FICIL

FICIL Position Paper No. 10

Foreign Investors' Council in Latvia on Fair Competition and Public Procurement

10 September 2020

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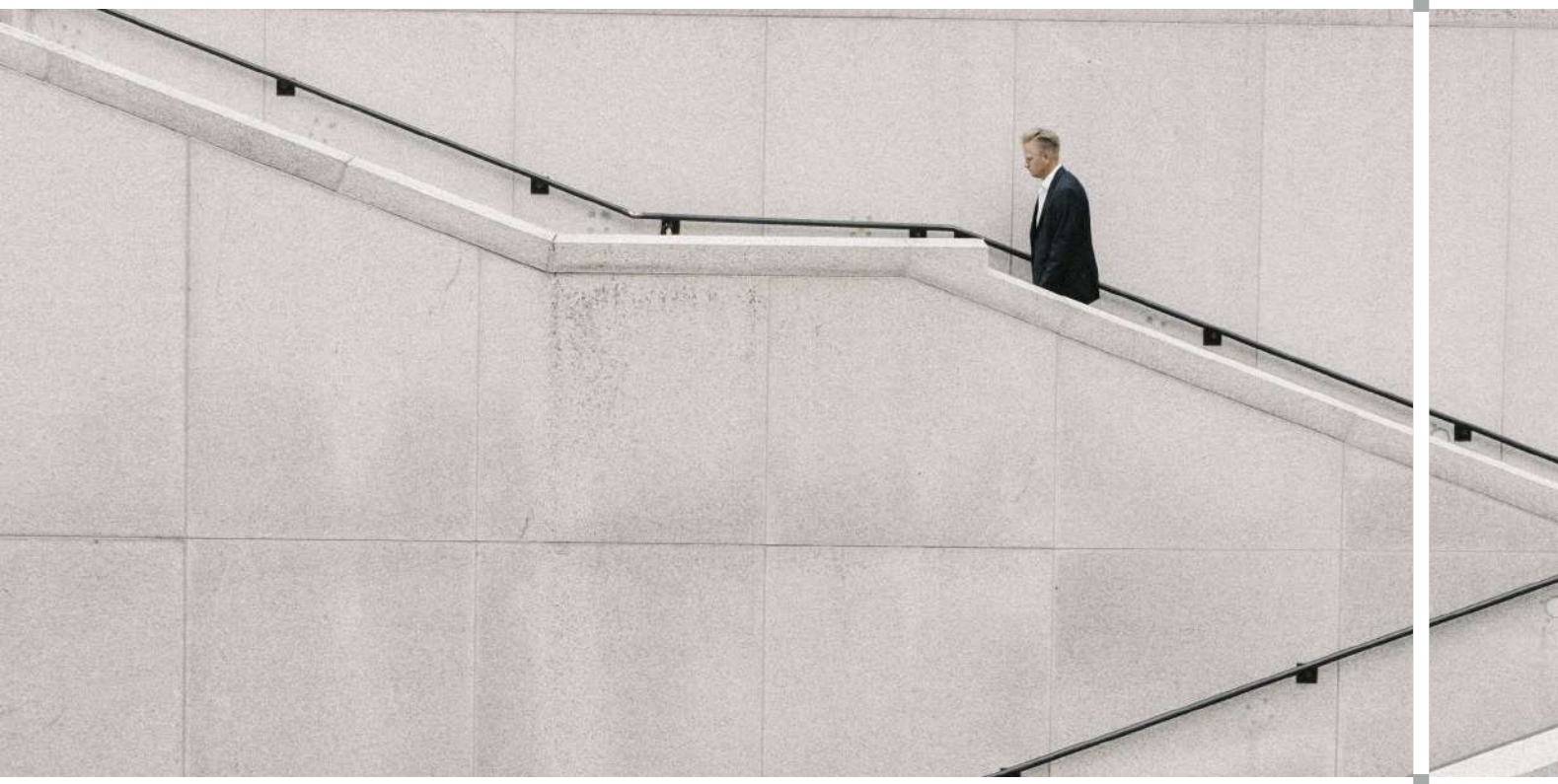
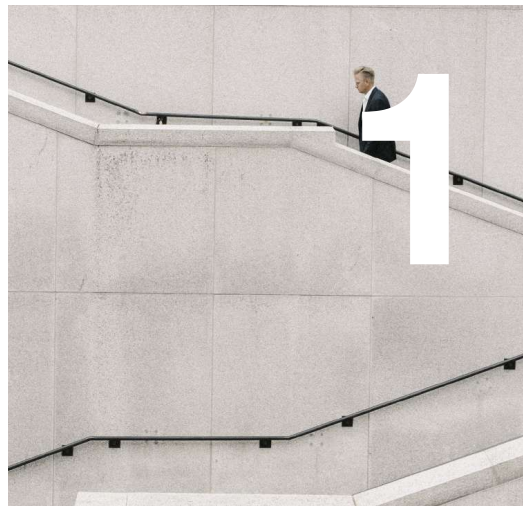
Introduction

