, as well as compliance with the obligations under those agreements, it is essential to establish provisions ensuring overall governance'). See further, C Barnard and E Leinarte 'Mobility of persons' in F Fabbrini (ed.) *The Law & Politics of Brexit Volume III: The Framework of New EU-UK Relations* (OUP, 2021) 134.
[173] Editorial Comments, n153, 15.
[174] That former Member State nationals are also former Union citizens is not irrelevant, but the argument does not depend on Union citizenship in a constitutive sense. Drawing protection more directly from Union

position and protection of former Member State nationals than the reciprocity-oriented Withdrawal Agreement fully achieved.[175] As emphasised above, at the beginning of Section 5.2, this would not go so far as to prevent the sovereign decision of a Member State to withdraw from the Union or the prospect of withdrawal without an agreement, which is built into Article 50 TEU itself – though it might provoke us to rethink the latter with respect to protection of citizens in a future Treaty amendment process and it can still require, already, that the interests of former Member State nationals must most seriously be considered at the brink of that outcome. The basic sovereign decision is not, in other words, undermined; but it can be tempered because membership establishes responsibilities that are not automatically or immediately extinguished.

But even rights that constitute a Member State national's legal heritage necessarily change through withdrawal from the Union: they *must* change – withdrawal does mean withdrawal. What does that mean for the circumstances in *Préfet du Gers*, but also for assessing the Withdrawal Agreement beyond the specifics of that case?

5.2.3. 'Legal heritage' and Article 50 TEU: delimiting the boundaries of responsibility

Van Gend en Loos constructed the 'new legal order' of the European Union in large part through the innovation that its subjects 'comprise not only Member States but also their nationals'; as a result, EU law 'not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community'.[176] Union citizenship rights are obviously 'expressly granted by the Treaty'. However, as *Préfet du Gers* underlines, they are granted only to persons 'holding the nationality of a Member State'. With respect to 'obligations which the Treaty imposes in a clearly defined way', there is absolutely nothing about citizens or citizenship in Article 50 TEU. Thus, the protection under EU law of the individual who is a former Union citizen is essentially constructed and given effect through the conclusion of a withdrawal agreement. The Agreement concluded for Brexit rebuffs any idea of the status of Union citizenship being retained by British nationals while, at the same time, setting out and providing a framework for

citizenship to argue that Directive 2004/38 could have continued to apply to British nationals by analogy, including in the event of a 'no deal' Brexit, see e.g. Spaventa, n18.

[175] As Roeben et al have expressed it, '[t]he life choices of individuals based on Union citizenship and the EU legal order can ultimately be protected only by the EU' (n77, 458). See differently, van den Brink and Kochenov, n149, 1374 ('[t]he EU should hold firm on the demand of reciprocity during negotiations in order to incentivise the UK to offer a favourable free movement regime for EU citizens').

[176] *Van Gend en Loos*. Developing an 'obligation to negotiate' from similar principles in a different context, see D Edward 'Scotland's position in the European Union' (2013/2014) 1 *Scottish Parliamentary Review* 1.

protecting the post-Brexit rights of both EU nationals residing in the UK and British nationals residing in EU27 by the end of the transition period.

The fact that negotiation of that settlement was hinged to reciprocity, on both the UK and EU sides attracted criticism; as have the uneven effects of the Agreement in practice.[177] The European Council affirmed the significance of Union citizenship and of protecting Union citizens in its April 2017 guidelines for Brexit negotiations:[178] in terms of how those guidelines were framed;[179] how the negotiations were structured;[180] and how the objective of securing an 'orderly withdrawal' from the Union would be achieved.[181] However, while paragraph 8 of the guidelines acknowledged that 'safeguard[ing] the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union w[ould] be the first priority for the negotiations', it also stated that this would be actually achieved only on the basis of '[a]greeing reciprocal guarantees' with the UK (emphasis added).[182] The central emphasis on ensuring an 'orderly withdrawal' – conceived by the European Council; articulated in the preamble of the Agreement; and affirmed by the Court of Justice in *Wightman* – is certainly a valid systemic concern, but it arguably tilted the three-sided constitutional balance of the EU legal order per *Van Gend en Loos* too strongly in favour of the Union and the Member States (including the UK).[183]

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[177] E.g. A Łazowski 'When c*ives europae* became bargaining chips: free movement of persons in the Brexit negotiations' (2018) 18 *ERA Forum* 469; C O'Brien, 'Between the devil and the deep blue sea: vulnerable EU citizens cast adrift in the UK post-Brexit' (2021) 58 CML Rev 431; and E Spaventa 'Brexit and the free movement of persons: what is EU citizenship really about?' in N Nic Shuibhne (ed.) *Revisiting the Fundamentals of the Free Movement of Persons in EU Law*, forthcoming (OUP, 2023).

