



# **JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA**

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## **Individual opinion of the Judge of the Constitutional Court**

**Irēna Kucina and Artūrs Kučs**

**Riga, 11 December 2023**

**in Case No. 2022-16-05**

**“On the compatibility of the Order No. 1-2/168 of 16 December 2021 “On Suspension of Operation of the Jūrmala State City Council Binding Regulation No. 38 of 30 September 2021 “Amendments to the Jūrmala City Council Binding Regulation No. 1 of 12 January 2017 “On the Entry of Vehicles into the Special Regime Zone in the Administrative Territory of the Jūrmala City””, issued by the Minister for Environmental Protection and Regional Development, with Article 115 of the Satversme of the Republic of Latvia and with Sections 10(3) and 12(1)(6) of the Law on Taxes and Fees”**

1 On 27 November 2023, the Constitutional Court returned a judgement in Case No. 2022-16-05 "On the compatibility of the Order No. 1-2/168 of 16 December 2021 “On Suspension of Operation of the Jūrmala State City Council Binding Regulation No. 38 of 30 September 2021 “Amendments to the Jūrmala City Council Binding Regulation No. 1 of 12 January 2017 “On the Entry of Vehicles into the Special Regime Zone in the Administrative Territory of the Jūrmala City””, issued by the Minister for Environmental Protection and Regional Development, with Article 115 of the Satversme of the Republic of Latvia and with Sections 10(3) and 12(1)(6)

of the Law on Taxes and Fees” (hereinafter referred to as – the Judgement), finding that the Order No. 1-2/168 of 16 December 2021 “On Suspension of Operation of the Jūrmala State City Council Binding Regulation No. 38 of 30 September 2021 “Amendments to the Jūrmala City Council Binding Regulation No. 1 of 12 January 2017 “On the Entry of Vehicles into the Special Regime Zone in the Administrative Territory of the Jūrmala City””, issued by the Minister for Environmental Protection and Regional Development did not comply with Section 49(1) of the Law On Local Governments.

While arguing our opinion, we will use the abbreviations used in the Judgement.

**2** We disagree with the conclusion expressed in the Judgement that the arguments on Article 115 of the Satversme provided in the application justify the right of the Applicant to act within the framework of the authority conferred thereto, which is one of the grounds for which the proceedings on compliance of the Contested Order with Article 115 of the Satversme should not be terminated. We also disagree with the finding in the Judgement that the argumentation in the application is essentially aimed at the Amendments being declared compatible with Article 115 of the Satversme, which, in turn, is the basis to declare the Contested Order incompatible with Section 49(1) of the Law On Local Governments.

**2.1** The right to live in a favourable environment, included in Article 115 of the Satversme, is recognised as an independent fundamental right and is applicable directly and immediately. When specifying the scope of Article 115 of the Satversme, the Constitutional Court has found that the above-mentioned provision of the Satversme first of all imposes on the State the obligation to establish and ensure an effective environmental protection system (*see Paragraph 16 of the Judgement of the Constitutional Court dated 19 December 2017 in Case No. 2017-02-03*).

The Amendments issued by the Applicant are substantiated by the considerations related to ensuring of fulfilment of the obligation of the State included

in Article 115 of the Satversme - to ensure the right of persons to live in a favourable environment. Objectives set in the field of the environmental law can be achieved through the participation of the State and local governments. Consequently, the term "State" used in Article 115 of the Satversme is not to be interpreted narrowly and is to include also local governments, which, together with the public authorities, are obliged to protect everyone's right to live in a favourable environment by taking care of its preservation and improvement (*cf. Paragraph 11 of the Judgement of the Constitutional Court of 8 February 2007 in Case No. 2006-09-03*). Thus, the local government is one of the entities responsible for ensuring environmental protection measures and, as a derived public entity belonging to the institutional system of public administration, it is obliged to take into account the public interest when making decisions related to environmental issues. Therefore, in matters related to environmental protection, local government is not to be comparable to civil society, but considered a "state".

