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Best Practices in Involuntary Loss of Nationality in the EU

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1. Introductory remarks

This policy brief deals with loss of citizenship of the European Union (EU) due to the loss of nationality of a Member State. To hold nationality of an EU Member State is the master key to European citizenship. Only the nationals of a Member State possess European citizenship. Consequently, the loss of nationality of a Member State also implies the loss of European citizenship.

Due to the fact that Member States are in principle autonomous in nationality matters, their rules on loss of nationality, and implicitly loss of the citizenship of the European Union, differ considerably. However, Member States have to respect international law and general principles of European law when dealing with loss of nationality.

The purpose of this policy brief, which is based on research conducted in the context of the ILEC-project (Involuntary Loss of European Citizenship: Exchanging Knowledge and Identifying Guidelines for Europe), is twofold:

a) To assess the grounds for loss of nationality of the Member States in light of international and European standards[1], in particular:
   - the prevention of arbitrary deprivation of nationality;
   - the principle of proportionality and
   - strong procedural guarantees.

b) To formulate recommendations for national policy makers, judges and other authorities dealing with issues about loss of nationality.

[1] See on those standards Gerard-René de Groot (2013), "Survey on Rules on Loss of Nationality in International Treaties and Case Law", CEPS Paper in Liberty and Security in Europe No. 57, CEPS, Brussels, July.

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2. Different types of loss

First of all the reasons for loss of nationality can be distinguished into voluntary and involuntary grounds for loss. Voluntary loss of nationality is loss on request of the person involved. This policy brief does not deal with this type of loss, but focusses on rules to do with involuntary loss of nationality. In case of the loss of European citizenship due to the voluntary loss of the nationality of a Member State there is no need for protection against the loss of the nationality of the person concerned. This is different in case of involuntary loss, where a European citizen deserves the protection of binding principles like proportionality, effective remedies, and legitimate expectations.

Within the rules on involuntary loss of nationality different grounds can be distinguished on the basis of which nationality can be lost.[2] We group these in five categories:

a) *Absence of a genuine link*. In this category loss of nationality is based on the assumption that certain facts related to a person indicate that no genuine link exists anymore between this person and the state which would justify the possession of this state's nationality. For example, the voluntary acquisition of the nationality of another state or permanent residence abroad have traditionally been viewed, in some states, as an indication that a genuine link no longer exists. Some states pre-empt the absence of a genuine link due to permanent residence abroad by restricting the acquisition of nationality by descent to the first or second generation born abroad. It is remarkable that seven Member States do not use any of these methods to avoid the indefinite transmission of their nationality by descent to descendants of nationals born abroad. This leads to considerable differences of inclusiveness between the nationality regulations of the Member States, which are particularly remarkable if these descendants do not maintain factual ties with 'their' Member State or with other Member States of the European Union.

b) *Undesirable behaviour*. In this category loss of nationality is a sanction against the undesirable behaviour of the national involved. For example, foreign military service or behaviour seriously prejudicial to the vital interests of the state (e.g. espionage, terrorist activities) are traditionally viewed as actions that may legitimise the loss of nationality. Nineteen Member States provide for modes of loss under this category. Nine do not provide for such possibilities.

c) *Fraudulent acquisition*. When it is discovered that the nationality of a state has been acquired based on fraud or similar acts, the legitimate grounds for possessing the nationality of a state disappears. Increasingly Member States provide in their national legislation that the discovery of fraudulent acquisition causes the loss of nationality. However, in four Member States the discovery of fraudulent acquisition does not cause the loss of nationality.

d) *Loss of family relationship*. If a family relationship was the basis for the acquisition of nationality and this relationship is lost (e.g. due to the successful denial of paternity) then nationality may be lost. Only five Member States provide expressly for this basis for loss of nationality. However, in ten other Member States this basis for loss is applied without being expressly mentioned in their nationality legislation. In thirteen states this category does not exist. A closely related basis is the loss of a conditional nationality, which occurs for example when it is discovered that a foundling, whose parents were originally unknown, did acquire a foreign nationality of a parent.

e) *Loss of the nationality of parents*. If a parent loses the nationality of a state this loss sometimes extends to minor children. Fifteen Member States provide for this basis for loss of nationality.