[178] European Council (Art.50) guidelines for Brexit negotiations, 29 April 2017, https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/#.

[179] E.g.'the Union's overall objective in these negotiations will be to preserve its interests, those of its citizens, its businesses and its Member States'; '[c]itizens who have built their lives on the basis of rights flowing from the British membership of the EU face the prospect of losing those rights'; and '[t]hroughout these negotiations the Union will maintain its unity and act as one with the aim of reaching a result that is fair and equitable for all Member States and in the interest of its citizens'.

[180] Confirming in para. 4 that one of two key aims of the first phase of the negotiations was to 'provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union'.

[181] Observing in para. 8 that '[t]he right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people'.

[182] Paragraph 8 concluded by providing that '[s]uch guarantees must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence. Citizens should be able to exercise their rights through smooth and simple administrative procedures'. The legitimacy of reciprocity was highlighted in *Préfet du Gers* by both the Court (paras 73-74) and AG Collins (paras 72-74 of the Opinion).

[183] Ironically, signals that reciprocity might not necessarily have blocked the protection of individuals in the case of a 'no deal' Brexit were evident in the negotiations on the UK side: see e.g. Department for Exiting the European Union 'Citizens' Rights - EU citizens in the UK and UK nationals in the EU', Policy Paper, 6 December 2018 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790570/Policy_Paper_on_citizens_rights_in_the_event_of_a_no_deal_Brexit.pdf) esp. para. 4 ('To remove any

In many respects, the Withdrawal Agreement does ensure far-reaching protection of the rights of both British nationals residing in EU27 and Union citizens residing in the UK at the end of the transition period (i.e. on 31st December 2020). Fundamentally, it mirrors the framework of Directive 2004/38, which means that criticisms about either exclusion from or the quality of protection provided by the Withdrawal Agreement can apply in large part to the Directive itself.[184] It also means that rights *not* protected by the Agreement connect more directly to EU primary law and therefore, arguably, more to the *status* of Union citizenship – mainly, alongside the voting, consular protection and political rights based on Articles 22-24 TFEU, residence rights for third-country national family members in a Union citizen's home State based on Article 20 TFEU and *Ruiz Zambrano*, and rights that manifest in a Union citizen's home State following the exercise of previous free movement under Article 21 TFEU.[185] These exclusions are ultimately political choices: recall, in particular, Advocate General Collins remarking not that voting rights were beyond the remit of the Withdrawal Agreement in legal terms, as an un-shareable core of Union citizenship; but rather that 'the United Kingdom did not seek to ensure that British nationals residing in the European Union enjoyed political rights after its withdrawal in exchange for the conferral of reciprocal rights upon Union citizens residing in the United Kingdom'.[186] But there are clearly significant legal complexities involved in somehow isolating citizenship-specific aspects of freedom of movement, for example – something faced already in the EEA;[187] serious practical difficulties about systematically extending *Rottmann* review for all individual effects produced by the application of the Agreement in practice; and knotty logistical questions about trying to sustain freedom of movement for some but not all British nationals into the future – where would the 'right' lines be drawn? In that sense, the broad conclusion reached in Section 5.1 above can be restated: in the *Préfet du Gers* case itself, the outcome was right; the exclusion of voting rights both for the transition period specifically and more generally thereafter probably falls within the legitimate space of political discretion in the sense that legal review would not impose a different choice.

At the same time, even the most generous review of the Agreement cannot overlook the challenges caused by instituting processes of residence validation at the scale that Brexit inevitably required,[188] or Agreement anomalies that significantly diminish the degree of protection that *might*

ambiguity about their future, the UK Government wants to reassure EU citizens and their family members living in the UK that they are welcome to stay in the UK in the unlikely event of a 'no deal' scenario. The Government is adopting an approach based on the Withdrawal Agreement'). For a different view, highlighting the political importance of reciprocity for the Union, see van den Brink and Kochenov, n149, 1374

[184] See Dougan, n8, 235-238.

[185] See e.g. Case C-673/16 *Coman,* EU:C:2018:385.

[186] AG Collins in *Préfet du Gers,* para. 73 of the Opinion.

[187] See generally, Franklin and HH Fredriksen, n161.

