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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

REPUBLIC OF LATVIA

**Draft Law on the Status of Former USSR Citizens
who are not Citizens of Latvia or any other State**

**Comments by Mr G. KOJANEC (Rome)
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**Opinion on the draft Law on the status of former USSR citizens
who are not citizens of Latvia or any other State**

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1. Scope of the proposed legislation

In general, the importance of the new draft law (see the Appendix to this opinion) must be stressed. Indeed, in view of the existence of a large number of persons who were formerly USSR nationals or are their descendants, permanently resident in Latvia, and who are not in possession either of the nationality of that State or of the nationality of any other State, the proposed legislation indicates the intention of establishing the legal framework to ensure them the guarantee of fundamental rights.

The draft law states (Article 2) that its provisions are applicable to those persons who are certified as resident on the basis of former USSR (internal) passports or of identification documents issued by the Republic of Latvia.

The exclusion from such guarantees of USSR armed forces personnel retired from active service after May 4th 1990 (Article 1) and associated persons, present in Latvia, should not be considered relevant in this context.

The adoption of the draft law should eliminate subsisting discriminations between nationals and other permanent residents, eg the one stemming from Article 10 of the Constitutional Law on the rights and obligations of a citizen and a person which, among specific basic rights reserved to nationals, includes, in particular, the right to reside in Latvia, to leave the country and to return there. It is clear that the enjoyment of political rights remains limited to nationals.

The ratification by Latvia of the Convention for the protection of human rights and fundamental freedoms and the acceptance of the competence of the Commission and the Court will further enlarge and strengthen the system of guarantees for non-nationals "within the jurisdiction of Latvia" to whom the provisions of the Convention will be applicable, as confirmed by the case-law of the Human Rights Court. The relevance of the rules contained in international treaties for the persons concerned is expressly mentioned in Article 3 of the draft law and, on the basis of Article 19 of the same draft, they prevail over the provisions of the draft law.

2. The right to stay in Latvia

2.1. A highly important rule of the draft law is contained in Article 11 whereby the right of the persons concerned (as indicated in Article 1) to stay in the country is implicitly confirmed (it might be explicitly stated) by recognising their freedom to "choose a place of residence in any part of the territory of Latvia and to freely leave and return to Latvia" if they maintain their permanent residence in the country.

Of course, the impact of these provisions depends on the nature of the regulations concerning the conditions required to maintain the status of permanent resident. The persons indicated in Article 1 are considered by law as "permanent residents" on fulfilling appropriate procedural requirements (see Article 18): it must be assumed that they do not lose their status unless they permanently transfer their place of living to another State.

It is clear that the right to freely leave the country (and return to it) may be substantiated only by delivering to the persons concerned an appropriate national document for travelling abroad, as passports for non-nationals, which formally indicate the obligation of Latvia to re-admit the holder to its territory. These matters may be regulated by separate legislation.

2.2. A necessary guarantee for the stability of stay concerns expulsion, and the draft law takes into consideration also these aspects, albeit in a limited way. Article 12, indeed, would permit expulsion on any ground (provided by Law, it should be assumed) on the condition that the decision be "adopted in accordance with the procedure set by Law". Such a decision (normally of an administrative character) is subject to appeal before the Courts.

It is relevant, in this regard, to consider legal developments relating to the expulsion of foreigners occurred in the European context.

Protocol No. 4 to the Human Rights Convention states in Article 4 that the "collective expulsion of foreigners is prohibited".

Protocol No. 7 to the said Convention deals in Article 1 with individual expulsions. It does not limit the grounds for expulsion but, by providing in paragraph 1 that "an alien lawfully resident shall not be expelled except in pursuance of a decision reached in accordance with Law", it implies that the grounds for expulsion must be prescribed by Law: the purpose is to avoid arbitrary decisions by the Executive.

Furthermore, the combined effect of paragraphs (1) and (2) of Article 1 is that an alien may not be expelled before having had the possibility to exercise his right "(a) to submit reasons against his expulsion; (b) to have his case reviewed and (c) to be represented for these purposes before the competent Authority or person or persons designated by that Authority". He may be expelled before the exercise of the rights under paragraph (1), a., b. and c. only "when such expulsion is necessary in the interest of public order or is grounded on reasons of national security" (Article 1, paragraph 2).

If we examine the draft law in the light of these principles we note that:

- it does not expressly exclude expulsion by means of a collective measure;
- unless the translation is erroneous, it does not provide that the decision must be grounded on reasons established by Law, since it refers expressly and exclusively to the circumstance that it must be adopted "in accordance with the procedure set by Law";
- it does not guarantee the right to submit reasons against expulsion;
- even if it establishes in Article 2, paragraph 2 that the decision may be appealed, it does not guarantee a suspensive effect of the appeal, which according to Article 1, paragraph 2 of Protocol No. 7 is excluded only in cases of expulsion grounded on reasons of public order or national security.

