THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT

on behalf of the Republic of Latvia

Riga, 29 June 2018

Case No. 2017-28-0306

The Constitutional Court in the following composition: Chairperson of the court hearing Ineta Ziemele, judges Sanita Osipova, Aldis Laviņš, Gunārs Kusiņš, Daiga Rezevska, Jānis Neimanis, and Artūrs Kučs,

upon request of the Ombudsman,

pursuant to Article 85 of the Constitution of the Republic of Latvia and Section 16, Clauses 3 and 6, Section 17, Paragraph one, Clause 8, and Section 28.[1] of the Constitutional Court Law,

on 5 June 2018, in the written procedure, reviewed the case

"On Compliance of Paragraph 3.[1] of the Binding Regulation of 9 June 2015 of the Riga City Council No. 148, On the Real Estate Tax in Riga, with Article 91 of the Constitution of the Republic of Latvia and the First Part of Article 18 and the First Part of Article 21 of the Treaty on the Functioning of the European Union".

Establishing Part

1. On 9 June 2015, the Riga City Council, inter alia, on the basis of Section 3, Paragraph one of the law On Immovable Property Tax (hereinafter – the Property

Tax Law), issued Binding Regulation No. 148, On the Real Estate Tax in Riga, (hereinafter – Binding Regulation No. 148) which entered into force on 1 January 2016.

The initial wording of Paragraph 3 of Binding Regulation No. 148 stipulated the following: "The real estate tax rates, i.e. 0.2 per cent of the cadastral value not exceeding EUR 57,000, 0.4 per cent of the part of the cadastral value exceeding EUR 57,000, but not exceeding EUR 107,000, and 0.6 per cent of the part of the cadastral value exceeding EUR 107,000, shall apply to:

3.1. the part of a building consisting of the residential property, the purpose of which is residence, and the area of premises of common use eligible for this part and single-apartment houses, if these objects of real estate tax (hereinafter – the objects) are not used for carrying out economic activity, except for the objects owned or possessed by the State, local government, and local government capital companies:

3.1.1. natural persons if at least one person who is a citizen of Latvia or a non-citizen of Latvia has declared his or her place of residence in the object on 1 January of the taxation year at 0:00. In other cases, the real estate tax rate in the amount of 1.5 per cent of the cadastral value of the object is applied;

3.1.2. legal persons, individual merchants, foreign merchants and their representative offices if the object is rented out for residential purposes, from the month following the month after the registration of the rental right in the Land Register, and if on 1 January of the taxation year at 0:00 at least one person who is a citizen of Latvia or a non-citizen of Latvia has declared his or her place of residence therein. In other cases, the real estate tax rate in the amount of 1.5 per cent of the cadastral value of the object is applied;

3.2. two or multi-apartment houses which are not divided into residential properties, including groups of premises in non-residential buildings, the purpose of which is residence, excluding objects owned or possessed by the State, local government, and local government capital companies:

3.2.1. natural persons for the part of the area of the house where persons who are citizens of Latvia or non-citizens of Latvia have declared their place of residence on 1 January of the taxation year at 0:00, assuming that one person who

has declared his or her place of residence shares 30 m^2 of the part of the house, the purpose of which is residence, and which is not used for carrying out economic activity, and the area of premises of common use eligible for this part (if cadastral survey of the building has been carried out). In other cases, the real estate tax rate in the amount of 1.5 per cent of the cadastral value of the object is applied;

3.2.2. legal persons, including individual merchants, foreign merchants and their representative offices, for an object (part thereof), the purpose of which is residence, and which is not used for carrying out economic activity, and the area of premises of common use eligible for this part (if cadastral survey of the building has been carried out), if the object is rented out for residential purposes, from the month following the month after the registration of the rental right in the Land Register, and persons who are citizens of Latvia or non-citizens of Latvia have declared the place of residence therein (or in part thereof) on 1 January of the taxation year at 0:00, assuming that one such person shares 30 m^2 of the part of the area. In other cases, the real estate tax rate in the amount of 1.5 per cent of the cadastral value of the object is applied."

In addition, on 13 October 2015, the Riga City Council, inter alia, on the basis of Section 3, Paragraph one of the Property Tax Law, issued Binding Regulation No. 169, Amendments to the Binding Regulation of 9 June 2015 of the Riga City Council No. 148, On the Real Estate Tax in Riga, (hereinafter – the Amendments) which entered into force on 1 January 2016.

According to the Amendments, the words "a citizen of Latvia or a non-citizen of Latvia" were replaced with the words "a citizen of Latvia or a non-citizen of Latvia, a citizen of another European Union Member State, a country of the European Economic Area or of the Swiss Confederation, or a person who has received a permanent residence permit in the Republic of Latvia in accordance with the procedures laid down in Paragraph $3.^1$ of this Binding Regulation" in the entire text of Binding Regulation No. 148. Furthermore, Binding Regulation No. 148 was supplemented with Paragraph $3.^1$ (hereinafter – the contested norm) in the following wording: "If the place of residence of a citizen of another European Union Member State, a country of the European Economic Area or of the Swiss Confederation, or a person who has received a permanent residence permit in the

Republic of Latvia is declared in the real estate object, for the purpose of the application of the real estate tax rate determined in the introductory part of Paragraph 3 of the Binding Regulation, the place of residence of the aforementioned person must have been declared in Latvia on 1 January of the year which was seven years before the relevant taxation year. Once compliance of the person with this criterion has been established, it is not re-examined in the subsequent taxation years and is considered as having been met."

The contested norm was not amended and is effective in the initial wording thereof.

2. **The applicant, i.e. the Ombudsman**, believes that the contested norm does not comply with Article 91 of the Constitution of the Republic of Latvia and the First Part of Article 18 and the First Part of Article 21 of the Treaty on the Functioning of the European Union (hereinafter – the TFEU).

The Ombudsman has initiated an investigation case concerning the contested norm. Within the scope of the aforementioned case, the Ombudsman issued an opinion, requesting the Riga City Council to exclude the contested norm from Binding Regulation No. 148. The Riga City Council has refused to remedy the identified deficiencies within the deadline specified by the Ombudsman.