The Constitutional Court has found that natural persons, as well as associations of persons and public organisations are the subjects of the right to live in a favourable environment (*see Paragraphs 12, 13.1 and 13.2 of the Judgement of the Constitutional Court of 17 January 2008 in Case No. 2007-11-03*). The subjective right of a local government to the constitutional protection of Article 115 of the Satversme cannot be inferred from the environmental law system. The Aarhus Convention also does not provide for a subjective right of a local government to bring an environmental case before the court. Nor is such a right of a local government provided for in Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Thus, the rights enshrined in Article 115 of the Satversme are exercised independently by civil society through natural persons or non-governmental organisations.

Consequently, a local government is not entitled to apply to court on behalf of the local residents with an application regarding the incompatibility of a legal act with Article 115 of the Satversme.

**2.2** The fundamental right enshrined in Article 115 of the Satversme provides for the State's obligation to protect persons both from activities that are actually taking place and may endanger human health or the environment, and from such activities that are foreseen in the future. The Judgement concludes that the Applicant, in compliance with the precautionary principle, with the aim to prevent foreseeable environmental risks in the future, has fulfilled the positive obligation arising from Article 115 of the Satversme, and, as a result, negative consequences have occurred and the Contested Order has been issued. However, the Judgement lacks line of reasoning as to why a departure from the previous case-law was allowed and why the grounds contained in the Amendments should be assessed within the context of Article 115 of the Satversme.

Since the present case involves neither application of the test of positive obligation of the State nor the test of restriction of fundamental rights of a person, which is the basis of the methodology for assessing compliance with Article 115 of the Satversme, it cannot be concluded from the Judgement how the incompatibility of the Contested Order with Section 49(1) of the Law On Local Governments could be linked to compatibility of the grounds contained in the Amendments with Article 115 of the Satversme.

The purpose of the application of the local government council provided for in Section 17(3) of the Constitutional Court Law is to subject the lawfulness of the Minister's decision to the control of the Constitutional Court. Therefore, we consider that the arguments provided by the Applicant on the necessity to ensure the right to a favourable environment could not be related to the assessment of compliance with Article 115 of the Satversme. Moreover, when examining the case on its merits, the Judgement did not assess compliance of the grounds included in the Amendments with Article 115 of the Satversme.

In view of the above, proceedings in the part concerning compliance of the Contested Order with Article 115 of the Satversme had to be terminated.

**3** Paragraph 21 of the Judgement concludes: "Since the arguments set out in the Contested Order concerning unlawfulness of the Amendments are unfounded, the Minister has suspended operation of the Amendments unreasonably. Consequently, the Contested Ordinance does not comply with Section 49(1) of the Law On Local Governments."

We agree with the conclusions of the Judgement that the Amendments do not infringe the scope of the local government's authority. However, we disagree with the fact that the Applicant has justified the necessity of the Amendments and carried out consultations with individuals.

**3.1** We disagree with the conclusion in Paragraph 20.2 of the Judgement that the explanatory memorandum to the Amendments contains sufficient substantiation for the necessity to increase the rate of the fee and to extend the period of application of the fee.

**3.1.1** Section 43<sup>1</sup> of the Law On Local Governments stipulated that, when drafting a binding regulation, it shall be accompanied by an explanatory memorandum, which shall provide, inter alia, substantiation of the necessity of the project. The aforementioned provision did not specify a particular level of detail of the substantiation. However, obligation to substantiate the necessity of legal provision arises from the principle of good legislation (*cf. Paragraph 23 of the Judgement of the Constitutional Court of 3 December 2020 in Case No. 2020-16-01*). The principle of good legislation applies to the drafting and adoption process of every legislative act. The Saeima and the people have legislative competence in accordance with the procedures and within the scope provided for in the Satversme, but the Cabinet of Ministers and local governments also play an important role in issue of legal provisions (*cf. Paragraph 24 of the Judgement of the Constitutional Court of 19 June 2020 in Case No. 2019-20-03*). Any legal provision, including a provision of a local

government's binding regulation, must be lawful in a democratic state governed by the rule of law and must promote public confidence in it. Therefore, the substantiation of the necessity of a legal provision must be credible and objective. Only then lawfulness of the relevant provision can be verified, and confidence in its lawfulness can be promoted in society.