In addition, other types of loss of nationality exist, for example in those cases, where an authority concludes that a person who was until then treated as a national, actually never held the nationality. Formally, such types of cases may be classified as 'non-acquisition' by the authorities, rather than as 'loss'. However, whether or not this is formally a situation of 'non-acquisition', the person who is concerned experiences this as a loss of

[2] See for details Gerard-René de Groot and Maarten Vink (2014), "Involuntary Loss of Nationality", CEPS Paper in Liberty and Security in Europe No. 73, CEPS, Brussels.

nationality. These situations are discussed in a separate policy brief on what we call 'quasi-loss' of nationality.

3. International and European standards

The most important standard on loss of nationality is enshrined in Art. 15 Universal Declaration of Human Rights: nobody shall be arbitrarily deprived of his or her nationality. This principle is also repeated in Art. 4 of the European Convention on Nationality and is today customary international law and therefore binding for all Member States of the European Union. In a later paragraph some reflections will be given on sub-principles which can be identified under the umbrella of the rule that arbitrary deprivation of nationality is forbidden.

Other leading principles on loss of nationality can be found in Articles 5-9 of the 1961 Convention on the reduction of statelessness. This convention forbids – with a few exceptions – loss of nationality, if this would result in statelessness. Eighteen of the Member States of the European Union acceded to this Convention. However, the European Union[3] made a formal pledge in September 2012 that all Member States will ratify this Convention. The 1961 Convention should be interpreted in light of more recent human rights treaties like CEDAW and CRC. A survey of the obligations which follow in that light from the 1961 Convention is given in the Conclusions of an Expert Meeting convened by the UNHCR in Tunis in autumn 2013 (hereinafter: Tunis Conclusions).[4]

Important standards on involuntary loss of nationality follow from Art. 7 European Convention on Nationality. That provision gives an exhaustive list of acceptable grounds for loss of nationality. Furthermore, it stresses that statelessness in case of loss of nationality is exclusively acceptable in case of fraudulent acquisition. Art. 11 and 12 European Convention on Nationality stress that all decisions in nationality matters must provide reasons and must be challengeable in court. These principles are of particular importance in loss cases. The European Convention on Nationality is binding for twelve Member States of the European Union, seven other Member States signed the European Convention on Nationality but have not yet ratified it.

The most important rules of European Union law follow from the European Court of Justice 2010 landmark decision in the *Rottmann*-case. The Court underlines that the loss of European citizenship (and the freedoms and rights attached to it) because of deprivation of a Member State's nationality due to fraud is only acceptable after application of a proportionality test. In paragraph 5 we discuss which sub-principles can be identified under the proportionality principle, as well as some other principles of European Union law, which could be relevant in loss of nationality cases.

4. What is arbitrary deprivation?

If nobody shall be arbitrarily deprived of his or her nationality, then what is 'arbitrary deprivation'? Here we will identify some guiding principles, partly inspired by a report of the Secretary General of the United Nations submitted to the Human Rights Council on 14 December 2009:

1. A loss or deprivation of nationality must have a firm legal basis

This principle seems self-evident in the legal order of the Member States of the European Union, as all Member States adhere to the rule of law. However, a closer look at the rules of the Member States indicates that this principle is not always consistently applied. European Union Citizenship can be lost in some Member States, by losing the nationality of a Member State, even though the basis for the loss of nationality is not expressly codified in the nationality act. This occurs when the loss of nationality is based on general principles of law, as is often the cases when nationality is lost on the basis of changing family relationships, or when 'loss of nationality' is treated as 'non-acquisition', for example in response to fraudulent acquisition.