In accordance with the second sentence of Article 91 of the Constitution, in a democratic country governed by the rule of law, it is inadmissible to restrict the fundamental rights of a person on the basis of an impermissible criterion. The First Part of Article 18 of the TFEU prohibits any form of discrimination on grounds of citizenship. Moreover, in accordance with the Second Part of Article 20 of the TFEU and the First Part of Article 21 of the TFEU, citizens of the European Union (hereinafter also – the EU) have the right to move and reside freely within the territory of the Member States. In accordance with the Charter of Fundamental Rights of the European Union, the free movement of persons is also a fundamental right. Thus, taking into account the international obligations undertaken by Latvia, citizenship is to be regarded as one of the prohibited criteria included in the second sentence of Article 91 of the Constitution.

The European Commission has highlighted the need to prevent situations where a citizen of one EU Member State buying property in another EU Member State cannot benefit from tax exemptions or is forced to pay higher real estate taxes than the local population. An EU Member State may treat cross-border situations differently from domestic situations only if this is justified by a difference in the taxpayer's circumstances. Unjustified restrictions on citizens of an EU Member State in another Member State are inadmissible as this would hinder the development of the common economic space and common judicial area.

In order to assess whether the principle of non-discrimination has been violated, it is necessary to establish the existence of the prohibited criterion, the comparable groups in the particular situation, a difference in treatment, and also whether there are objective and reasonable grounds for such treatment. In the present case, citizenship is the prohibited criterion. The comparable groups are, on the one hand, citizens or non-citizens of Latvia and, on the other hand, citizens of another European Union Member State, a country of the European Economic Area or of the Swiss Confederation. A difference in treatment is reflected in the different real estate tax rates applied depending on the nationality of the person declared in the property.

If a person who is not a citizen or a non-citizen of Latvia declares the place of residence in his or her property, according to the contested norm, the reduced real estate tax rates would apply to him or her only after seven years. However, a citizen or a non-citizen of Latvia in the same situation would be subject to the application of these rates in the subsequent taxation year. Thus, a person who is not a citizen or a non-citizen of Latvia is deprived of the right to apply for reduced real estate tax rates for seven years. If a taxpayer who is a citizen or non-citizen of Latvia rents out his or her property to a foreigner, allowing him or her to declare his or her residence there, he or she will not be subject to the application of the reduced tax rate. For this reason, owners of residential premises prefer to rent out the premises to citizens or non-citizens of Latvia rather than to foreigners. It should also be taken into account that, according to the Residential Tenancy Law, the tenant must compensate for the payment of the real estate tax prescribed by law. Moreover, the contested norm stipulates, inter alia, that the compliance of a person

who is not a citizen or a non-citizen of Latvia with the seven-year declaration requirement shall be assessed once and the requirement shall be deemed to be fulfilled even if that person has declared his or her place of residence in Latvia for even one day.

The Riga City Council points out that the purpose of the contested norm is to apply the reduced real estate tax rates only to the properties where such persons have declared their place of residence who have lasting and permanent ties with Latvia. According to the Ombudsman, the aforementioned cannot be recognised as objective and reasonable grounds for a difference in treatment and there are no apparent other objective and reasonable grounds for a difference in treatment in the present case. Nationality is not an objective criterion for applying reduced tax rates within the EU. Moreover, a local government has no right to act outside its competence and to regulate immigration-related matters. Consequently, the contested norm violates the principle of non-discrimination.

Having examined the case materials, the Ombudsman concludes that compliance with the requirement contained in the contested norm does not demonstrate that a person has lasting and permanent ties with Latvia. In the present case, it should also be taken into account that foreigners who have declared their place of residence in Latvia are to be regarded as domestic taxpayers (residents) in the same way as citizens or non-citizens of Latvia for the purposes of the Latvian tax legislation.

3. **The authority that issued the contested act, i.e. the Riga City Council,** believes that the contested norm complies with Article 91 of the Constitution and also the First Part of Article 18 and the First Part of Article 21 of the TFEU.

The contested norm was adopted for two reasons: first, to increase the number of persons to whom the reduced real estate tax rates apply, and second, to ensure that such tax rates are applied only to those properties where persons with lasting and permanent ties with Latvia have declared their place of residence. Within the meaning of the contested norm, such ties are to be regarded as proven even if the person has declared his or her place of residence in Latvia even for one day, i.e. 1 January which was seven years prior to the relevant taxation year.

In the present case, the reduced real estate tax rates are not applied according to the nationality of the person, but according to other criteria, i.e.: 1) whether the property is intended for residential use; 2) whether the property is used for residential purposes (i.e. whether a person has declared his or her place of residence there); 3) whether the person using the property for residential purposes has lasting and permanent ties with Riga (and therefore also with Latvia).

When adopting the contested norm, account was taken of the fact that the population of Latvia, on the one hand, and citizens of another European Union Member State, a country of the European Economic Area and of the Swiss Confederation, or persons who have obtained a permanent residence permit in Latvia (hereinafter also – foreigners), on the other hand, are not in the same circumstances. Citizens and non-citizens of Latvia, unlike foreigners, have lasting and permanent ties with Latvia. Moreover, the economic and social conditions of foreigners are better than that of the population of Latvia. When issuing binding regulations, the Riga City Council should objectively assess the payment possibilities and the economic situation of the population. The exclusion of the contested norm from Binding Regulation No. 148 will put the population of Latvia in a worse position compared to the citizens of other countries, as the inhabitants of Latvia are exposed to a greater tax burden. Moreover, the local government, taking into account the resources available thereto, has no other possibility to assess individually whether a particular person has lasting and permanent ties with Latvia.

The obligation to declare the place of residence established in the contested norm is the only criterion by which both foreigners and the inhabitants of Latvia can be objectively grouped in order to determine the relations of these persons with Latvia and, accordingly, the applicable real estate tax rate. The requirement to declare the place of residence in a particular property has also been recognised in the Property Tax Law as reasonable and consistent with the principle of objective classification. Thus, the contested norm does not undermine the right of foreigners to move freely and to choose their place of residence.