[188] On the Agreement more generally, see M Dougan 'So long, farewell, auf wiedersehen, goodbye: the UK's withdrawal package' (2020) 57 CML Rev 631; and S Peers, 'The end – or a new beginning? The EU/UK withdrawal agreement' (2020) 39 *Yearbook of European Law* 122.

have been extended. Two examples illustrate the latter point,[189] and they deliberately concern the effectiveness and enforcement of rights rather than choices about included/excluded rights *per se* to avoid the legal, practical, and logistical challenges indicated above as well as to delimit the extent to which a legal 'heritage' can define future protection post-membership. First, while Part Two of the Agreement attracts comparably stronger enforcement[190] and regulatory[191] mechanisms at Union level, it remains the case that the principles of EU citizenship law that will apply to any disputes that might arise remain frozen in time at the end of the transition period and that the preliminary reference option will end.[192] The political reasons for this enforcement infrastructure are obvious, but so is the inevitable divergence of national/UK and EU understandings of individual rights over time; bringing about the very 'asymmetry' in protection that the Court cautioned against in *Préfet du Gers.*[193]

Second, and perhaps most fundamentally, Article 18(1) WA provides that '[t]he host State *may require* Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status *which confers the rights* under this Title'. As the Commission has affirmed, Article 18(1) thus 'stipulates that the host State has the choice to operate a *constitutive* residence scheme'.[194] This strikingly permissive concession to national input contrasts directly with EU citizenship law, which underlines that any national procedures and/or administrative formalities are declaratory and not constitutive of EU rights.[195] Instead, Article 18(1) WA aligns with similar portals to

[189] See more comprehensively, O'Brien, n178; and E Spaventa 'The rights of citizens under the Withdrawal Agreement: a critical analysis' (2020) 45 EL Rev 193. Focusing on procedural gaps in enforcing rights conferred by the Agreement, see S Smismans, 'EU citizens' rights post Brexit: why direct effect beyond the EU is not enough' (2018) 14 EuConst 443.

[190] In particular, a preliminary reference concerning Part Two may be sent to the Court of Justice where a case is 'commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom' (Article 158(1) WA); and under Article 174 WA, the Court of Justice retains binding and indefinite oversight of the interpretation of questions of Union law relevant to Agreement disputes than end up before an arbitration panel. See generally on the enforcement of Part Two WA, C Barnard and E Leineirte 'Citizens' Rights' in F Fabbrini (ed.) *The Law & Politics of Brexit Volume II: The Withdrawal Agreement* (OUP, 2020) 107 at 117-129.

[191] E.g. Article 165(1) WA includes a Committee on citizens' rights as one of just six 'specialised committees' established as part of the Agreement's governance structures.

[192] Article 6 WA. Cf. Article 36 WA, which ensures dynamic alignment with the future evolution of EU law in the area of social security coordination.

[193] *Préfet du Gers*, para. 72.

[194] European Commission, Guidance Note relating to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community Part two – Citizens' rights, C(2020) 2939 final, para. 2.6.1 (emphasis added).

[195] E.g. Case C-85/96 *Martínez Sala*, EU:C:1998:217, para. 53; confirming in EU citizenship law the position established in Case 48/75 *Royer*, EU:C:1976:57. More therefore suggests that '[t]he principles of reciprocity, uniformity and indeed the declaratory nature of EU rights were therefore compromised on this point' (G More 'From Union citizen to third-country national: Brexit, the UK Withdrawal Agreement, no-deal preparations and Britons living in the European Union' in Cambian, Kochenov and Muir (eds), n16, 457 at 467).

significant national discretion found elsewhere in the Agreement.[196] And again, asymmetry of protection is inevitable.

It must be re-emphasised that the argument presented here is not about downgrading or ignoring Union citizenship – or indeed, about ignoring the repercussions of a decision to withdraw from the Union. It is about recognising that the protection of the individual in EU law is inherently (and historically[197]) part of yet extends beyond protecting those who hold Member State nationality;[198] that Union citizenship is one dimension of the wider protection of individuals mandated by EU law rather than having subsumed it entirely. For third-country nationals generally, EU measures adopted under the auspices of the AFSJ must comply with the general principles of EU law and the rights guaranteed to 'every person' by the Charter. For former Union citizens more specifically, reading the Withdrawal Agreement not just in light of Union citizenship but also the wider legal heritage constructed by the EU legal order opens questions about the protection conferred by the Withdrawal Agreement and the legal responsibilities on both the Union and the UK in negotiating it – notwithstanding the acknowledged discretion that the Union enjoys in determining its relations with third states more generally.