[3] See Note verbale of the Delegation of the European Union to the United Nations of 19 September 2012, para. A4 (www.unrol.org/files/Pledges%20by%20the%20European%20Union.pdf).

[4] UN High Commissioner for Refugees (UNHCR), Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions"), March 2014 (www.refworld.org/docid/533a754b4.html).

*2. A legal provision regarding loss or allowing deprivation of nationality may not be enacted with retroactivity: '*nulla perditio, sine praevia lege*'*[5]

The legal basis for loss or deprivation of nationality should already exist at the moment when the act or fact happened that constitutes the basis for the loss or deprivation.

The loss or deprivation of nationality is often experienced by the person concerned as a form of sanction. Furthermore, loss or deprivation of nationality, in particular that of a Member State, can have far-reaching consequences, not only for the person concerned, but also for members of his family, who, for example, derive their right of residence from the Union citizen.

Therefore States should not enact laws which result in the retroactive loss or deprivation of their nationality. This does not preclude, however, the possibility of Member States to retroactively enacting laws that restrict the loss or deprivation of their nationality.

3. No extensive interpretation of a mode of loss

A basis for loss of nationality should never be interpreted extensively or applied by analogy, because such interpretation or application would imply that the mode of loss is applied to cases, which are not covered by the wording of the loss provision. That would violate the previous principle.

4. In case of the introduction of a new basis for loss a reasonable transitory provision has to be made, in order to avoid a person losing his or her nationality because of an act which started before the introduction of the new basis for loss.

If e.g. a state introduces voluntary acquisition of a foreign nationality as a new basis for loss of nationality, no such loss should occur if the foreign nationality is acquired after the introduction of this basis, but the application to acquire the nationality was already made prior to its introduction.

5. A legal provision regarding the acquisition of nationality may not be repealed with retroactivity.

This principle is closely related to principle number 2, as the retroactive repeal of a legal provision regarding the acquisition of nationality has the same result as the retroactive loss of nationality.

*6. The principle of '*tempus regit factum*'*[6]

To establish whether a person acquired or had a nationality withdrawn through certain acts or facts, the legislation has to be applied which was in force at the moment when these acts or facts took place.

Transitory provisions may allow exceptions to be made to this principle, as long as they are not contrary to principles 4 and 5 above.

7. Loss- or deprivation-provisions must be predictable

The principle of legal certainty requires that laws, in particular as regards loss or deprivation provisions, must be predictable. Similar situations may not lead to different results (the principle of equality). The principle of predictability also means that provisions on loss or deprivation of nationality may not be interpreted by analogy (applied on facts which are not evidently covered by the wording of the provisions involved).

8. The administrative practice based on loss- or deprivation-provisions may not be discriminatory[7]

Loss or deprivation of nationality may not be based on discrimination on any ground prohibited in international human rights law, either in law or in practice. These include all the grounds established in Article 2 of the ICCPR: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

9. It must be possible to challenge the application of loss-provisions or acts of deprivation in court

The UN Secretary-General underpinned in his 2009 Report: "Procedural safeguards are essential to prevent abuse of the law. States are thus expected to observe minimum procedural standards in order to ensure that decisions on nationality matters do not contain any element of arbitrariness." More specifically: "Violations of the right to a nationality must be open to an effective remedy."[8]

[5] Literally: no loss without previous law. Compare the '*nulla poena sine praevia lege poenali*'- principle in criminal law (literally: no punishment without previous criminal law).

[6] Literally: the time governs the fact.

[7] See the 2009 Report of the UN Secretary-General, A/HRC/13/34, para. 21.

[8] See the 2009 Report of the UN Secretary-General, A/HRC/13/34, paras. 43 and 46.