It should also be noted that binding regulations of local governments are usually aimed at regulating issues that affect only the municipality in question and its residents. However, local governments may also issue binding regulations that affect not only the residents of the municipality in question, but society as a whole in the cases provided for in the legal provisions. Impact of the Amendments extends beyond the administrative territory of Jūrmala State City, as it affects every person wishing to enter the special regime zone in Jūrmala. Under such circumstances, the requirement arising from the principle of good legislation - to substantiate the necessity of a legal provision - must be complied with in particular.

Consequently, the Applicant had to provide credible and objective substantiation that the Amendments were necessary.

**3.1.2** The explanatory memorandum to the Amendments states that they are based, *inter alia*, on the precautionary principle. The application explains that the precautionary principle allows for taking such measures which may have an impact on the environment or on the health of persons, even if that impact has not yet been sufficiently assessed or scientifically proven. Thus, according to the Applicant, the degree of detail of substantiation of necessity of the Amendments was affected, *inter alia*, by the precautionary principle.

The Judgement does not assess whether the Amendments could be substantiated, *inter alia*, by the precautionary principle. We consider that, when examining the arguments on the necessity of the Amendments indicated in the Contested Order, the Constitutional Court should have ascertained the required level of detail of such substantiation. Namely, the Constitutional Court had to assess

whether the Amendments could be substantiated, inter alia, by the precautionary principle.

The Constitutional Court has recognised that the precautionary principle stipulates that a State may not avoid taking effective and proportionate measures necessary to prevent the risk of serious and irreversible damage to human health and the environment simply because the technical and scientific information available at the time does not provide a definite answer to the question of the degree of such risk. In the decision-making process, first of all, a proper investigation should be carried out, which would allow to assess in advance the impact that certain actions could have on the environment and the rights of individuals, to prevent adverse effects, as well as to ensure a fair balance between various competing interests (*see Paragraph 19.2 of the Judgement of the Constitutional Court of 19 December 2017 in Case No. 2017-02-03*). Assessment of the likelihood of damage should be carried out to the extent practically possible (*see Paragraph 20.1 of the Judgement of the Constitutional Court of 17 January 2008 in Case No. 2007-11-03*). Assessment of the likelihood of damage is, inter alia, inextricably linked to the State's obligation to carry out due research and to balance the various interests of society fairly in the decision-making process (*see Paragraphs 99 and 104 of the Judgement of the Grand Chamber of the European Court of Human Rights of 8 July 2003 in Case "Hatton and Others v. the United Kingdom", Application No. 36022/97*). A due and fair balance is achieved when these different interests are taken into account not only formally but also on the merits.

The precautionary principle is thus a tool for the management of a specific environmental risk, which can be referred to when there is a risk to human health and the environment, but the technical and scientific information available at the time does not yet specifically demonstrate that risk. However, measures taken within the framework of the precautionary principle should be proportionate and reviewed as soon as more detailed technical and scientific information is available.

The precautionary principle therefore only applies where there is a potential risk to human health and the environment, but this cannot be proven at the relevant time. The precautionary principle cannot be used to justify arbitrary decisions.

**3.1.3** When increasing the rate of the fee and extending the period of application thereof aimed at reducing the number of vehicles entering the special regime zone in Jūrmala because of its impact on the quality of the environment, the Applicant should have provided credible, objective and data-based substantiation for: 1) the damage caused by heavy vehicle traffic to the environmental quality of Jūrmala, and 2) the impact of the fee on the intensity of vehicle traffic. We believe that such substantiation has not been provided.

