Everything Comes at a Price

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It is a common refrain that the European Union as a Union of 27 Member States is more than the mere sum of its pieces. The Union is, after all, unique in its form and substance. Membership in the Union incorporates each state into a larger endeavor: the (in)famous ever-closer Union of the peoples of Europe. The people in this endeavor are, however, not merely objects but are themselves subjects. The role of the individual in the European Union goes to the very essence of what the European Union is. In this sense, the judicially enunciated promise of Union citizenship as a status destined to be the fundamental status of the individual in European law is an poignant reminder that the ever-closer Union has a distinct subjective dimension. It is, therefore, no coincidence that issues pertaining to the nature and fundamentality of this status have ever since captured the attention of so many writings that study, narrate and deconstruct the process of European integration.

In this light it is unsurprising that the sale of Union citizenship, which is at the heart of the case against Malta currently pending before the ECJ, has also been the subject of feverish writing. With the Court's judgment nearing, this short blogpost will, however, not opine on what the judgment should be. Instead, it considers the potential effects of a judgment that endorses the (ill-conceived) Opinion of AG Collins that Malta's nationality by investment scheme does not conflict with EU law.

The marginal costs of nationality

An obvious point to begin with is that the judgment would allow Malta to keep on selling its nationality and possibly even extend the business. If it is legal to sell a few hundred Maltese nationalities, why stop there? On a small island with few resources, a vibrant nationality industry would be a valuable addition to gambling and tourism industries. With over € 1,4 billion in revenue between 2015 and 2020 Maltese nationality has indeed been Malta's third largest export "good" and provided the resources for the first budget surpluses in decades. But things could get even bigger. Just look at Dominica or Saint Kitts, where the respective nationality selling schemes made up 32,6 and 52,9 percent of GDP between 2017 and 2019.

The problem is that if Malta can sell its nationality, any Member State can. And with an increase in supply comes a decrease in price. According to this economic logic, prices should indeed fall to the point of marginal costs for a nationality. But how much again does it cost to produce a nationality? The bureaucracy, obviously, the paper for passports and documents and so on. Whatever else you might have added here, prices should clearly fall well below the € 650.000 Malta charged.

And while some would call this a race to the bottom, one has to appreciate the potential of such a deflationary policy. If it now costs several thousand euros for irregular migrants to enter the EU illegally, why not let some of them pay a few thousand euros more to legally acquire the nationality of a Member State and move freely within the EU? It may not be the most affluent clientele, the high-net-worth individuals targeted hitherto, but for sure a whole new way to think about migration into Europe.

However, such a commodification of nationality could also have downsides. It is commonplace that few – if any – of the neo-Maltese nationals under the current scheme have settled in Malta. Maltese Union citizenship has been the gateway to move to and reside in other Member States. If nationality schemes were operated on a larger scale and by several Member States, we could see a change in attitude, questioning the right to free movement of Union citizens altogether. This is not far-fetched. Recall the rhetoric before and during the Brexit referendum, or, more

recently, take a look at the negotiations between the EU Switzerland that nearly derailed on the issue of free movement. To take the right to free movement in the context of the EU (and beyond) as a given might turn out to be a fallacy rather soon.

Dumping policies and discrimination

This could be even more so if a Member State decides to use its nationality to undermine the Common European Asylum System in a *new* way. Instead of accepting asylum seekers and refugees, hand them a passport and provide them with a bus ticket to Brussels. Nothing to see here: It is all legal! Because if you can sell your nationality, you can surely hand it out for free. (Unless, of course, you think this "dumping policy", which undercuts the price of Union citizenship – clearly below marginal costs –, runs afoul of some EU competition rules?)