The period of seven years included in the contested norm is a reasonable criterion which allows to ascertain the long-term intentions of a foreigner to commit his or her life with Latvia. For example, according to the Immigration Law, only a

foreigner who has continuously stayed in Latvia for at least five years is eligible for the receipt of a permanent residence permit. However, a prerequisite for a person to be admitted to Latvian citizenship under the naturalisation procedure is that he or she has been a permanent resident of Latvia for at least the last five years. Moreover, the five-year period for a citizen of another country starts from the date of obtaining the permanent residence permit. When drafting the contested norm, also other criteria were assessed for establishing lasting and permanent ties of a person with Latvia, including the status as an employed person in Latvia that he or she had for a certain period of time. However, such a criterion would have been more burdensome than the one contained in the contested norm.

4. **The invited person, i.e. the Ministry of Environmental Protection and Regional Development,** considers that the contested norm does not comply with Article 91 of the Constitution and the First Part of Article 18 of the TFEU; however, the rights specified in the First Part of Article 21 of the TFEU are not directly restricted thereby.

The Ministry of Environmental Protection and Regional Development, on the basis of Section 45, Paragraph two of the law On Local Governments, has assessed the legality of Binding Regulation No. 148. The Ministry had no objections to the tax rates contained in the aforementioned Binding Regulation. However, it has requested an opinion from the Ministry of Finance with regard to the declared place of residence as a criterion for applying reduced tax rates. The Ministry of Finance has noted that such criterion corresponds to the principle of objective classification and also respectively with Section 3, Paragraph one and Section $3.^1$, Paragraph one of the Property Tax Law.

Meanwhile, when assessing the legality of the Amendments, the Ministry of Environmental Protection and Regional Development requested the Riga City Council to consider whether the period of seven years provided for in the contested norm with regard to the declared place of residence in Latvia is proportionate. According to the Ministry, the respective norm restricts the right of an owner to freely choose the tenant. However, the Riga City Council has left the contested norm unchanged. The Ministry of Environmental Protection and Regional

Development has also requested an opinion from the Ministry of Justice concerning the compliance of the contested norm with international legal acts binding upon Latvia. The Ministry of Justice has concluded that the contested norm does not directly restrict the right of citizens of other EU Member States to move freely, to enter into an employment relationship, or to carry out economic activities in Latvia; however, it makes their stay in Latvia more complicated and financially unprofitable.

The Property Tax Law, inter alia, grants a local government discretion to develop a tax policy in the administrative territory thereof. According to the law On Local Governments, the exclusive competence of a local government includes taking care of the improvement of its administrative territory, promotion of economic activities to be carried out there, approval of the budget, development programme, and spatial plan of the local government, and also taking decisions on the procedures for the performance of autonomous functions of the local government. Therefore, the Ministry of Environmental Protection and Regional Development is not entitled to substantially assess the compliance of the real estate tax rates included in the Binding Regulation of the local government with the Property Tax Law. It is necessary to take account of the fact that the tax rate of 1.5 per cent of the cadastral value of the property is the maximum permissible basic tax rate and not an increased rate. However, the rates of 0.2, 0.4, or 0.6 per cent of the cadastral value of the property are to be regarded as reduced rates that are determined by the local government by assessing its budgetary possibilities and taking into account the principles laid down in the Property Tax Law. The introduction of reduced rates implies the application of a preferential tax regime and the granting of an additional benefit to taxpayers. Therefore, the inclusion of additional criteria for the receipt of such benefits in the Binding Regulation of the local government is justified.

However, the legitimate objective pursued by the regulation included in the contested norm is not apparent, in particular in the sense that the contested norm allows the application of reduced tax rates even if a person declared his or her place of residence in Latvia for only one day seven years ago. Foreigners are placed in an unequal situation compared to the citizens or non-citizens of Latvia.

Consequently, the contested norm discriminates against persons on grounds of their nationality.

5. The invited person, i.e. the Ministry of Finance, believes that the contested norm does not comply with Article 91 of the Constitution and also the First Part of Article 18 and the First Part of Article 21 of the TFEU.

In accordance with Section 3.[1], Paragraph one of the Property Tax Law, when determining the real estate tax rate or rates, a local government shall comply with the principle of objective classification, the efficiency principle, the principle of responsible budget planning, and the principle of predictability and stability. The laws and regulations governing the real estate tax sector do not prohibit local governments from taking into account other principles and criteria for determining the real estate tax rate or tax reliefs. However, the criteria established by the local government must comply with higher-ranking legal norms.

The compliance of the contested norm with the prohibition of discrimination should be assessed in the context not only of the TFEU, but also of the conventions concluded by Latvia on the prevention of double taxation and tax evasion. The Model Tax Convention of the Organisation for Economic Cooperation and Development that includes legal norms used for the conclusion of tax conventions, thus imposing the obligation to prevent discrimination on the contracting states. In particular, it prohibits a contracting state from imposing different or more burdensome taxes or requirements relating to the field of taxation on the citizens of the other contracting state than those imposed thereby on its own citizens in analogous circumstances, in particular by reason of residence.

In order to assess whether the contested norm discriminates against the citizens of another country, it is necessary to compare the taxation regulations applied to a citizen of another country with the regulations applied to a citizen of Latvia under the same circumstances. According to the contested norm, a citizen of another country who owns a property where his or her place of residence is declared shall pay real estate tax in the amount of 1.5 per cent of the cadastral value of the property for the first seven years, whereas a citizen or a non-citizen of Latvia in the same situation shall pay real estate tax in the amount of 0.2 to 0.6 per cent of

the cadastral value of the property from the first year in which he or she has declared his or her place of residence in the relevant property. Thus, the contested norm violates the prohibition of discrimination not only within the meaning of the Constitution and the TFEU, but also within the meaning of the tax conventions concluded by Latvia.

6. The invited person, i.e. a representative of the Republic of Latvia in the Court of Justice of the European Union (hereinafter – the CJEU) ***Dr. iur.* Irēna Kucina,** indicates to the requirements arising from the First Part of Article 18 and the First Part of Article 21 of the TFEU in the context of the contested norm.

According to the case-law of the CJEU, it must first be ascertained whether the relevant situation falls within the material scope of application of European Union law, in the present case the norm governing the right of EU citizens to free movement and the prohibition of discrimination. The contested norm applies to situations where citizens of other EU Member States, exercising the rights laid down in Article 21 of the TFEU, reside and declare their place of residence in Latvia. The situation in the present case therefore falls within the scope of application of the Treaty on European Union and the TFEU.