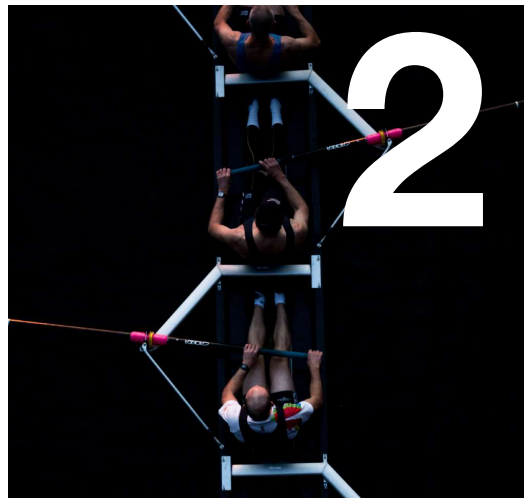


When choosing a country to invest in, entrepreneurs always consider the free market and fair competition aspects focusing on the competition policy of the particular country and also effective prevention of the detected violations thereof. The Foreign Investors' Council in Latvia (hereinafter – FICIL) would like to emphasise in this Position Paper that public procurement is one of the instruments to promote fair and open competition, as well as to highlight several areas where it is possible to improve the fair competition and public procurement aspects.

When preparing changes aimed at improvement of the public procurement system, it is necessary to engage business organisations and also experts who are involved in relevant sectors on a daily basis and represent the major target group which would be affected by such changes. Public procurement is an integral part of economy of each European Union Member State. One of the objectives of the Public Procurement Law is to ensure free competition among suppliers, as well as equal and fair treatment in respect of such suppliers.
Likewise, the aim of the Competition Law is to protect, to maintain and develop free, fair and equal competition in all economic sectors. The Competition Council has drawn public attention to the fact that it is still quite common to include conditions restricting competition in the Terms of Reference (TOR) for public procurement. Public procurement serves as an instrument for achieving two important overarching objectives of public administration. On the one part, public procurement is used to ensure free competition among suppliers because a contracting authority is obliged to treat them all in an equal and fair manner. On the other part, public procurement serves as a means for efficient use of the contracting authority's resources that way minimising its exposure to risk.

Content





Recommendations

Improving the institutional capacity of public authorities

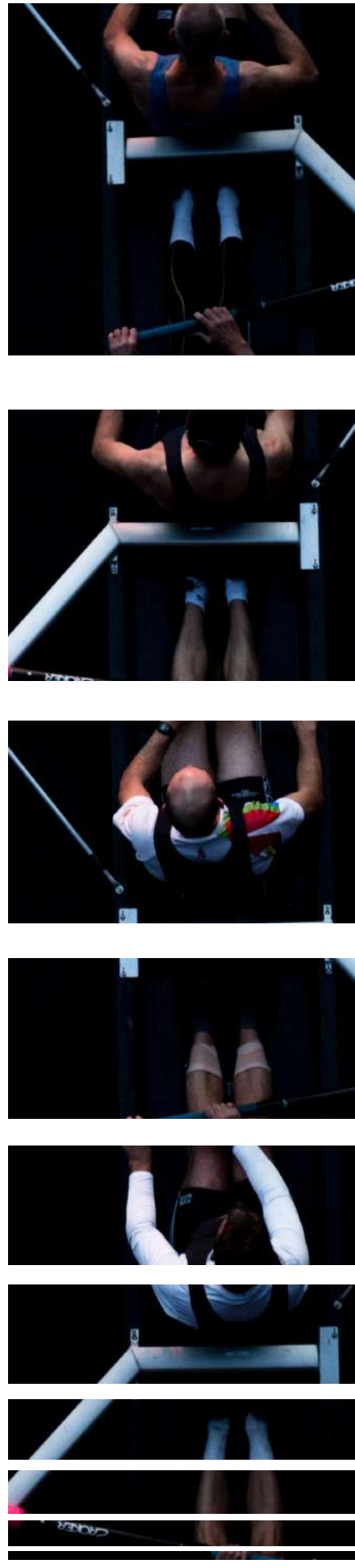
In order to improve the supervision of fair competition, it is necessary to strengthen the capacity of public authorities (Procurement Monitoring Bureau, Competition Council) in respect of digitalization of supervision and developing competences (digital skills) for improved efficiency of operations of the controlling authorities. More focus would be necessary on the possible digitalisation of the tools related to investigation, such as those required for acquisition, selection and analysis of information carried out online while performing data screening of the public information system.