10. Last but not least: The consequences of a deprivation-decision must be proportional

This principle is the core rule that follows from the *Rottmann*-judgment by the Court of Justice of the European Union. According to the principle of proportionality, as defined by European Union law, a measure must be necessary, effective, as well as proportional to the goal to be achieved. This is also already mentioned in the 2009 Report of the United Nations Secretary-General. The Report underscored in this respect: "Measures leading to the deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law. Such measures must be the least intrusive instrument of those that might achieve the desired result, and they must be proportional to the interest to be protected. In this respect, the notion of arbitrariness applies to all State action, legislative, administrative and judicial. The notion of arbitrariness could be interpreted to include not only acts that are against the law but, more broadly, elements of appropriateness, injustice and lack of predictability also."[9]

5. When and how should the proportionality principle be applied?

The proportionality principle has the following consequences for procedures on deprivation of nationality:

a. No deprivation should take place in case of minor offences.

b. Consideration should be given to the person's situation, culpability of the act(s) and the circumstances in which the act(s) serving as the basis for the deprivation was committed. Deprivation should not take place, for instance, if the person was not aware and could not have been aware of the fact that information provided during naturalisation was false. Furthermore, due consideration should be paid to the reasons for why a person provided false information, for instance if incorrect information was provided during a naturalisation procedure because of fear for the safety of family members in another country.

c. In case of deprivation of nationality as a result of fraudulent behavior during the naturalisation procedure, authorities need to consider how much time has elapsed from the moment of committing fraud to the discovery of the fraud. In addition, it is also relevant how much time has elapsed between the discovery of the fraud and the moment of the deprivation decision. For that reason some States use time limits; however, these limits vary greatly. The time that has passed since the act was committed is also relevant for the assessment as to whether the gravity of the act justifies deprivation of nationality. If this time period is lengthy, only very grave offenses may justify a deprivation of nationality.

d. Attention needs to be paid to the consequences of the deprivation of nationality for the person involved and his/her family members, in particular whether or not they might lose their right to reside in the country of which the person held the nationality. This includes the situations where the family members are third-country nationals who derive their right of residence from their relationship with the person facing deprivation of his/her EU citizenship.

e. The proportionality test has to be applied individually for each person affected by the deprivation of nationality. If, for example, a couple was naturalised in one naturalisation decree and this naturalisation extended to their two children, separate deprivation decisions need to be made for all the persons involved in case.

f. Special consideration should be given to the nationality status of children of a person who committed fraud during the naturalisation procedure, in particular if the deprivation of nationality would make those children stateless; the guiding principle should be the best interest of the child (Art. 3, Convention on the Rights of the Child).

[9] See the 2009 Report of the UN Secretary-General, para. 25. Compare also para. 27.

6. The paramount importance of adequate procedural guarantees

The foregoing considerations about banning arbitrary deprivation and the necessity of applying a proportionality test imply that adequate procedural safeguards are essential. These should include the following:

a. All decisions relating to the loss and deprivation of nationality need to be provided in writing, and have to contain explicit reasons for the deprivation; this applies also to cases where authorities conclude that a nationality has never been acquired (compare Art. 11 European Convention on Nationality).

b. All decisions relating to the loss or deprivation of nationality are open to judicial review; this applies also to cases where authorities conclude that a nationality has never been acquired (compare Art. 12 European Convention on Nationality).

c. The fees for judicial review should not be an obstacle for applicants; furthermore there should not be a risk that an applicant has to pay the costs made by the State, if the procedure is lost (compare art. 13(2) European Convention on Nationality).

d. During the procedure applicants should be treated as nationals; however, a state may use the construction of retroactivity after a final decision cannot challenged anymore.

7. Assessment of the different modes for involuntary loss of nationality in light of international and European standards

In this section the different modes of involuntary loss of nationality employed by Member States will be assessed in light of international and European standards, with special emphasis on procedural guarantees (access to justice and effective legal remedies). A detailed description and comparative analysis of the grounds for loss can be found in the paper of De Groot and Vink, prepared in the context of the ILEC-project.

