



GUIDELINES INVOLUNTARY LOSS OF EUROPEAN CITIZENSHIP (ILEC Guidelines 2015)

European citizenship is acquired by the acquisition of the nationality of a Member State of the European Union. European citizenship is lost, if this nationality is lost.

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 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.

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 made a formal pledge in September 2012 that all Member States will consider ratifying this Convention.¹ The 1961 Convention should be interpreted in light of more recent human rights treaties like the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1989 Convention on the Rights of the Child (CRC) and the 2006 Convention on the Rights of Persons with Disabilities (CRPD). 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).²

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.

¹ See Note verbale of the Delegation of the European Union to the United Nations of 19 September 2012, par. A4, available on: <http://www.unrol.org/files/Pledges%20by%20the%20European%20Union.pdf>

² 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, available on: <http://www.refworld.org/docid/533a754b4.html> .



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.

These Guidelines result from research and discussions in the context of the project Involuntary Loss of European Citizenship: Exchanging Knowledge and Identifying Guidelines for Europe, Co-funded by the European Commission's DG for Justice, Citizenship and Fundamental Rights. The ILEC project has aimed to establish a framework for debate on international norms on involuntary loss of nationality.^{3 4}

The ILEC Guidelines 2015 are intended to provide guidance on implementation of international and European standards on involuntary loss of nationality for government officials, legal practitioners, decision-makers and the judiciary in the Member States of the European Union.

I. General guidelines on loss of nationality

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

Members States should avoid depriving a person of his nationality on the basis of general principles of law or by holding that a nationality was never acquired.

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

The legal basis for loss or deprivation of nationality should already exist at the moment when the act or fact took place, which constitutes the basis for the loss or deprivation. Member States may, however, retroactively enact laws that restrict the loss or deprivation of their nationality.

3. No extensive interpretation of a mode of loss

A ground for loss of nationality should never be interpreted extensively or applied by analogy, i.e. applied on facts which are not evidently covered by the wording of the provisions involved.

4. In case of the introduction of a new ground for loss, a reasonable transitory provision must be adopted, 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.

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

³ For more information visit: www.ilecproject.eu.

⁴ The ILEC Guidelines were drafted by Gerard-René de Groot, Patrick Wautelet and Maarten Vink on the basis of the Policy Briefs prepared for the final conference of the ILEC project on 11-12 December 2014 in Brussels and the debates during that conference.



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

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. Exceptions to this principle may not run against principles 4 and 5.

7. Loss- or deprivation-provisions must be predictable

In order to guarantee legal certainty, legal provisions dealing with loss or deprivation of nationality must be predictable. This entails that similar situations may not lead to different results (the principle of equality) and that that provisions on loss or deprivation of nationality may not be interpreted by analogy .

8. The (administrative) practice based on loss- or deprivation-provisions may not be discriminatory

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.

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

Violations of the right to a nationality must be open to an effective remedy, before a court bound to observe minimum procedural standards.

10. The consequences of a decision to deprive somebody of his nationality must be assessed against the principle of proportionality.

According to the principle of proportionality, a measure must be necessary, effective, as well as proportional to the goal to be achieved. A deprivation of nationality 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.

II. The principle of proportionality

The principle of proportionality should be paramount in all decisions on loss or deprivation of nationality, including in cases where authorities conclude that a given person never acquired a nationality and in cases where the loss of nationality does not require an administrative decision but occurs automatically (*ex lege*). When applying the principle of proportionality, the authorities of Member States should at least pay attention to the following elements:

1. No deprivation should take place in case of minor offences.
2. 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.



3. In case of deprivation of nationality as a result of fraudulent behavior during the acquisition 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. 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.

4. 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.

5. The proportionality test has to be applied *individually* for each person affected by the deprivation of nationality.

6. 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.

III. Procedural guidelines

Banning arbitrary deprivation and the necessity of applying a proportionality test imply that adequate procedural safeguards are essential. These safeguards apply in all cases of loss and deprivation, including in cases where authorities conclude that a given person never acquired a nationality.

1. 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.

2. All decisions relating to the loss or deprivation of nationality should be open to judicial review, i.e. access to an independent judge leading to a reasoned decision;

3. The fees for judicial review should not be an obstacle for applicants. Applicants should not be held liable to pay the costs incurred by the State, even if they fail to successfully challenge the deprivation.