Necessity to improve the concordance of actions and priorities of public authorities

It is necessary to improve the concordance of actions and priorities of public authorities, that way creating legitimate expectation of uniform interpretation of law and common practice of public authorities, especially when implementing projects related to nationally signifi cant infrastructure objects (e.g. PPP), by ensuring transparent and secure environment for investment. It is also important to consider the allocation of competences amongst public authorities by determining the responsible and collaborative bodies, as well as minimising the risk of overlapping competences that may lead to divergent interpretation and application of law (e.g. different interpretation by the Procurement Monitoring Bureau and the Competition Council in respect of *prima facie* competitive constraints found in procurements).

Development of control and monitoring mechanisms to supervise the use of funding related to the state aid measures due to the Covid-19 crisis

In response to the economic consequences caused by COVID 19, the Government has chosen to implement various state aid measures for businesses that way supporting commercial activity in various sectors including by means of investing in the infrastructure and increasing the competitiveness of certain businesses in external markets. **Such form of state aid also requires establishment of a specific control and monitoring mechanism to supervise the use of public funding, as well as assessment of the impact of such forms of state aid on the influx of foreign investment in Latvia.** It should be noted that this form of state aid creates advantage for certain businesses and may at the same reduce the amount of investment in the related or competitive markets.



Assessment of the efficiency of control mechanisms for monitoring participation of public persons in commercial activity

Careful thought should be given to the efficiency of mechanisms for controlling participation of public persons in commercial activity, namely, application of Section 88 of the State Administration Structure Law, considering that consultations with the competent competition authority and associations or foundations representing the merchant are only deemed as recommendations by their nature which may not necessarily prevent unreasonable involvement of public persons in commercial activity.

The best value for money in correlation with free and fair competition in the public interest