For the Withdrawal Agreement is *not* – as the Advocate General and the Court in *Préfet du Gers* stated – part of EU external relations. It is negotiated with a departing Member State when the latter *is still a Member State* (in distinction from agreements about the future relationship, as drawn in Article 50(2) TEU itself).[199] Former Union citizens might not – entirely legitimately – 'benefit *fully*' from the rights conferred by the status of Union citizenship. But negotiating a withdrawal takes place still within the systemic relationship of dependency between the Union, the Member States and Member State nationals that *Van Gend en Loos* envisages. All three are connected, and finding a balance across the interests of all three is therefore essential. That template for systemic balance and interconnection is reflected across the TEU now through how it articulates and structures the governance of the Union: through the objectives of the Union for its 'peoples' and 'citizens' in Article 3 TEU; how it relates to its Member States in Article 4 TEU; and especially through the provisions on democratic principles in Title II TEU, exemplified by the statement in Article 13(1) that '[t]he Union

[196] See esp. Article 18(1)(p) WA on criminality checks.
[197] E.g. AC Evans 'European citizenship' (1982) 45 *Modern Law Review* 497.
[198] The applicability of the Charter to the nationals of third states in various circumstances can be noted as an example here: whether in the context of applying EU legislation at national level (e.g. Case C-571/10 *Kamberaj*, EU:C:2012:233, paras 79-81 and 92) or when Member States act within the scope of the EEA Agreement (e.g. *Ruska Federacija v IN*, paras 63-65). Reflecting on the scope of the Charter in the context of Schengen irrespective of the nationality of the individual concerned, see Case C-435/22 PPU *Generalstaatsanwaltschaft München v HF*, EU:C:2022:852; I am grateful to Alessandro Petti for raising this example.
[199] See generally, C Hillion, 'Withdrawal under Article 50 TEU: an integration-friendly process' (2018) 55 CML Rev 29; and P Eeckhout and E Frantziou, 'Brexit and Article 50 TEU: a constitutionalist reading' (2017) 54 CML Rev 69.

shall have an institutional framework which shall aim to promote its values, advance its objectives, serve *its interests, those of its citizens and those of the Member States*'.[200]

The same ambition of balance is evident in the *Rottmann* case law, where there is recognition of two potentially conflicting things at the same time – exclusive competence of the Member States to determine nationality, on the one hand; and tempering of that competence through compliance with obligations imposed by EU law, on the other. The citizen constitutes the end through which these positions can be reconciled through the functional means of proportionality review. Similarly, the relationship between a third state national and the Union is accessed *through* the nature of the relationship between that state and the Union,[201] whether that is an EU Member State with which a third state national has close links (*Spain v UK*) or a third state with special links to the Union (*IN*). For former Union citizens, former Union membership is legally meaningful: it alters, obviously; but a withdrawal decision does not erase altogether and at once the rights that contribute to the legal heritage of that State's nationals,[202] and it does not transfer the negotiation of their protection to the more distant sphere of EU external relations before 'actual withdrawal from the Union'.[203] The protection of individuals in EU law long predates the creation of Union citizenship. And even past membership of the Union matters, also legally.

6. Conclusion

In *Préfet du Gers*, there was scope to examine the contours and limits of the implications of withdrawal from the Union for that Member State's nationals in richer constitutional terms. Former Union citizens can no longer benefit *fully* from the rights conferred by Union citizenship. At the same time, dimensions of protection conferred by that status are already severable from it. Assuming now that the Withdrawal Agreement as ratified is outside the scope of review altogether does not reflect the core constitutional idea that EU rights became part of the legal heritage of former Union citizens.[204]

[200] Reading that provision instead as more indicative of a 'direct link' between the Union and its citizens, see Rieder, n147, 163.

[201] Contrasting examples of more autonomous language used with respect to citizens in the Draft Constitutional Treaty compared to the 'more careful' language in the adopted Lisbon Treaty, see Rieder, ibid, 162-163.

[202] Precisely that perspective can explain the otherwise extremely odd reasoning in the *RO* case, where the Court reflected on why European arrest warrants should continue to be executed vis-à-vis the UK before it formally left the Union even if terms in prison served there in consequence would extend past the UK's membership of the EU (Case C-327/18 PPU *RO*, EU:C:2018:733; see further, N Nic Shuibhne 'Did Brexit change EU law?' (2021) 74 *Current Legal Problems* 195 at 209-211).

[203] *Préfet du Gers*, para. 54.