The European Convention on Establishment is also relevant in regard to expulsion of nationals of States Parties lawfully residing in the territory of another Party. The purpose of this Convention being the adoption of common rules for the treatment of nationals of other States Parties.

The basic principle contained in Article 3, paragraph 1 of the Convention is that "nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against *ordre public* or morality"; paragraph 3 specifies that "nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of another Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this Article are of a particularly serious nature". The suspensive effect of an appeal is granted by paragraph 2 to aliens lawfully residing for more than two years, except where "imperative considerations of national security otherwise require".

This Convention limits the grounds for expulsion in consideration both of the fact that it refers to a special category of aliens (nationals of a State Party) and of the importance of the links established by the person concerned with the State of residence (period of residence). Such factors might not be irrelevant in the case under consideration, i.e. former USSR nationals long-term permanent residents of Latvia.

In conclusion, while appreciating the principle inspiring Article 12 of the draft law, we suggest that its drafting be modified in order to take account of the above-mentioned considerations and bring it into line with Protocols Nos. 4 and 7 as well as with the European Convention on Establishment.

We stress the relevance of that part of Article 12 of the draft which makes expulsion impossible if no other State accepts the person expelled. The rule might be completed by introducing the principle that nobody shall be expelled to a country where there are well-founded grounds to believe that the person might be persecuted for reasons of race, religion, ethnic origin etc.

3. Treatment of permanent residents

A general remark should be made in regard of the other provisions of the draft law which will be referred to hereinafter and which are intended to guarantee specific fundamental rights in different areas.

These provisions should not be interpreted as being exhaustive, in the sense that they exclude the enjoyment of other rights not covered by them; in order to make it clear a general clause might be introduced in the text specifying that the provisions of the law do not prejudice the enjoyment by the persons concerned of other rights granted by internal legislation (with reference in particular to the Constitutional Law on rights and obligations of a citizen and a person) or by international treaties to which Latvia is a Party. This is a mere consequence of Article 3 of the draft.

3.1. The principle of non-discrimination is expressed in Article 4; the purpose of this Article should be to exclude the possibility of applying present and future legislation of the country in such a way as to differentiate the treatment of nationals from that of the persons whose situation is regulated by the draft law.

This amounts to recognising the principle of equality of treatment with nationals. Reference may be made in this regard to Article 4 of the European Convention on Establishment which, in relation to the status of nationals of the Contracting Parties, states that they "shall enjoy in the territory of any other Party treatment equal to that enjoyed by nationals of the latter Party in respect to the possession and exercise of private rights (*droit civil*), whether personal rights or rights relating to property". A similar provision might be integrated into Article 4, so that the principle of non-discrimination it contains would be better qualified.

It may be noted that the list of situations which may lead to prohibited discrimination contained in Article 4 of the draft law is, in some aspects, more limitative than the one included in Article 14 of the Human Rights Convention (and it might easily be integrated) but it extends to "differences in national and ethnic heritage" which is the very positive and relevant factor for the purposes to be pursued by the new legislation.

3.2 With reference to other specific rights envisaged in the draft:

3.2.1. Article 5 does not require any observation.

3.2.2. Article 6: it states the right to be assisted by an interpreter in judicial and other administrative proceedings "in accordance with Articles 8 and 9 of the Language Law", which refer only to the use of other languages in documents. Unless the English text contains an erroneous translation, it should read "when attending judicial ... institutions Articles 8 and 9 of the Language Law are applicable to the subjects of this Law and they shall have the right to be assisted by an interpreter, free of charge, when necessary".

3.2.3. Article 7 makes effective the very fundamental principle of family reunion. It might be completed by stating that "members of the family taking up permanent residence in Latvia in application of this Article shall enjoy the benefits of the present Law".

3.2.4. Article 8: insofar as it purports to express the same principles as Articles 9 and 10 of the Human Rights Convention, it might be more appropriately drafted using the same wording. The second paragraph contains an additional provision of great relevance and should in any case remain in the text.

3.2.5. Article 9 must be very positively appreciated as it protects basic rights of a non-national minority residing in the country, by guaranteeing the preservation of its culture, language and traditions.