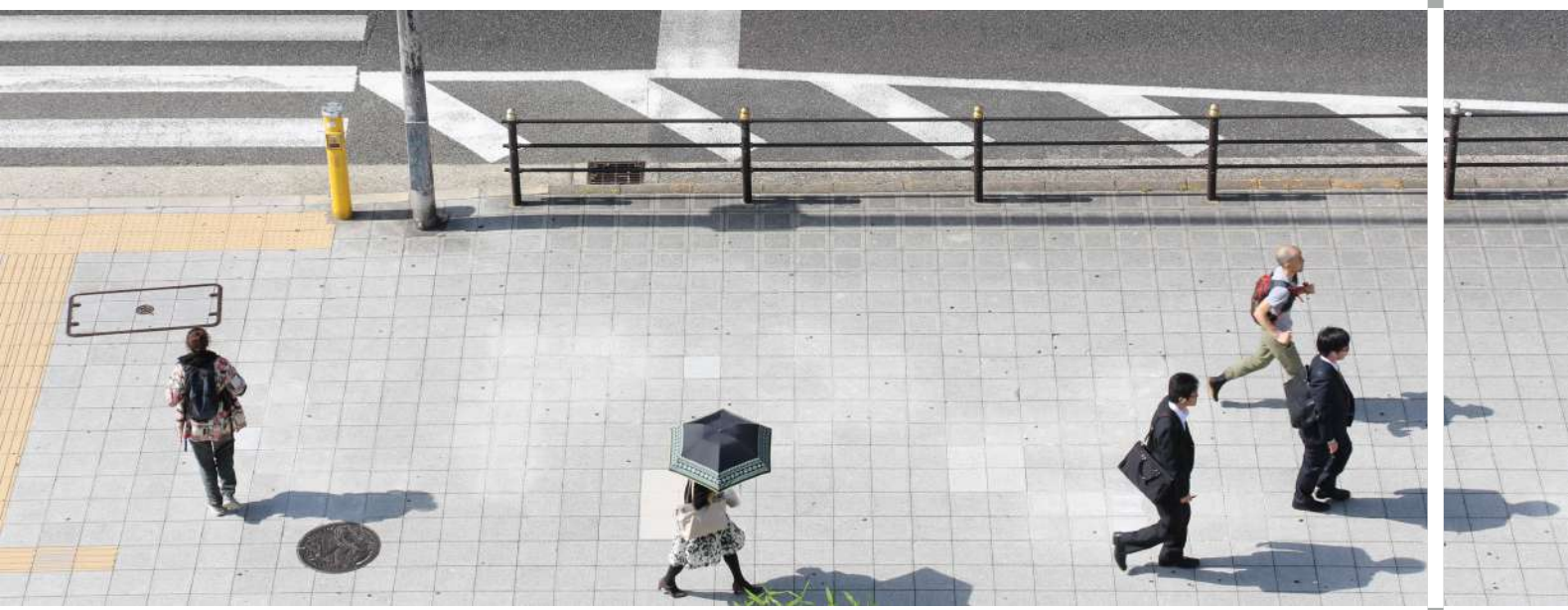
There is an urgent need to change the focus in public procurements – substance should prevail over form. One of the main tasks of public procurement is to provide a contracting authority with an opportunity to select a tender bid that meets the principles of free and fair competition and ensures **the best value for money.**

Active opinion leadership by the Procurement Monitoring Bureau in the field of public procurement

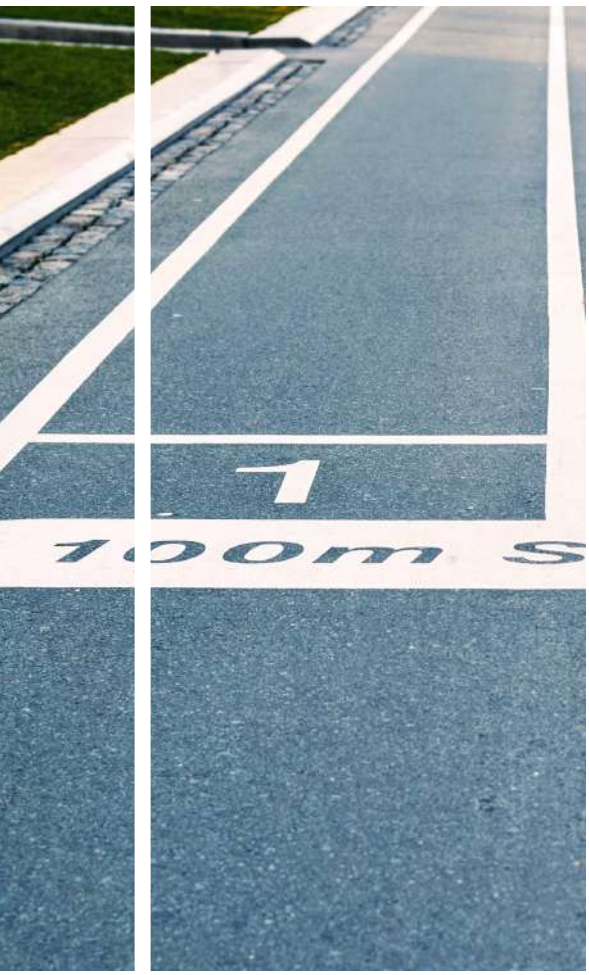
The Procurement Monitoring Bureau should promote its **opinion leadership** more actively and purposefully in the field of public procurement. Proactive expression of opinion or suggestions in certain situations in combination with assuming responsibility for active resolution of publicly discussed matters would allow to organise and improve the public procurement sector in a more dynamic manner**.**

Extensive database of anonymous decisions by the Procurement Monitoring

As in the case of the judicial system, **the database of decisions made by the Procurement Monitoring Bureau** (including refusals to consider certain matters) should be publicly available to all stakeholders. That would constitute a significant contribution to promoting reliability and transparency, as well as uniform understanding**.**



Rationale for Recommendations



Improving the institutional capacity of public authorities

On 22 October 2019, the Cabinet of Ministers reviewed the Informative Statement "Proposals for Improving the Public Procurement System", followed by a task to elaborate a detailed action plan under the management of the Ministry of Economics for improving the public procurement system that would be reviewed and approved on 11 February 2020.