Such a move, nevertheless, depends on a Member State's ability to facilitate the migration of its new nationals to somewhere else in the EU. It may, therefore, be necessary to create the right incentives. Create what has been described in another context as a "hostile environment" to ensure that these new nationals do not want to stay. Such a hostile environment can certainly be created in many ways, though legally speaking, discrimination may provide a fertile option. This brings me to another "lovely" aspect of the policy of selling (or gifting) Union citizenship. While EU law has plenty to say about what you cannot or must do with regard to Union citizens of other Member States, it has little to say about the discrimination between one's own nationals. The beauty of such a purely internal situation is that Member States could distinguish between old and new nationals in many ways. In detail, of course, care would have to be taken to ensure that such measures, e.g. linking the right of residence within a Member State or full access to the national labour market or social security systems to some form of autochthonous criteria, are not unduly discriminatory on the basis of other protected grounds such as religion or ethnicity. But even if they are, legal battles on such issues take time. So even the most egregious discriminations can have the "desired" effects.

There are other measures one could imagine: total political disenfranchisement at the national level for example. This may not be the most hostile policy in terms of lived reality but as of yet clearly beyond the scope of EU law. While voting at the European level cannot be (so easily) restricted, nobody – as far as I can see – has ever dared to claim that Union citizens have a right to vote in national elections in their home Member State because they are Union citizens.

Conditional nationality

Or, how about a more audacious idea: making the granting of nationality conditional on the exercise of the right to free movement itself. This certainly would fall within the scope of Article 21 TFEU. However, to argue that such a policy, which favours, even requires, the free movement of Union citizens, negatively interferes with, i.e. impairs, the right to free movement would turn on its head everything we thought we knew about Article 21 TFEU.

As far as absurdity is concerned, one could still argue that the potential loss of nationality (and thus of citizenship of the Union) for new nationals, who despite such incentives remain stationary in their home Member State, could be called into question under Article 20 TFEU. This is because the loss of nationality insofar as it leads to a loss of Union citizenship must be subject to an individual proportionality assessment in light of EU law. But even if we go down this rabbit hole, one should be aware that the restrictions derived from this proportionality assessment under EU law are frail. At the moment, we only have the unambiguous "drinking-driving-prohibition" in the case of Wiener Landesregierung, where the ECJ established that a minor traffic offenses cannot justify the loss of nationality and, with it, Union citizenship. All other nationality cases hinge on a proportionality test that, if at the best of times is actually applied on the ground, reverts back to the societal integration of the individual. In view of the purely financial premise and commitments of such new nationalities, it is rather difficult to see how this proportionality

approach could stand in the way of a provision that threatens new nationals with the loss of their nationality if they do not move.

Yet even in cases where these new nationals have private and family ties within the EU, we should not forget that EU law is not an autonomous island. There is after all the ECHR which inspires the protection of fundamental rights in EU law. The relevant case law of the ECtHR on the withdrawal of nationality, however, is rather lack luster. Under a diffuse standard of arbitrariness read into Article 8 ECHR, Member States can roam free as long as the loss of nationality is in accordance with (some kind of) law, is accompanied by procedural safeguards, and the authorities act diligently and expeditiously. Whether the loss of nationality is legitimate in a democratic society or proportionate is irrelevant. And for those who think that the ECtHR's subserviently added phrase that the loss of nationality must not only not be arbitrary but has to take into account the consequences of the revocation for the right to private and family life must mean something: don't be naïve. As has been pointed out, under this approach of the ECtHR anything goes and family ties can be maintained elsewhere, beyond the shores of Europe. Incidentally, under this approach of arbitrariness (which has inexplicably been expanded to the absolute right of Art 3 prot No 4 ECHR) Member States do not even necessarily have to withdraw their nationality. A little bit of banishment of their own nationals is allowed.

Remigration for the others

In the end, of course, none of this really concerns us. These are just economic (or security) policies that affect the newbies and/or baddies. We, the peoples of an ever-closer Union, are here to stay, we know who we are. Nationality conceptions after all are legal manifestations of deeply rooted traditions, they do not change. Just as it does not really cost anything to sell your nationality, imposed (re)migration and exile are for the others.

Until they aren't.

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