In relation to the damage caused by vehicles to the quality of the environment, the Constitutional Court has referred in its Judgement to the necessity indicated in the explanatory memorandum to the Initial Amendments to promote use of more environmentally friendly means of transport for entry into the special regime zone in Jūrmala by means of financial incentives.

However, the Applicant has not provided any data to substantiate the environmental damage caused by heavy vehicle traffic. It is clear from the case file that there is no air monitoring station in Jūrmala State City, therefore no information is available on the impact of the fee on the emissions of air pollutants. According to the current data modelling results provided by the Limited Liability Company "Latvijas Vides, ģeoloģijas un meteoroloģijas centrs", the concentration level of air pollutant emissions in the territory of Jūrmala State City in 2021-2023 is relatively low. Similarly, comparing the emission trends in Jūrmala State City in 2017-2019 and 2020-2022, no significant changes have been detected.

Therefore, we consider that the Applicant has not provided credible and objective substantiation that heavy vehicle traffic is detrimental to the quality of the environment in Jūrmala.

As regards the impact of the fee on the intensity of vehicle traffic, the Constitutional Court notes the following in its Judgement: "The Applicant has

analysed the flow of vehicles entering Jūrmala State City in 2021 and concluded that the period of application of the fee has a direct impact on the traffic intensity. The statistical data collected by Jūrmala State City on the entry of vehicles into the special regime zone, i.e., 463,012 entries in March 2021, 417,500 - in April, 379,078 - in September and 447,794 - in October, shows that the fee has a preventive function and deters persons from entering the special regime zone in Jūrmala.”

However, the statistical data summarised by the Applicant provide information on the flow of incoming vehicles in only two of all the months in which the fee was not previously applied. Namely, statistical data reflects the traffic intensity in March and October, but they do not give an idea of the situation in the other months when the fee was not applied - in November, December, January and February. At the hearing, the Applicant stated that data for these months had not been summarised. Thus, it is not possible to conclude from the data summarised by the Applicant that the number of vehicles entering the special regime zone in Jūrmala in the months when the fee was not applied was higher than in the months when it was applied.

Furthermore, the data for October 2021 also cover the vehicles owned by residents of Jūrmala or companies registered in Jūrmala, which are not subject to the fee. It is not possible to draw any conclusions from these data as to how many of the vehicles entering the special regime zone in Jūrmala are owned by residents of Jūrmala or companies registered in Jūrmala, which could also cause damage to the quality of the environment, but do not pay a fee for entering the special regime zone. It is therefore not possible to conclude how the fee affects the number of vehicles subject to the fee.

During the examination of the case, the Applicant submitted to the Constitutional Court statistical data on the entry into the special regime zone in Jūrmala also for 2022 and 2023. The Applicant has not summarised data for the entire year also concerning this period, nor has it distinguished vehicles owned by the residents of Jūrmala or companies registered in Jūrmala from other vehicles. Furthermore, the data for March 2022 do not reflect the situation for the entire month,

and there is no data at all for March 2023. At the hearing, representative of the Applicant pointed out that the cameras were not in operation in March 2023 and summarising data for the months during which the fee is not applied would have violated the requirements on the protection of personal data.

Data for 2022 and 2023 was not available to the Applicant at the time of the issue of the Amendments, but they demonstrate that the necessity for increase in the fee rate and extension of the fee application period is not under review and still lacks reliable and objective substantiation.

Thus, we consider that the Applicant has not provided a credible and objective substantiation for the impact of the fee on the intensity of vehicle traffic. In view of all the above, in our opinion, it is not possible to gain assurance that the Applicant could not prove the environmental damage caused by heavy vehicle traffic in the special regime zone in Jūrmala. It is evident from the case file that the Applicant had the opportunity to carry out research on the vehicle traffic intensity, but it was not done in reliable and objective manner. It also appears from the case file that the impact of the fee on the emission of air pollutants could be assessed using the current data modelling results provided by the Limited Liability Company "Latvijas Vides, ģeoloģijas un meteoroloģijas centrs".