The Informative Statement included a proposal to assess the possibility to organise the procurement monitoring system according to certain identifiers (risk elements indicative of inadequate distribution of price, dumping, price increase, unrealistic deadlines or settlements with subcontractors). For this reason, the same task was also included as Clause 7.1 in the Action Plan, namely, to ensure by 01/07/2020 an analytical tool for monitoring the published procurement announcements that automatically analyses procurements and the risk features of each contracting authority and public service provider. The Procurement Monitoring Bureau was appointed as the responsible authority, without specifying any other public bodies which would be jointly responsible, hence only the system used by the Procurement Monitoring Bureau was improved rather than considering the possibility to achieve several goals with the same system.

As market operators become more aware of the competition law and its application principles, better accessibility of data would create new possibilities including in respect of investigation of cartel agreements by the Competition Council, by extending the range of detection tools and methodologies.

Automated (rather than manual) data collection by means of data screening in the information systems may be as efficient as the classic methods used for discovering cartel agreements (leniency programme, whistleblowing, reports by collaborative authorities) helping to identify the risks related to cartel agreements etc.

Even though the Information Report emphasises the Competition Council's insufficiency of human resources and facilities in relation to information technologies, as well as considering that the SRDA (State Regional Development Agency) ensures administration of electronic governance systems and various state aid programmes such as Electronic Procurement System (EPS), neither SRDA, nor the Competition Council has been appointed as the body jointly responsible for developing a procurement monitoring tool. Automated data collection from the state information systems should be expanded accordingly by ensuring a wider usage of the state information systems and decreasing the necessity for manual data collection and input in order to use the existing and available data for discovering cartel agreements.

Rationale for Recommendations

Necessity to improve the concordance of actions and priorities of public authorities

The Competition Council receives complaints about the requirements included in the Terms of Reference of public procurements at the same time as they are sent to the Procurement Monitoring Bureau, and both public authorities interpret provisions of law by assessing, for instance, requirements included in the technical specification and their compliance with the contracting authority's obligation to ensure free competition for suppliers. The Competition Council does it by exercising its rights under Section 7 and Section 14[1] of the Competition Law, whereas the Procurement Monitoring Bureau – by exercising its rights under Section 66, 68 and 71 of the Public Procurement Law. That causes competence overlapping amongst public authorities, as well as divergent interpretation and application of law which does not ensure uniform interpretation of law and legitimate expectation for market operators (neither contracting authorities, nor suppliers). Allocation of competences of public authorities and collaboration in this respect are essential for efficient operation of the procurement system, that way reducing the administrative burden for public authorities and promoting clear rules for market operators.

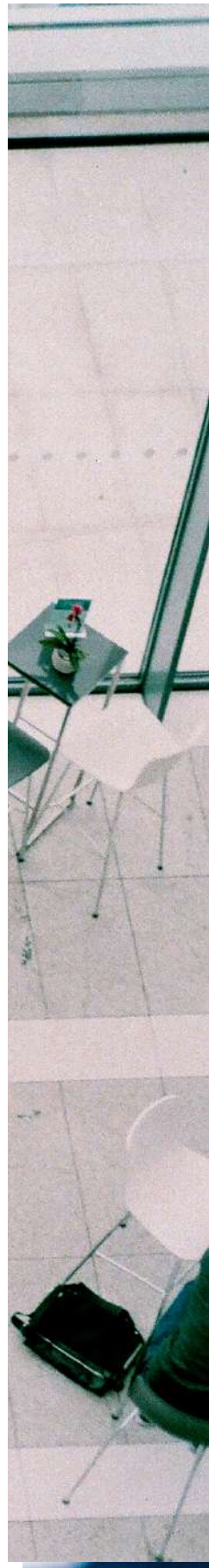
Collaboration of public authorities is also crucial in a few other areas where this divergent interpretation of law and the lack of collaboration lead to a conflict of interest. For instance, in respect of waste management where municipality has the right to choose the mechanism for selecting a service provider such as through procurement or public–private partnership (PPP) procedure. None of the mechanisms under the Waste Management Law are positioned as less efficient or less restrictive of competition, yet the applicability of law and compatibility of certain laws (e.g. Waste Management Law and Competition Law) give rise to contradictory discussions, which, in turn, not only fails to ensure legitimate expectation for the contracting authority and suppliers, but also adversely affects attraction of investments for implementing important projects.