In accordance with Article 18 of the TFEU, a Member State may not apply different conditions to the citizens of other Member States and to its own citizens in similar situations, nor apply the same conditions in different situations. The unequal treatment on grounds of citizenship may affect the right of free movement of the citizens of other Member States within the meaning of Article 21 of the TFEU. For example, the CJEU declared in its judgment of 26 May 2016 in case C-300/15 that Luxembourg legislation, which effectively denies a tax deduction to a taxpayer residing in Luxembourg if his or her pension taxable in Luxembourg is earned in another country, restricts the rights laid down in Article 21 of the TFEU.

The contested norm effectively creates unequal treatment depending on whether the person declared in the property is a citizen of Latvia or of another EU Member State. A citizen of another EU Member State is subject to the application of an additional requirement, i.e. the place of residence in Latvia is declared on 1 January seven years before the relevant taxation year. It is necessary to assess

whether the situations are comparable. The treatment of the citizens or non-citizens of Latvia and citizens of other EU Member States in the application of the basic and reduced real estate tax rates could be of relevance. If there is the same treatment in the first aspect, this means that there are no objective differences between the relevant persons and, therefore, there should be the same treatment when applying reduced rates.

It is also necessary to assess the purpose for which the contested norm was adopted. A restriction on the right of free movement of the citizens of the European Union may be justified on the basis of overriding reasons relating to the public interest. National legislation must be appropriate to achieve the objective pursued, but must not go beyond what is necessary to achieve that objective.

In matters not governed by EU law, Member States have a wide margin of discretionary power in terms of deciding on the criteria for assessing ties of a person with the general public of the relevant Member State. However, according to the case-law of the CJEU, these criteria cannot be too exclusive. For example, the CJEU in its judgment of 26 February 2015 in Case C-359/13 considered as too exclusionary the condition that the student applying for funding must have a place of residence in the relevant Member State for at least three out of six years preceding the registration for studies. The CJEU has held that this condition cannot be regarded as one which, if fulfilled, would unquestionably demonstrate the extent to which the applicant for funding has integrated into the relevant Member State. Therefore, in the present case, it is also necessary to ascertain whether the conditions included in the contested norm are permissible in the context of the case-law of the CJEU when assessing whether a person has lasting and permanent ties with Latvia.

7. The invited person, i.e. Associate Professor at the Department of International and European Law of the Faculty of Law of the University of Latvia *Dr. iur.* Kristīne Dupate, considers that the contested norm does not comply with the First Part of Article 18 and the First Part of Article 21 of the TFEU and also with other EU legislation on the free movement of citizens.

The notion ‘the single EU market’ is to be understood as an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured. The TFEU prohibits obstacles to such movement and establishes the right of EU citizens to move freely between EU Member States and to live in the territory of any EU Member State, whether or not they are economically active. EU secondary legislation is also relevant to the present case: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 and Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011.

The contested norm is discriminatory against the citizens of other EU Member States. The objective stated by the Riga City Council, i.e. to establish lasting and permanent ties of a person with Latvia, is contrary to both the rights of EU citizens to move and reside freely throughout the territory of the EU stipulated in Articles 20 and 21 of the TFEU and the objective of other EU freedoms, namely, to ensure the mobility of EU citizens and to remove any obstacles to it.

Concluding Part

8. The Ombudsman requests to assess compliance of the contested norm with Article 91 of the Constitution and also with the First Part of Article 18 and the First Part of Article 21 of the TFEU.

If the compliance of a legal norm with several higher-ranking legal norms is contested, the Constitutional Court, taking into account the substance of the case subject to examination, must determine the most effective approach to assessing that compliance (*cf. the judgment of the Constitutional Court of 8 March 2017 in Case No. 2016-07-01, Paragraph 14.1*).

The contested norm governs the procedures for applying the reduced tax rates stipulated in Paragraph 3 of Binding Regulation No. 148 to a real estate tax payer if the place of residence of a foreigner is declared in the property. The regulation contained therein affects foreigners with different legal status and grounds for stay in the Republic of Latvia. The First Part of Article 18 of the TFEU and the First Part of Article 21 of the TFEU apply only to some of the persons affected by the contested norm. By contrast, Article 91 of the Constitution

guarantees the existence of a uniform legal order and comprehensive effect of the law on all persons in Latvia (*see, for example, the judgment of the Constitutional Court of 14 September 2005 in Case No. 2005-02-0106, Paragraph 9.1*).

Consequently, the Constitutional Court shall, first of all, assess the compliance of the contested norm with Article 91 of the Constitution.

9. Article 91 of the Constitution determines the following: 'All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.'

Article 91 of the Constitution contains two closely interrelated principles: the principle of equality in the first sentence of the Article and the principle of non-discrimination in the second sentence (*see the judgment of the Constitutional Court of 14 September 2005 in Case No. 2005-02-0106, Paragraph 9.3).* The principle of equality allows and even requires different treatment of persons who are in different circumstances and also allows different treatment of persons who are in the same circumstances if there are objective and reasonable grounds for that (*see, for example, the judgment of the Constitutional Court of 13 May 2005 in Case No. 2004-18-0106, Paragraph 13*). In turn, the principle of non-discrimination supplements, clarifies, and assists in the application of the principle of equality in specific situations (*see the judgment of the Constitutional Court of 23 November 2015 in Case No. 2015-10-01, Paragraph 15*).

The objective of the principle of non-discrimination contained in the second sentence of Article 91 of the Constitution is to eliminate a difference in treatment based on an impermissible criterion (*see the judgment of the Constitutional Court of 29 December 2008 in case No. 2008-37-03, Paragraph 6*). These criteria vary and, taking into account both the specifics of the relevant criterion and the factual circumstances of the particular case, the justifiability of their use may differ (*see, for example, the judgment of the Constitutional Court of 14 September 2005 in Case No. 2005-02-0106, Paragraph 9.2*). Namely, there are criteria that cannot be justified and criteria that can be justified under certain circumstances.

The Ombudsman considers that citizenship is one of the criteria included in the content of Article 91 of the Constitution. Taking into account the reasoning

provided in the application of the Ombudsman and other materials of the case, the Constitutional Court will assess compliance of the contested norm with the entire content of Article 91 of the Constitution. For this purpose it must first be established whether citizenship is a criterion that is part of the content of the relevant Article.