[204] It also provides much food for thought on any future withdrawal processes: e.g. developing an argument about rights based on (length of) prior residence, see H Oosterom-Staples 'The triangular relationship between

In *Préfet du Gers*, recourse was had too easily and too thinly to the political discretion built into the conduct of EU *external* relations. The circumstances of the case itself might not produce a different outcome had more consideration been given to EU *internal* relations.[205] But the case did merit more careful articulation of the responsibility of the Union and its Member States, including its former Member State, to respect and appropriately recalibrate the legal heritage of former Union citizens. Questions about how that heritage changes and, yes, dissolves over time must also be worked through. Whether the Court of Justice might yet do so remains to be seen.[206] But it is hoped that some of the formalism of *Préfet du Gers* might be reconsidered.

Beyond the TCA or any future agreements yet to be concluded between the EU and the UK, legal heritage can also ground initiatives that might yet be taken by the EU legislator.[207] As Thym has argued, 'if you are concerned with a pragmatic solution securing the rights of EU citizens in the UK and of British nationals in the EU, there is no need to embark on a politically sensitive, procedurally complicated, and normatively loaded debate about the direct conferral of EU citizenship' since 'the

nationality, EU citizenship and migration in EU law: a tale of competing competences' (2018) 65 *Netherlands International Law Review* 431 at 459-460.

[205] See e.g. S Coutts, 'Bold and thoughtful: the Court of Justice intervenes in nationality law Case C-221/17 *Tjebbes*', European Law Blog, 25 March 2019, https://europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes/ (arguing that '[t]he absence of *a genuine link with one of the Member States* is sufficient *to justify loss of Union citizenship*; being a member of a national political community is necessary to be a Union citizenship', emphasis in original). Similarly, Strumia asks 'whether the right to simultaneously belong to multiple national communities has a political soul' (Strumia, n138, 638). On the limits of *Van Gend en Loos* in broader terms, see JHH Weiler '*Van Gend en Loos*: the individual as subject and object and the dilemma of European legitimacy' (2014) 12 Int'l J Const L 94 at 101: 'at the most primitive level of democracy, there is simply no moment in the civic calendar of Europe when the citizen can influence directly the outcome of any policy choice facing the Community and Union in the way that citizens can when choosing between parties which offer sharply distinct programs at the national level'.

[206] E.g. Case C-32/21 *Institut national de la statistique and des études économiques and Others*, pending. See also the ongoing litigation in *Shindler*, pending on appeal before the Court of Justice and focused mainly on the criteria of direct and individual concern so that standing for judicial review might be established (see esp. Case C-501/21 P *Shindler and Others v Council*; appealing the Order in Case T-198/20, EU:T:2021:348).

[207] E.g. by – lawfully – distinguishing British nationals as a special category of third-country nationals for legislation on 'the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States' (Article 79(2)(b) TFEU), with former Union membership providing the necessary distinguishing factor from other third-country nationals thereby rendering them in a non-comparable position. As indicated in Section 5.1.1 above, EU legislation adopted under Article 79(2)(b) as regards 'the definition of the rights of third-country nationals residing legally in a Member State' includes competence to determine 'the conditions governing freedom of movement and of residence in other Member States' and, according to the Commission, 'may therefore confer certain similar rights to those linked to citizenship of the Union on citizens of a State that has withdrawn from the Union pursuant to Article 50 TEU' (Commission Decision of 22 March 2017 on the proposed citizens' initiative entitled 'EU Citizenship for Europeans: United in Diversity in Spite of jus soli and jus sanguinis' (2017 OJ L81/18, recital 4). Adopting legislation on the basis of Article 18(2) or 25(2) TFEU might be more problematic given the perspectives on both nationality discrimination and Union citizenship confirmed in *Préfet du Gers*.

EU and the UK resolve 95% of all problems through advanced rules on immigration statuses in the exit agreement'.[208]

Beyond that, as the Court of Justice sometimes points out in its case law on the free movement of persons and Union citizenship, if gaps in protection under the Withdrawal Agreement are deemed not to fall within the scope of EU law, resolution could, in principle, be sought in Strasbourg. On EP's claim specifically, the ECtHR already upheld the proportionality of the UK's 15-year voting rule.[209] MIght the circumstances of Brexit bring new considerations to that judicial table?

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[208] D Thym 'The case against an autonomous "EU rump citizenship"' in Orgad and Lepoutre (eds), n146 11 at 12.

[209] For the ECtHR, proportionate restrictions on voting rights can be accepted in certain circumstances, even though it also stated that '[t]he right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion' (*Shindler v United Kingdom* (2013) 58 EHHR 9, para. 103).

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