3.2.6. Article 10 has the purpose of guaranteeing the right to property and it constitutes a very relevant protective measure for the persons concerned. Some questions might be raised in this regard: Should not the principle of equal treatment with nationals be expressly stated? Will the rule eliminate those discriminations indicated by the League of Stateless Persons to the Rapporteurs of the Political Affairs Committee of the Parliamentary Assembly (document AS/Pol (1994) 38, Addendum, pages 32 and 33)? Does the principle apply to houses, flats and does it apply to the ownership of land? What other restrictions does the reference to the respect of "the procedure set in the Laws of the Republic of Latvia" imply?

3.2.7. Article 13 refers to two different but very important principles: the right to work and the right "to join and form trade unions or other trade organisations".

As to the right to work, this principle is expressed in an unusual way, "right to protect themselves from unemployment", which amounts to a rather vague statement. It would seem more appropriate to use the wording of Article 10 of the European Convention on Establishment, in the sense that "the subjects of this Law shall have the right to engage in the territory of Latvia in any gainful occupation on an equal footing with nationals. This provision shall apply, but not be limited, to industrial, commercial, financial and agricultural occupations, skilled crafts and the professions, whether the person concerned is self-employed or is in the service of an employer".

The rule that persons concerned have a right "to receive fair pay for work" should also be completed by the phrase "on an equal footing with nationals", for obvious reasons.

3.2.8. In Article 14 the relevant provisions should apply "on an equal footing with nationals".

3.2.9. Article 15 of the draft law reflects an important principle but its drafting might raise difficulties by making the rights provided for therein dependant upon the "legislation of the Republic of Latvia". Although discriminatory legislation should not be envisaged, it would seem appropriate to retain the following rules, reproduced from Articles 7, 8 and 9 of the European Convention on Establishment: "the subjects of this Law shall enjoy in the territory of Latvia, under the same conditions as nationals of Latvia, full legal and judicial protection of their persons and property and of their rights and interests. In particular they shall have, in the same manner as Latvians, the right of access to the judicial and administrative Authorities and the right to obtain the assistance of any person of their choice who is qualified by the Laws of Latvia, and they shall be entitled to obtain free legal assistance under the same conditions as nationals of Latvia. No security or deposit of any kind or guarantee of legal costs may be required whenever they are plaintiffs or third parties before the Courts of Latvia".

4. Documents required (Articles 16 to 18 of the draft law)

It seems appropriate that the ancient USSR passport be substituted by a Latvian identity card which should not, however, constitute a document meant to differentiate holders from Latvian nationals. Therefore, it should have the same characteristics as identity cards for Latvians, although containing the indication that the holder is a permanent resident alien (or Stateless person).

The provision of Article 18, paragraph 2 contains a serious sanction, amounting to the deprivation of all rights guaranteed by the draft law, in regard to all persons who do not change their USSR passport for the new identity card within a specified period of time, unless a "substantiated reason" is given. Is such a sanction absolutely necessary?

5. Concluding remarks

In the Council of Europe expertise of 25 November 1993 on the draft Citizenship Law of Latvia, it was stated that "the protection of the legitimate interests of non-citizens who were permanently residing in Latvia before it recovered its independence and who had hitherto exercised all the rights then attaching to citizenship demand that they are granted, in general, the same basic rights as Latvians, including those with regard to residency, economic rights (including the right to have a flat or family house) and social rights".

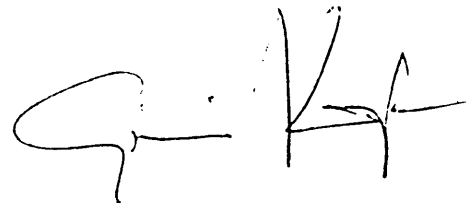
The draft law under consideration is intended to meet these requirements.

It clearly appears from the preceding analysis of the provisions of the text which has been submitted at this date, that a substantial effort is being envisaged in order to guarantee an appropriate status to the persons concerned on the basis of the recognition of their right to stay in the country. The proposed regulations cover the basic aspects concerning civil, economic and social rights, with the aim of eliminating discriminatory treatment. It must be remarked that, to our knowledge, this is the first example of a legislation of this kind in States formerly subject to the sovereignty of the USSR.

The suggestions relating to improvements in the drafting of the text, contained in this Opinion, serve mainly the purpose of clarification and precision in the realisation of the scope pursued by each provision, in line with its spirit, taking into account the relevant Conventions of the Council of Europe.

It might seem appropriate that a Working Group of the Council of Europe discuss the relevant details with the Latvian Authorities before finalisation of the draft law to be presented to Parliament.