10. Article 89 of the Constitution stipulates that 'the State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia'. International norms of human rights and the practice of application thereof serve as a means of interpretation in establishing the content and scope of fundamental rights and the rule of law principle, to the extent this does not lead to decreasing or restricting the fundamental rights included in the *Constitution* (*see, for example, the judgment of the Constitutional Court of 24 November 2017 in Case No. 2017-07-01, Paragraph 19*). The Constitutional Court has recognised that, inter alia, international human rights documents should be taken into account when disclosing the content of Article 91 of the Constitution (*see the judgment of the Constitutional Court of 14 September 2005 in Case No. 2005-02-0106, Paragraph 14*).

In turn, in accordance with the provisions of Article 68 of the Constitution, along with the accession of Latvia to the European Union, European Union law has become an integral part of the Latvian legal system (*see the judgment of the Constitutional Court of 6 June 2018 in Case No. 2017-21-01, Paragraph 16*). The Republic of Latvia must fulfil the obligations arising from its membership in the European Union *(see the judgment of the Constitutional Court of 19 October 2011 in Case No. 2010-71-01, Paragraph 13.3*). Latvian legislation must be interpreted in such a way as to avoid any conflict with the obligations undertaken by Latvia towards the European Union, unless this concerns the fundamental principles contained in the Constitution (*see the judgment of the Constitutional Court of 17 January 2008 in Case No. 2007-11-03, Paragraph 25.4*). The legal acts of the European Union and the interpretation thereof established in the case-law of the CJEU must be taken into account when ascertaining the content of national legislation and applying them (*see the judgment of the Constitutional Court of*

11 April 2018 in Case No. 2017-12-01, Paragraph 13). The case-law of the CJEU has recognised that the scope of European Union law covers all situations relating to the exercise of the freedoms guaranteed by the European Union Treaties, in particular those relating to the freedom to move and reside within the territory of the Member States (*see, for example, CJEU judgment of 29 April 2004 in Case C-224/02, Paragraph 17*).

When interpreting the norms contained in the Constitution, international human rights documents, and the TFEU, such solution must be sought that ensures harmony between these norms. Thus, the interpretation of Article 91 of the Constitution is affected by the norms contained in international human rights documents and, in certain cases, also the TFEU and the practice of their application.

10.1. Article 26 of the International Covenant on Civil and Political Rights (hereinafter – the Covenant) stipulates that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Although the respective norm does not *expressis verbis* specify citizenship, it should be noted that the list of criteria contained in the Covenant is not exhaustive. In the practice of the Human Rights Committee, in certain cases, e.g. cases concerning the restoration of property rights in respect of confiscated property or the right to a pension, citizenship has been recognised as 'another factor' on the basis of which discrimination is prohibited (*see, for example, the opinion of the Human Rights Committee of 3 April 1989, Ibrahima Gueye et al. v. France, Communication No. 196/1985, Paragraph 9.4, and the opinion of 30 October 2001, Des Fours Walderode and Kammerlander v. Czech Republic, Communication No. 747/1997, Paragraph 8.4*). However, in a case concerning a difference in the amount of pensions for former citizens of the Netherlands residing abroad, the Human Rights Committee held, under the circumstances of the case, that a difference in treatment which has reasonable and objective grounds does not constitute discrimination within the meaning of Article 26 of the Covenant (*see the*

decision of the Human Rights Committee of 23 July 1997, Van Oord v. Netherlands, Communication No. 658/1995, Paragraph 8.5).

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) stipulates that 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. It should be noted that Article 14 of the Convention applies only in conjunction with the rights guaranteed by the Convention.

The wording of Article 14 of the Convention, similar to Article 26 of the Covenant, does not explicitly mention citizenship as a criterion. However, according to the case-law of the European Court of Human Rights (hereinafter – the ECHR), in certain situations, habitual residence (domicile) in a foreign country or citizenship constitutes 'another status' referred to in Article 14 of the Convention, on the basis of which any form of discrimination is prohibited (*see, for example, the ECHR judgment of 30 September 2003, Koua Poirrez v. France, Application No. 40892/98, Paragraph 49, and the ECHR Grand Chamber judgment of 16 March 2010, Carson and Others v. the United Kingdom, Application No. 42184/05, Paragraphs 66 and 70*). The ECHR has also recognised that a Member State has a certain degree of discretion in assessing whether and to what extent differences existing in otherwise similar situations can justify a difference in treatment (*see, for example, the ECHR Grand Chamber judgment of 7 November 2013, Vallianatos and Others v. Greece, Application Nos. 29381/09 and 32684/09, Paragraph 76*). The scope of such discretion may vary depending on the circumstances and the fundamental issue in the case (*see, for example, the ECHR judgment of 8 April 2014, Dhahbi v. Italy, Application No. 17120/09, Paragraph 46*). For example, a Member State has a wide margin of discretionary power in matters of economic or social strategy (*see, for example, the ECHR Grand Chamber judgment of 7 July 2011, Stummer v. Austria, Application No. 37452/02, Paragraph 89*). However, the ECHR has concluded that a Member State is required to provide specific reasons for a difference in treatment based solely on the

citizenship of a person to be declared as non-compliant with the Convention (*see, for example, the ECHR judgment of 16 September 1996, Gaygusuz v. Austria, Application No. 17371/90, Paragraph 42*).

Thus, it derives from the international human rights norms binding upon Latvia that citizenship should be considered as one of the criteria on the basis of which discrimination is prohibited. However, the establishment of a distinction on the basis of this criterion is not absolutely prohibited and in certain cases the use of this criterion may be justified.

10.2. The First Part of Article 20 of the TFEU stipulates that the concept of 'citizenship of the Union' which provides that any person who holds the citizenship of a Member State is a citizen of the European Union. EU citizenship supplements, not replaces, national citizenship. One of the objectives of the concept of 'citizenship of the Union' is to ensure adequate legal protection for people moving within the EU (*see: Krūma K. EU Citizenship, Nationality and Migrant Status. An Ongoing Challenge. Leiden: Nijhoff, 2014, p. 120*). Union citizenship is destined to be the fundamental status of a citizen which confers rights and other advantages stipulated in the EU Treaties (*see, for example, the CJEU judgment of 20 September 2001 in Case C-184/99, Paragraph 31*).