Consequently, we consider that, when substantiating the necessity of the Amendments, the Applicant could not "hide" behind the precautionary principle, namely, it could not substantiate the Amendments on the precautionary principle and thus derogate from the obligation to prove the necessity of the Amendments in objective, reliable manner on the basis of data. Whereas, the data the Applicant based the necessity of the Amendments on was not reliable and objective.

Consequently, the arguments included in the Contested Order that the Applicant has not substantiated the necessity of the Amendments in the explanatory memorandum to the Amendments are well-founded.

**3.2** We agree with the conclusion made in Paragraph 20.4 of the Judgement that the Law on Local Governments (as effective during the period from 1 July 2021

to 31 December 2021) did not impose an obligation on the local government to consult individual. However, we consider that the approach taken in the Judgement to the matter of public involvement in the discussion of the Amendments is too formal. The legislative process must promote public confidence in the state and in the law, and this confidence is ensured, inter alia, through public involvement in a democratic discussion (*cf. Paragraph 21.3 of the Judgement of the Constitutional Court of 12 April 2018 in Case No. 2017-17-01*). The principle of good legislation implies the requirement to identify, to the extent possible, the opinions of all the interested persons and to hear objections to the envisaged legal regulation directly or indirectly (*cf. Paragraph 18.1 of the Judgement of the Constitutional Court of 21 April 2022 in Case No. 2021-27-01*). In the case when the legal framework established as a result of the development of the municipal binding regulations ensures interests of the persons residing in the special regime zone in Jūrmala, but may negatively affect the rights of other persons residing in the administrative territory of Jūrmala, public involvement in the legislative process is particularly important.

By adopting the Local Government Law, the legislator has provided for public participation in the work of local government and defined specific forms of public participation. Although the expired Law On Local Governments did not provide for a specific range of issues and policy areas in which the forms of public participation stipulated by the law could be used, it is nevertheless evident that the legislator wished to facilitate, to the extent possible, the participation of residents in the governance processes implemented by local government.

Furthermore, we believe that the obligation to consult the public on matters affecting the environment is enshrined in the principles of the environmental protection. We also consider that, in the present case, it was possible to identify the range of persons whose hearing would have been important for the development of the Amendments, whereas the Judgement indicates the opposite.

The process of assessment of the environmental protection measures should be as open as possible and involve all the stakeholders at the earliest possible stage. It

helps the decision-makers to develop legitimate measures that may affect the environmental protection in general (*cf. Paragraph 20.1 of the Judgement of the Constitutional Court of 17 January 2008 in Case No. 2007-11-03*). Therefore, consultations with society should be subject to stricter requirements than other issues related to the operation of local government. Understanding on how society and the business environment will react to an increase in the amount of the fee is important when developing proposals that target the object of the imposed fee.

The State's obligation to improve the condition of the environment, enshrined in Article 115 of the Satversme, must be fulfilled taking into account the situation in the entire country, and not within the framework of a single municipality. Article 115 of the Satversme does not require preservation of an intact environment for residents of one municipality, while another municipality would be forced to tolerate pollution (*see Paragraph 6.2 of the Judgement of the Constitutional Court of 24 February 2011 in Case No. 2010-48-03*). It can be concluded from the case file that, while planning reduction of transit traffic through the special regime zone in Jūrmala, impact on the use of other road infrastructure, sustainability of the territories in their vicinity and the rights of their residents to a favourable environment was not assessed. Thus, the Amendments were drafted and issued without listening to and weighing against the interests of the residents of the other parts of the administrative territory of Jūrmala State City adjacent to the aforementioned zone.

In view of the above, we consider that the Applicant has not carried out adequate consultations with individuals.

Therefore, we conclude that the Contested Ordinance complies with Section 49(1) of the Law On Local Governments.

Judge of the Constitutional Court\*

Irēna Kucina

Judge of the Constitutional Court\*

Artūrs Kučs

\*The document is signed with a secure electronic signature and contains a time stamp.