Strasbourg, 19 September 1994



G. KOJANEC

Opinion on the Latvian "Draft Law on the Status of Former USSR Citizens who are not Citizens of Latvia or any other State"

Frank Horn

Rovaniemi, 23 September 1994

1. General observations

Generally every act that corroborates human rights both of citizens and of foreigners living in the State concerned ought to be appreciated. However, it may be considered redundant to repeat those universal human rights, which beyond any doubt are granted to all persons irrespective of citizenship.

On the other side more specific provisions as to establishing clear criteria as to when a person belongs to the category of *'former USSR citizens with permanent residence in Latvia'*, as distinct from other foreigners (foreign citizens and stateless persons under the 1992 Alien's Act), ought to be inserted in the proposed Act.

2. Article 2: Documents certifying legal status

This is certainly one of the crucial provisions of the Draft. It appears to be quite restrictive in its approach.

Only persons who have

- "a former USSR passport"

or

- "a personal identification document issued in the Republic of Latvia containing a personal code"

are covered by the provisions of the proposed Act.

I have to admit that I feel a certain uneasiness as to the contents of Article 2 read in conjunction with Article 17. What is the actual relationship between the "personal identification document issued in the Republic of Latvia containing a personal code of a resident of the Republic of Latvia" in Article 2(1) and the *"personal identification certificate"* in Article 17? I have no concrete knowledge as to which kind of identity documents have been and are issued at present by the Latvian authorities. The two provisions read together could be understood in two ways:

a) Persons having **either** a former USSR passport or an older "personal identification document issued in the Republic of Latvia containing a personal code of a resident of Latvia"

(before the present Act enters into force) may enjoy the rights under the proposed Act and be entitled to the new kind of document, the '*personal identification certificate*'.

It is not possible for me to know the exact number of persons who have resided in Latvia for a longer period and who had not managed to get a USSR passport or the personal identification document of the re-established Republic of Latvia (probably documents issued during the time of the pre-war Republic are not intended here?). I would believe there is a certain number of people which would fall under this category.

b) According to the second understanding, Article 2 only states that those persons having either a passport of the former USSR or a newly required *personal identification certificate* will enjoy the rights (and be bound by the obligations) of the proposed Act. If this is the true interpretation, it would be convenient to use the terminus technicus *personal identification certificate* already in this provision with a reference to Article 17, where the new concept is clarified.

As a matter of structural clarity of the proposed Act, Article 2 ought only to make reference to non-citizens having a Latvian *personal identification certificate*. The entire Act would a priori concern these persons (i.e. non-citizens being residents of Latvia and having an old USSR passport), which constitute a third category along with the category of citizens and the category of traditional foreigners and stateless persons. As there only temporarily will be persons, who have old USSR passports and who not yet have received a new Latvian *personal identification certificate* and who will benefit from the proposed Act, a provision stating that such persons will also enjoy the rights of the Act would best be inserted in the final, transitional provisions of the Act. Mark also that former USSR passport holders which do not hand in their USSR passports within a given period, will not profit from the Act, though he still may be called 'a former USSR passport holder'.

It would seem unreasonable to exclude categorically all persons who are unable to provide a passport of the former USSR from the possibility to acquire the new *personal identification certificate* mentioned in Article 17 and thus the status of permanent resident of the Latvia. I would believe there is a substantial number of residents, being non-citizens who had not been able to get a USSR passport. My suggestion would be a more open-ended approach, making it possible for persons to prove by other means, other documents than former USSR passports permanent residence before 1 July 1992 (Article 1(1)) in order to acquire a *personal identification certificate*. It would seem unreasonable to deny people a *personal identification certificate* and thus the rights under the proposed Act, by the simple fact that they for some reason or another did not manage to get a USSR passport.

Most probably this second interpretation is the correct one.

3. Article 2(2)

On the one hand this paragraph may be seen as to restrain authorities from resorting to any kind of arbitrariness. On the other hand it accentuates the very restrictive scope of Article 2 and thus the whole Act.

4. CHAPTER 2: Rights and Obligations

Reference is made in Article 3 to rights and obligations for non-citizens enumerated in the Constitution and international treaties. It would seem unnecessary to repeat rights already mentioned in these instruments. Section III of the Latvian Constitution concedes rights and obligations to both citizens and non-citizens. Where formulations in the proposed Act and in the Constitution differ, it may create problems when applying the Act.

The implementing authority may only resort to the proposed Act, without checking the relevant parallel provisions in the Constitution.

Only provisions which go beyond the constitutional ones should be inserted in the proposed Act.