Among the most important rights that derive directly from being a citizen of the European Union is the right to freedom of movement and residence, provided for in the First Part of Article 21 of the TFEU. In accordance with that norm, every citizen of the European Union has the right to move and reside freely within the territory of the Member States. The First Part of Article 21 of the TFEU gives EU citizens a subjective right and it has direct effect in EU Member States (*see, for example, the CJEU judgment of 19 October 2004 in Case C-200/02, Paragraph 26*). The First Part of Article 18 of the TFEU provides that, in the application of the Treaties and without prejudice to any specific provisions laid down therein, any discrimination based on citizenship shall be prohibited.

The First Part of Article 21 of the TFEU, in conjunction with the First Part of Article 18 of the TFEU, gives every EU citizen the right to equal treatment in the host Member State, i.e. the right to receive in another Member State the same treatment as its own nationals. As a citizen of the European Union, the right to free

movement means not only the right to move and reside physically in another EU Member State, but also the right not to be discriminated against in another Member State simply because he or she is not a citizen of that Member State. Moreover, the right to free movement also protects EU citizens from measures by Member States that could prevent them from exercising that right or put them at a disadvantage simply because they have exercised their right to free movement [*see, for example*: *Bambāne G., Jugāne E. Eiropas Savienības pilsonība. Grām.: Schewe C.* (*zin. red.*). *Eiropas Savienības tiesības. II daļa. Materiālās tiesības. Rīga: Tiesu namu aģentūra, 2016, p. 70–71*].

Thus, it follows from the obligations that Latvia assumed with its membership in the European Union that citizenship is a criterion on the basis of which discrimination is prohibited.

Therefore, citizenship is one of the criteria falling within the content of Article 91 of the Constitution.

11. In assessing whether the contested norm complies with Article 91 of the Constitution, the Constitutional Court must establish:

1) whether and which persons (groups of persons) are in similar and comparable circumstances according to certain criteria;

2) whether the contested norm provides for equal or different treatment of those persons;

3) whether such treatment is established by legal provisions adopted in accordance with the procedures laid down in laws and regulations;

4) whether such treatment has an objective and reasonable basis, i.e. whether it has a legitimate aim and whether the principle of proportionality has been observed (*see, for example, the judgment of the Constitutional Court of 15 May 2018 in Case No. 2017-15-01, Paragraphs 17 and 20*).

12. Binding Regulation No. 148 provides for three types of real estate tax rates: the basic rate of 1.5 per cent of the cadastral value of the property; reduced rates of 0.2, 0.4, or 0.6 per cent of the cadastral value of the property; and a higher rate of

3 per cent of the cadastral value of the property. The contested norm does not affect the procedures for applying the increased rate.

In accordance with Paragraph 3 of Binding Regulation No. 148, reduced real estate tax rates shall apply to a taxpayer whose property is used for residential purposes if the place of residence is declared in the property on 1 January of the taxation year at 0:00 for a citizen or a non-citizen of Latvia, or a foreigner corresponding to the requirement laid down in the contested norm. In other cases, the basic real estate tax rate is applied.

Thus, Paragraph 3 of Binding Regulation No. 148 and the contested norm distinguish the following groups of persons:

1) real estate tax payers in whose property the place of residence of a citizen or a non-citizen of Latvia, or a foreigner who meets the requirement laid down in the contested norm is declared;

2) real estate tax payers in whose property the place of residence of a foreigner who does not meet the requirement laid down in the contested norm is declared.

In order to establish whether the groups of persons are in similar and, according to certain criteria, comparable circumstances, it is necessary to establish the main unifying feature of such groups of persons (*see, for example, the judgment of the Constitutional Court of 15 May 2018 in Case No. 2017-15-01, Paragraph 18*). In the present case, there are a number of features characteristic to both groups of persons, e.g. the type of use of the real estate tax object or the fact that the place of residence of a person is declared in the tax object. However, taking into account the regulation of the contested norm and the circumstances of the case under examination, the main unifying feature of the relevant groups of persons is the obligation to pay the real estate tax.

Both groups of persons are therefore in similar and comparable circumstances.

13. The Ombudsman considers that the contested norm provides for a difference in treatment in terms of the application of the real estate tax rates.

According to the contested norm, in the case where the place of residence of a foreigner is declared in the real estate tax object, the reduced tax rates are applied only if the residence of the foreigner was declared in Latvia on 1 January seven years prior to the relevant taxation year. Once compliance with this requirement has been established, it shall not be reassessed in subsequent taxation years and shall be deemed to have been met. By contrast, if the tax object is the declared place of residence of a citizen or non-citizen of Latvia, no such additional requirement is imposed.

Thus, the real estate tax payer in whose property the place of residence of a citizen or a non-citizen of Latvia, or a foreigner who meets the requirement laid down in the contested norm is declared is subject to the application of reduced tax rates. However, the real estate tax payer in whose property the place of residence of a foreigner who does not meet the requirement laid down in the contested norm is declared is subject to the application of the basic real estate tax rate. Namely, different tax rates are applied to taxpayers.

Consequently, the contested norm provides for a difference in treatment of persons who are in similar and comparable circumstances.

14. Difference in treatment can be established by law (*cf. the judgment of the Constitutional Court of 19 May 2007 in Case No. 2007-13-03, Paragraph 12*). The word 'law' covers not only laws adopted by the *Saeima*, but also other generally binding (external) normative acts, provided that they are issued on the basis of a law, published in accordance with the procedures laid down in normative acts, are worded sufficiently clearly to enable the addressee to understand his or her rights and obligations, and comply with the principles of a democratic state governed by the rule of law. It would not comply with the principles of a democratic state governed by the rule of law for the competent authorities to have unlimited power in terms of the margin of discretion (*see, for example, the conclusions of the Constitutional Court of 20 May 2002 in Case No. 2002-01-03 and the judgment of 2 March 2016 in Case No. 2015-11-03, Paragraph 20*).