4. During the procedure, applicants should be treated as nationals; this treatment should be afforded during appeals procedure, including any recourse to supranational courts. However, a state may use the construction of retroactivity after a final decision cannot be challenged anymore.

5. Decisions should only take effect when the (judicial) decision cannot be challenged anymore.



IV. Application to some grounds of loss

1. Voluntary acquisition of another nationality

A Member State which provides for the loss of its nationality in case of voluntary acquisition of another nationality, should not conclude that a person has lost her or his nationality, respectively decide not to deprive a person from her or his nationality:

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

2. Residence abroad

Member States may only consider that residence abroad may lead to loss of their nationality provided the following principles are observed:

- a) Loss of nationality on the grounds of residence abroad should never cause statelessness;
- b) Loss of nationality should not apply in case of residence in another Member State of the European Union;
- c) Loss of nationality should not apply only to naturalised citizens;
- d) All relevant circumstances should be taken into account, in particular all indications of existing links with the state involved;
- e) 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. Member States should use a 'deprivation' construction rather than an 'automatic loss' approach.
- f) 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, this period should be longer than the period of validity of a passport or identity card;
- g) 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.

3. Loss due to undesirable behavior

Member States may only consider that residence abroad may lead to loss of their nationality provided the following principles are observed:

- a) Loss of nationality due to undesirable behaviour (e.g. acts seriously prejudicial to the vital interests of the State or foreign military service) should never cause statelessness ;
- b) 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;

- c) 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;
- d) Foreign military service in the army of another Member State of the European Union should never be a ground for deprivation of nationality;
- e) 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.

4. Fraud and similar acts

- a) A proportionality test must always be applied when deciding on the deprivation of nationality on the grounds of fraudulent acquisition of the nationality concerned, including in cases where no potential statelessness is at stake;
- b) 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.;
- c) 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.

5. Loss of the family relationship

- a) If a State provides that the loss of a family relationship is ground 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;
- b) Loss of nationality due to the loss of a family relationship should never cause statelessness;
- c) 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;
- d) 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.

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

- a) Extension of loss of nationality should never cause statelessness;
- b) A child should never lose her or his nationality by extension if one parent is still a national;
- c) The loss of nationality should never be extended to the child by a parent, if that parent does not have parental authority;
- d) A child should never lose her or his nationality by extension without being heard, if necessary represented by a special guardian;



- e) 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;
- f) 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;

V. The treatment of quasi-loss situations

A quasi-loss occurs when persons who had assumed that they possessed the nationality of a country are confronted with the discovery that they never had the nationality of that country. In order to avoid protection gaps and also different levels of protection against quasi-loss in different Members States, Member States should respect the following guidelines:

a) *A preference for treatment as case of possible deprivation of nationality*

In order to ensure application of existing protection measures such as limitation rules and proportionality tests, States should deal with cases of *quasi-loss* as a situation where the person concerned can be deprived of his/her nationality, instead of considering that nationality is annulled or lost *ex lege*.

In exceptional circumstances, such as when a nationality was acquired by fraud, a state may consider that a deprivation works back to the day the acquisition occurred (annulment *ex tunc*), without considering, however, that the person concerned never held the nationality (*ab initio* null and void construction). However, the retroactive loss of nationality should only become effective at the moment the judicial decision cannot be challenged anymore.

b) *Protection of legitimate expectations - substance*

In all cases of *quasi-loss*, and whatever characterization is retained by a state (i.e. constructing a situation of *quasi-loss* as a case of loss, deprivation or annulment of acquisition), States should strive to protect the legitimate expectations of the persons concerned. The extent and strength of this protection may vary depending on the specific circumstances of the case. When a person has enjoyed the benefit of a nationality for a period exceeding the maximum number of years required to acquire it by naturalisation, the State concerned should consider that such nationality was indeed duly acquired.

When a case of *quasi-loss* is discovered, States should preferably attempt to guarantee the continuation of the nationality of the person concerned. States are free to decide what mechanism or device they wish to use to guarantee such continuation. It may be that under the relevant national law, such continuation is achieved through the legal instrument of apparent status of national (*possession d'état de nationalité*), through an administrative recognition of nationality, or through another device. It is advisable to combine such legal instruments with limitation provisions.



c) Protection of legitimate expectations – procedure

In order to determine the extent to which legitimate expectations deserve protection, a state should take into account all relevant circumstances of each individual case and apply a proportionality test.