7.1 Voluntary acquisition of nationality

Due to the increasing acceptance of multiple nationality, only ten Member States provide for the loss of nationality as a result of the voluntary acquisition of another nationality. Eight Member States provide an automatic (*ex lege*) loss of nationality, the other two Member States provide for the deprivation of nationality. From 2015 on, all of these Member States provide for (sometimes many) exceptions on the main rules. Germany and Latvia are the only two Member States that provide for the exception that the nationality is not lost in case of voluntary acquisition of the nationality of another Member States.

The following observations and recommendations can be made:

In case of a deprivation procedure a proportionality test is necessary in light of the international standards. Such a test should also be applied when loss of nationality does not require an administrative decision but occurs automatically. In such cases the national authorities should restrictively interpret a loss provision when concluding that a person has lost the nationality of a Member States would violate the proportionality principle. A Member State which provides for this mode of loss should in particular *not* conclude that a person has lost her or his nationality, respectively decide *not* to deprive a person from her or his nationality:

- If the acquisition was automatic (not on application), but could have been rejected;
- If no acquisition of nationality took place, but was merely a confirmation of the possession of another nationality;
- If the application for the foreign nationality was made by another person (e.g. parent for an already adult child);
- If serious doubts exist whether the application of the foreign nationality happened voluntarily.

7.2 Residence abroad

Ten Member States assume in their nationality legislation that due to residence abroad no genuine link exists anymore between the person involved and the state. In three Member States this rule only applies to naturalised citizens. In two Member States loss of nationality on this basis can also apply when the person concerned was born in the country. Six Member States provide for the possibility of deprivation, whereas four use an automatic loss provision.

The following observations and recommendations can be made:

- Loss of nationality on the grounds of residence abroad should never cause statelessness (Art. 7 European Convention on Nationality; would also be a violation of the proportionality principle);
- Loss of nationality should not apply in case of residence in another Member State of the European Union; this would be problematic in view of the free movement right guaranteed by European Union law;
- Loss of nationality should not apply only to naturalised citizens; such discrimination is at odds with the principle that citizens by birth and those by naturalisation should be treated equally (Art. 5(2) European Convention on Nationality);
- All relevant circumstances should be taken into account, in particular all indications of existing links with the state involved. Member States have an obligation to inform the person concerned explicitly and individually about the steps to be taken in order to avoid loss of nationality due to residence abroad. For these reasons, it is recommendable to use a 'deprivation' construction rather than an 'automatic loss' approach.
- If loss of nationality due to residence abroad can be prevented by a declaration, the application for a passport or identity card should suffice; if such declaration should be made within a certain period after having attained the age of majority, this period should be longer than the period of validity of a passport or identity card;
- In the context of checking the proportionality of a deprivation decision, it is appropriate to distinguish between the first generation born abroad and further generations born abroad.

7.3 Undesirable behaviour

Nineteen Member States provide for the possibility of deprivation of nationality in case of certain types of undesirable behaviour. The European Convention on Nationality allows in this category exclusively deprivation of nationality in case of foreign military service (nine Member States do so) or in case of behaviour seriously prejudicial to the vital interests of the state (fifteen Member States provide so). However, in six Member States foreign state service is also considered a basis for loss. The European Convention on Nationality does not allow causing statelessness on these grounds for loss of nationality. The 1961 Convention allows statelessness to occur exclusively if a Contracting State made a declaration within the terms of Art. 8(3) of the Convention. Nevertheless, in eleven Member States grounds of loss belonging to this category can cause statelessness.

The following observations and recommendations can be made:

- Loss of nationality due to undesirable behaviour should never cause statelessness (Art. 7 European Convention on Nationality);
- Due to the paramount importance of the proportionality principle, loss of nationality due to undesirable behaviour should never occur automatically, but always by deprivation through means of an explicit decision by competent authorities;
- The unacceptable character of the undesirable behaviour of the person involved should be proven beyond any reasonable doubt. Such behaviour should constitute a crime and a criminal court should have imposed a sanction;
- Foreign military service in the army of another Member State of the European Union should never by a ground for deprivation of nationality;
- Foreign state service should not be a ground for deprivation, except in cases where this service can be classified as behaviour seriously prejudicial to the vital interests of the state.