14.1. The Constitutional Court has recognised that the legislator may transfer the competence to decide on certain matters to local governments and the

local government council also has the right to issue generally binding (external) normative legal acts within the limits of the powers granted thereto. However, the local government council does not have the discretion of a legislator and is only entitled to issue external normative legal acts in the cases and to the extent laid down by law. The scope of powers determines the extent to which the local government council may act when drafting and issuing legal norms (*see, for example, the judgment of the Constitutional Court of 12 February 2016 in Case No. 2015-13-03, Paragraph 14.1*).

Section 3, Paragraph two of the law On Taxes and Fees stipulates that 'The law on the specific tax may grant local governments the right to apply reliefs to such payments which are payable into the local government budgets and to determine the object and rate of the immovable property tax'. In addition, in accordance with Section 3, Paragraph one of the Property Tax Law, a local government shall determine in its binding regulations the real estate tax rate or rates from 0.2 to 3 per cent of the cadastral value of real estate. Such binding regulations must be published by 1 November of the pre-taxation year.

Thus, the legislator has granted a certain degree of powers to the local government, i.e. the right to determine the real estate tax rate or rates in the binding regulations thereof.

14.2. Binding Regulation No. 148 and the Amendments are issued on the basis of Section 1, Paragraph two, Clause 9.[1] and Paragraph 2.[1], Section 3, Paragraph one, Paragraphs 1.[4], 1.[5], 1.[6], and Section 9, Paragraph two of the Property Tax Law. Binding Regulation No. 148 was published on 3 August 2015 in the official gazette *Latvijas Vēstnesis* No. 149. The Amendments were published on 19 October 2015 in the official gazette *Latvijas Vēstnesis* No. 204. Both Binding Regulation No. 148 and the Amendments entered into force on 1 January 2016.

The parties to the case and the invited persons do not dispute the fact that the contested norm has been issued on the basis of the law, published in accordance with the procedures laid down in laws and regulations, and that it is worded sufficiently clearly.

When assessing the regulation included in the contested norm in the aspect of tax rates, the Constitutional Court concludes that the tax rates chosen by the Riga

City Council fall within the scope of real estate tax rates established by the legislator. Thus, the Riga City Council has not violated the powers granted thereto by the legislator.

The requirement for the application of reduced real estate tax rates contained in the contested norm is worded sufficiently clearly to enable a person to understand the content of the rights and obligations arising from this norm and to foresee the consequences of the application thereof. However, whether such a claim is permissible in substance must be assessed by ascertaining whether the difference in treatment established by the contested norm has a legitimate objective and whether the principle of proportionality has been complied with.

Consequently, the difference in treatment is established by legal provisions adopted in accordance with the procedures laid down in laws and regulations.

15. Difference in treatment of persons who are in similar and comparable circumstances requires a legitimate objective (*see, for example, the judgment of the Constitutional Court of 11 December 2006 in Case No. 2006-10-03, Paragraph 21*). Moreover, the authority that has issued the contested act the obligation to indicate and justify the legitimate objective in the proceedings of the Constitutional Court *(cf. the judgment of the Constitutional Court of 5 February 2015 in Case No. 2014-03-01, Paragraph 20*).

15.1. It follows from the case materials that according to the initial wording of Paragraph 3 of Binding Regulation No. 148, the reduced real estate tax rates were to be applied only to those taxpayers whose property is declared as the place of residence of a citizen or a non-citizen of Latvia. By the Amendments, the Riga City Council intended to increase the number of taxpayers to whom the reduced tax rates are applicable, thus stipulating that in certain cases the respective rates are also applicable to persons in whose property the place of residence of a foreigner is declared. At the same time, the contested norm establishes an additional requirement for a foreigner who has declared his or her place of residence in the tax object, i.e. the place of residence is declared in Latvia on 1 January seven years

prior to the taxation year (*see also Explanatory Memorandum to the Amendments, vol. 1 of the case materials, pp. 15–16*).

The Riga City Council believes that the economic and social conditions of foreigners are better than that of the population of Latvia and that the citizens and non-citizens of Latvia are exposed to a greater tax burden than foreigners. The contested norm ensures that only those properties where persons with lasting and permanent ties with Latvia are declared are subject to the application of reduced real estate tax rates (*see the reply of the Riga City Council in the case materials, vol. 1, p. 29*). In addition, it is intended that the Amendments would motivate owners to consider more seriously to whom to rent out their premises and to take into account that accommodation of persons having close ties with the State of Latvia will serve as the basis for the application of reduced tax rates. This will increase the range of rental accommodation available to the public (*see Explanatory Memorandum to the Amendments, vol. 1, pp. 15–16*).

15.2. Similar to other taxes, the real estate tax through the fiscal function ensures revenue in the local government budget. According to the regulation of the Property Tax Law, the tax can, for example, facilitate territorial development and improvement, ensure rational use of land, take care of the sustainable use of buildings, support entrepreneurship, and achieve other objectives.

Since 2013, local governments have the right to determine the real estate tax rate or rates within the scope of the powers granted thereto by the legislator. This solution has been chosen in order to enable local governments, which are more familiar with their capabilities and the needs of their inhabitants, to introduce such real estate tax policy that is more favourable to a particular local government in the long term (*see vol. 1 of the case files, p. 81*).

However, when determining real estate tax rates within the scope of the powers granted by the legislator, the local government must, inter alia, comply with the general principles of law and sectoral principles as specified in Section $3.^1$ of the Property Tax Law.

15.3. In accordance with the powers granted by the legislator and the principle of objective classification stipulated in Section $3.^1$, Paragraph one,

Clause 1 of the Property Tax Law, a local government is entitled to determine different tax rates for different taxpayers and different tax objects.

The Riga City Council considers that the declared place of residence is an objective criterion for applying different real estate tax rates. This opinion is also shared by the Ministry of Environmental Protection and Regional Development (*see vol. 1, p. 55*).

The Constitutional Court has recognised that the local government, inter alia, also means the right and actual possibility of an institution of local authority to regulate and deal with a considerable part of public issues in the interests of local inhabitants by also bearing responsibility for them (*see, for example, the decision on termination of legal proceedings of the Constitutional Court of 16 April 2008 in Case No. 2007-21-01, Paragraph 14*). In order to be able to effectively exercise the autonomous powers and to perform the functions granted by law, a local government must, among other things, identify the inhabitants thereof and their needs. Information on the inhabitants of a local government allows to plan budget revenues and expenditures, ensure territorial development of the local government by providing for certain infrastructure and its possible types of use, provide the necessary services, and also to carry out other tasks. One of the ways a local government can identify its inhabitants is to encourage them to declare their place of residence.