5. Article 4: Inadmissibility of all forms of discrimination

A certain reformulation would be advisable and certain terms could be left out. The term "differentiation" has in the *Belgian Linguistics* case been given a positive notion. "Differentiation" is permitted in order to take into consideration the specific needs of a distinct group (e.g. a minority) and is not to be confounded with prohibited discrimination. "Privilege" could also be read as to mean specific measures in order to guarantee a distinct group the preservation of their culture. A privilege could mean the right of a minority to education in the minority language, not being forced to send children to schools teaching in the majority language. The terms of this Article could easily be reformulated following for example the wording of Article 26 of the CCPR, to which Latvia is a party.

6. Article 6: Rights in (before?) judicial, and state government and administrative institutions

A person may be assisted by an interpreter according to Article 6 "when necessary". The need should be established on objective grounds. The formulation "when necessary" is too vague and could allow for arbitrariness by the authorities. A person should have the right to an interpreter in cases he does not understand or speak the language used by the authority (See e.g. CCPR Art. 14(3)(f)). The provisions on 'fair trial' in Article 6 of the ECHR also guarantees free access to an interpreter if the accused cannot understand or speak the language used in court. Anticipating Latvia's future participation in the ECHR, it should be kept in mind that the Strasbourg case law (*Luedicke, Belkacem and Koc*) also guarantees coverage of expenses for translating legal instruments such as charges.

In municipalities, where we would find e.g. Russian-speaking staff and the applicant is himself Russian-speaking, it would appear cumbersome to require the use of Latvian with the interposition of an interpreter.

7. Article 9: Right to retain one's national identity

What does the right "to retain their native language" encompass? Does it cover the right to publicly financed schools teaching in a minority language?

8. Article 10: The right to handle one's property

Title could be changed to "The right to property". "Handling" is in the Article mentioned as one of the forms to deal with property.

9. Article 13: Right to employment and to receive pay

The "right to protect oneself from unemployment" is vague. Is it to mean the right to unemployment benefits? Or is it to mean access to employment on an equal basis with citizens or both?

10. Article 17: *Personal identification certificate*

The Article introduces the new legal concept: *personal identification certificate* and paragraph 1 clarifies the concept. Therefore it would be better to reformulate the paragraph in the following way: "*The personal identification certificate* ...is a personal identification document issued by..." "Personal identification document" is the generic term, and "*personal identification certificate*" is a specific case of such identification documents. The provision is empty, it does actually not say very much.

11. Article 18: Exchange of a former USSR citizen's passport for a *personal identification certificate*

As I see it the enumeration of rights and obligations is generally redundant, as they are already established in other legally binding instruments. A short reference to these would have been sufficient. The important provisions relate to **the modalities for requiring a status of permant resident of Latvia** by those persons who formerly had been citizens of the Soviet Union and have resided (permanently) in Latvia. These provisions should be concrete and unambiguous.

The acquisition of the status of permanent resident (holder of a *personal identification certificate*) in Latvia concerns greatly the rights and obligations of persons, and should thus be as far as possible regulated through legislative acts(laws) and not in instruments of a lower order like decrees and administrative regulations. The rule of law requires that everyone should have easy access to the texts of all the instruments dealing with his rights and obligations. The best guarantee for this is that the norms relating to rights and obligations of individuals are inserted in legislative acts. These acts are publicly discussed and have to be

published in order to be widely disseminated among the public. Instruments of a lower order may not to the same extent reach the public.

Conditions for issuing *personal identification certificates* should be comprehensively fixed in the proposed Act. There ought to be no obstacles to describe in the Act itself the details of the procedure to acquire the *personal identification certificate*. Even the time limit for exchanging a former USSR passport for a personal identification certificate (or otherwise proving that he has been a USSR citizen and has been resident in Latvia) should be set out in the Act. It could be for example one or two years from the entry into force of the Act. This would give clear information to the persons concerned as to how to proceed.

In Eastern and Central European States we meet a certain disposition to defer, decision-making, the elaboration of rules in important matters to lower and lower normative levels: decrees, orders, regulations, instructions a.s.o. This may lead to the intransigence of the legal system jeopardizing the rights of citizens as well as non-citizens.

12. Final comments

- It is important that the right to request a *personal identification certificate* is not limited to those who are able to present a passport of the former USSR. Residents should have the right to present other documentation which will prove that they were citizens of the former USSR and that they have been residing on the territory of Latvia.

- There must be a right to appeal a decision concerning the request for a *personal identification certificate*. Here we have a clear gap in the Draft.

- It is not evident to which extent non-citizens having a *personal identification certificate* enjoy wider rights than foreigners and stateless persons in the usual sense. I suppose that this is the intention of the legislator. Chapter 2 is only relevant to the extent it provides rights which go beyond the rights guaranteed to everyone, citizens and foreigners alike in the Latvian Constitution. In that sense Article 9 and Article 12 could perhaps be elaborated a little further.