If a state intends to extend the consequences of a situation of *quasi-loss* to members of the family of the person concerned, i.e. spouses or children, separate decisions on their nationality are necessary, which cannot be automatic replicas of the decision taken for the person concerned. These decisions should instead be taken after an individual assessment of the position of the spouse and/or children taking into account a proportionality test.

If the decision to consider that a person can be deprived of his nationality was based on the fraudulent conduct of this person, this conduct cannot automatically be attributed to the spouse and/or children of the person. Such attribution can never take place in relation to children, if the adult only pretended to be the legal representative.

In all cases concerning the situation of children involved in a *quasi-loss* situation, the decision should in the first place be guided by the best interests of the child.

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ILEC Policy Briefs

(available for free downloading from the ILEC website <http://www.ilecproject.eu/Publications>)

Gerard-René de Groot and Patrick Wautelet, *How to deal with quasi-loss of nationality situations? Learning from promising practices*, ILEC Policy Brief, CEPS Paper in Liberty and Security, No. 71/ November 2014;

Gerard-René de Groot and Sergio Carrera, *European citizenship at a Crossroad: Enhancing European cooperation on acquisition and loss of nationality*, ILEC Policy Brief, CEPS Paper in Liberty and Security, No. 72/ November 2014;

Gerard-René de Groot and Maarten Peter Vink, *Best Practices on Involuntary Loss of Nationality in the EU*, ILEC Policy Brief, CEPS Paper in Liberty and Security, No. 73/ November 2014;

Maarten Peter Vink and Ngo Chun Luk, *Statistics on loss of nationality*, ILEC Policy Brief, CEPS Paper in Liberty and Security, No. 70/ November 2014.

ILEC Papers

(available for free downloading from the ILEC website <http://www.ilecproject.eu/Publications>)

Rainer Bauböck and Vesco Paskalev, *Citizenship Deprivation. A Normative Analysis*, Background paper ILEC-project (project on Involuntary Loss of European Citizenship), CEPS Paper in Liberty and Security in Europe No. 76 (January 2015);

Sergio Carrera, *How much does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair, A breakthrough for sincere cooperation in citizenship of the union?* Background paper ILEC-project (project on Involuntary Loss of European Citizenship), CEPS Paper in Liberty and Security in Europe No. 64 (April 2014);

Gerard-René de Groot, *Survey on Rules on Loss of Nationality in International Treaties and Case Law*, Background paper ILEC-project (project on Involuntary Loss of European Citizenship), CEPS Paper in Liberty and Security in Europe No. 57 (July 2013);

Gerard-René de Groot and Maarten Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, Background paper ILEC-project (project on Involuntary Loss of European Citizenship), CEPS Paper in Liberty and Security in Europe No. 75 (December 2014);

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Maarten Peter Vink and Ngo Chun Luk, *Mapping Statistics on Loss of Nationality in the EU: A New Online Database*, Background paper ILEC- project (project on Involuntary Loss of European Citizenship), CEPS Paper in Liberty and Security in Europe No. 76 (December 2014).



Databases

Maarten Peter Vink and Ngo Chun Luk, *Statistics on Loss of Nationality*: <http://eudo-citizenship.eu/statistics-on-loss-data>

Comparing citizenship laws: loss of citizenship: <http://eudo-citizenship.eu/databases/modes-of-loss>

Other Relevant Documents

Gerard-René de Groot, *Avoiding statelessness caused by loss or deprivation of nationality: Interpreting Articles 5-9 of the 1961 Convention on the reduction of statelessness and relevant international human rights norms*, Background paper UNHCR, Genève 2013;

Gerard-René de Groot en Chun Luk, Twenty Years of CJEU Jurisprudence on Citizenship, *German Law Journal* 2014, p. 821-834;

Gerard René de Groot, Maarten Vink en Iseult Honohan), *Loss of citizenship*, Eudo-citizenship Policy brief, No. 3 (October 2010), http://eudo-citizenship.eu/docs/policy_brief_loss_of_citizenship.pdf;

Jo Shaw (ed.) (2011), *Has the European Court of Justice Challenged Member State sovereignty in Nationality Law?*, EUI Working Papers, RSCAS 2011/62, EUDO Citizenship Observatory, <http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law>;

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, <http://www.refworld.org/docid/533a754b4.html>;

UN Secretary-General, *Human rights and arbitrary deprivation of nationality*, 2009 Report to the Human Rights Council, A/HRC/13/34, <http://www.refworld.org/pdfid/4b83a9cb2.pdf>.