Consequently, the taxation of tax objects where a person has declared his or her place of residence with reduced real estate tax rates may, in certain cases, contribute to the performance of the functions and tasks of the local government.

15.4. However, in accordance with the contested norm, the address of the declared place of residence of a foreigner in the tax object allows the taxpayer to apply reduced tax rates only if the foreigner had declared his or her place of residence in Latvia on 1 January seven years prior to the relevant taxation year.

15.4.1. In the present judgment, the Constitutional Court has already referenced to the right of a citizen of the European Union to move and reside freely in the territory of other EU Member States and also to the content of the principle of non-discrimination in European Union law (*see Paragraph 10.2 of this judgment*). In accordance with the provisions of the Agreement on the European

Economic Area of 13 December 1993, the free movement of persons between the European Union Member States and the European Free Trade Association Member States shall be ensured and also any discrimination on grounds of citizenship shall be prohibited. Citizens of the Swiss Confederation are granted equivalent rights in the European Union on the basis of the Agreement of 21 June 1999 between the European Community and its Member States and the Swiss Confederation on the free movement of persons.

In accordance with the case-law of the CJEU, in the area of European Union law, a difference in treatment on grounds of citizenship can only be justified on objective grounds unrelated to the citizenship of the relevant persons (*see, for example, the CJEU judgment of 16 December 2008 in Case C-524/06, Paragraph 75, and the judgment of 20 January 2011 in Case C-155/09, Paragraph 69*). By contrast, it follows from the Explanatory Memorandum to the Amendments and the reply of the Riga City Council that the Riga City Council wanted to impose an additional requirement regarding the declared place of residence of the citizens of another European Union Member State, countries of the European Economic Area and of the Swiss Confederation in particular due to the citizenship of these persons, as it considered that they were not comparable to the citizens or non-citizens of Latvia (*see, for example, the reply of the Riga City Council, vol. 1 of the case materials, p. 29*).

The requirement contained in the contested norm in a comparable situation specifically distinguishes a citizen of another European Union Member State, a country of the European Economic Area or of the Swiss Confederation who has exercised the right of free movement from the citizens and non-citizens of Latvia. Such requirement by itself does not comply with the fundamental nature of the right to free movement and violates the principle of non-discrimination on grounds of citizenship. The contested norm provides for a difference in treatment of taxpayers depending on the country of citizenship of the person who has declared his or her place of residence in the property owned by the taxpayer. However, in the area of EU law, the criterion of citizenship cannot be used to establish a difference in treatment between taxpayers.

Thus, the difference in treatment provided for by the contested norm towards taxpayers in whose property a citizen of another European Union Member State, a country of the European Economic Area or of the Swiss Confederation has declared his or her place of residence cannot be justified.

15.4.2. In addition, the contested norm also applies to those taxpayers in whose property a foreigner who is not a citizen of another European Union Member State, a country of the European Economic Area or of the Swiss Confederation has declared his or her place of residence.

Differences in tax rates must be justified on the basis of the criteria associated with the purpose of the tax. Namely, when establishing the difference in treatment, which is manifested in the application of different tax rates to persons who are in the same and comparable circumstances, a set of considerations that would substantiate the existence of such differences between taxpayers that would require the application of different tax rates may constitute a legitimate objective (*cf. the judgment of the Constitutional Court of 19 October 2017 in Case No. 2016-14-01, Paragraph 27.3*).

The Riga City Council has not substantially indicated any reasons justifying the legitimate objective of the difference in treatment provided for by the contested norm and also the fact that there are such objective differences between taxpayers that would require the application of different tax rates. Namely, why a taxpayer in whose property a foreigner who is not a citizen of another European Union Member State, a country of the European Economic Area or of the Swiss Confederation has declared his or her place of residence should be subject to reduced real estate tax rates only if the place of residence of the foreigner in Latvia was declared on 1 January seven years prior to the relevant taxation year.

In accordance with the considerations provided by the Riga City Council, it could be assumed that the contested norm was adopted for the purpose of ensuring the availability of residential premises for rent or for the purpose of ensuring the reduction of the tax burden for the citizens and non-citizens of Latvia. However, in the case subject to examination, the Constitutional Court finds no confirmation that the difference in treatment of taxpayers depending on the country of citizenship of the person who has declared his or her place of residence in the property owned by

the taxpayer could serve for the achievement of the aforementioned objectives. In particular, it is not clear how the requirement for a foreigner to have a declared place of residence in Latvia, and not in the relevant property, on 1 January seven years prior to the relevant taxation year (which is to be considered fulfilled even if the place of residence in Latvia is declared for only one day) could ensure wider availability of rental accommodation or reduce the tax burden for the citizens and non-citizens of Latvia. The Constitutional Court also fails to find a reasonable explanation as to how the requirement for a foreigner who is not a citizen of another European Union Member State, a country of the European Economic Area or of the Swiss Confederation to have lasting and permanent ties with Latvia ensures or facilitates the performance of the functions and tasks of the local government on the grounds of which the real estate tax is collected.

Thus, the difference in treatment provided for by the contested norm towards taxpayers in whose property a foreigner who is not a citizen of another European Union Member State, a country of the European Economic Area or of the Swiss Confederation has declared his or her place of residence does not constitute a legitimate objective.

Consequently, the contested norm does not comply with Section 91 of the Constitution.

16. In concluding that the contested norm does not comply with Article 91 of the Constitution, it is not necessary to assess the compliance thereof with the First Part of Article 18 and the First Part of Article 21 of the TFEU.

Substantive Part

On the basis of Sections 30-32 of the Constitutional Court Law, the Constitutional Court

decided:

to declare the non-compliance of Paragraph 3.[1] of the Binding Regulation of 9 June 2015 of the Riga City Council No. 148, On the Real Estate Tax in Riga, with Article 91 of the Constitution of the Republic of Latvia.

The Judgment is final and not subject to appeal.

The Judgement shall enter into force as of the date of its publication.

Chairperson of the court hearing I. Ziemele