7.4 Fraud and similar acts

In twenty-four Member States the discovery of fraud committed during the acquisition of nationality by naturalisation, option, or similar procedure, may be grounds for the deprivation of nationality. Although both the European Convention on Nationality and the 1961 Convention allow statelessness to occur as a result of loss of nationality due to fraud or similar acts, a proportionality test is essential.

The following observations and recommendations can be made:

- A proportionality test must always be applied when deciding on the deprivation of nationality on the grounds of fraudulent acquisition of the nationality concerned. Such a test must also be applied in cases where no potential statelessness is at stake. In the context of the proportionality test the issues mentioned above in para. 4 deserve particular attention.
- A deprivation of nationality based on fraudulent behaviour should never extend to other persons but be based on a decision for each person individually, taking into account all individual circumstances. For that reason an extension of such deprivation to children is unacceptable.
- A proportionality test should also be applied in deprivation procedures that result from the non-renunciation of another nationality, in those Member States where such renunciation is a requirement for naturalisation and the non-renunciation is grounds for deprivation of nationality.

7.5 Loss of the family relationship which was the basis for the acquisition of the nationality

Observations and recommendations:

- If a State provides that the loss of a family relationship is grounds for the loss of nationality, in specific circumstances, it should provide so expressly in its nationality law and regulate the conditions and limits of its application;
- Loss of nationality due to the loss of a family relationship should never cause statelessness;
- In light of the proportionality principle and the desirability of the protection of legitimate expectations a limitation period is desirable. The required period should be shorter than the residence period required for naturalisation and also shorter than the limitation period which may exist in the state involved for deprivation of citizenship based on fraud;
- The protection mechanisms (no statelessness; limitation period) should not only apply in cases where the family relationship legally existed, but was annulled, but also in cases where it is discovered that the family relationship never legally existed.

7.6 Extension of loss of nationality by (a) parent(s) to minor children

In fifteen Member States rules on extension of loss of nationality to children exist. Of these Member States only seven provide – under certain conditions – for the extension of loss of nationality due to a declaration of renunciation.

Four of the ten Member States which provide – under certain circumstances – for loss of nationality due to voluntary acquisition of a foreign nationality also provide for the extension of this loss to minor children. Four of the ten MS that provide for the possible loss or deprivation of nationality because of permanent residence abroad, provide for the extension of this loss to minor children.

None of the Member States provides for extension of loss due to undesirable behaviour to children of the person concerned. That is in line with the standards set by Art. 7(1)(c) and (d) European Convention on Nationality.

Four Member States provide for the extension of deprivation of nationality based on fraud. This is at odds with the requirement for the individual application of a proportionality test on each person involved in a deprivation procedure.

If a State wants to provide for an extension of nationality to children, the following minimum conditions should be included:

- Extension of loss of nationality should never cause statelessness;
- A child should never lose her or his nationality by extension if one parent is still a national;
- The loss of nationality should never be extended to the child by a parent, if that parent does not have parental authority;
- A child should never lose her or his nationality by extension without being heard, if necessary represented by a special guardian;
- The loss of nationality due to the voluntary acquisition of another nationality should never be extended to a child, if the child lives in the Member State of the nationality concerned or in another MS;
- The loss of nationality due to residence abroad should never be extended to a child, if the child lives in the Member State of the nationality concerned or in another MS;

Due to this very detailed list of conditions that would need to be safeguarded in order to meet appropriate standards under which loss of nationality can be extended to minor children, we recommend that Member States provide in their national legislation that loss of nationality is not extended to minor children.

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