Interpretation of Section 88 of the State Administration Structure Law performed by the Cross-Sectoral Coordination Centre and the Competition Council, as well as by the State Audit Office, also raises reasonable concern about the uniformity of opinions and legitimate expectation of market operators in respect of application of law. Each public authority provides its own interpretation of the specific provision of law or mechanism which should be applied to the assessment of a public person's participation in a capital company and which entities would be subject to such assessment. For instance, whether the assessment of participation should be performed for public authorities, subsidiaries of a capital company etc. The divergent interpretation and application of law not only jeopardise the implementation of the law or achievement of the objective of the specific provision of law, but also create an unstable business environment.

Rationale for Recommendations

Development of control and monitoring mechanisms to supervise the use of funding related to the state aid measures due to the Covid-19 crisis

To prevent distortion of competition in the European Union's internal market that may be caused by granting certain advantages to market operators, provision of general state aid is prohibited. However, a possibility to apply exceptions on the grounds of implementing specific general political objectives still remains. Covid-19 pandemic has caused serious distortion in the supply chain and consumer behaviour and has adversely affected financial results of many market operators. By supporting commercial activity in various sectors, the state has tried to minimise the economic consequences of the pandemic, however, consideration should be also given to the impact of such business support mechanisms not only on the other market operators but also this impact should be subject to systemic assessment in respect of the specific market in general, including upstream and downstream markets of the specific market, that way preventing further risk of causing distortion of competition. It should also be noted that this year considerable amount of state aid has been provided to the state-owned and municipal companies which have been funded from various sources already before. There is a lack of assurance that the allocated funding is granted only for the purposes of ensuring healthy cash flow and improving the efficiency of the company's operations in the future, including, with an aim to resolve permanent, systemic industry specific issues related to the efficiency of operations and governance of a capital company. Here supervision and control of granting and usage of the state aid (goals to be achieved with the help of such funding), as well as the potential impact thereof play particularly significant role.



Rationale for Recommendations

Assessment of the efficiency of control mechanisms for monitoring participation of public persons in commercial activity

Section 88 of the State Administration Structure Law lays down provisions for the participation of a public person in capital companies and the mechanism for assessing such participation thereof. A public person prior to establishing a capital company or acquiring a participation in an existent capital company shall carry out the evaluation of the intended activity by including also the economic evaluation. While performing the evaluation, the public person shall consult with competent competition authorities and associations or foundations which represent merchants. Even though consultation is set as a mandatory requirement for the assessment of participation, the evaluation/opinion provided by the associations representing public authorities and merchants is only deemed as a recommendation by its nature.

Notwithstanding the fact that competent competition authorities would potentially point out non-compliance with provisions of Section 88 of the State Administration Structure Law or would highlight substantial shortcomings in the content of such evaluation, a public person is not obliged to consider such evaluation or opinion, that, in turn, may prevent achieving the objective of the specific provision of law, namely, to reduce unreasonable involvement of the public person in commercial activity.

Meanwhile, at the beginning of this year, amendments to the Competition Law became in full force and effect adopting a control mechanism for public persons and their capital companies – Section 14^1 of the Competition Law. Considering the general clause of Section 14^1 of the Competition Law, namely, to prohibit any directly or indirectly governed authority, as well as capital company where a public person has a decisive influence, to prevent, to limit or to distort competition as a result of their actions. Having regard to the aforementioned application of Section 88 of the State Administration Structure Law, it should be noted that the scope of Section 14^1 of the Competition Law is quite extensive so that when a public person is getting involved in commercial activity without legitimate grounds (e.g. in case of non-compliance with any of the provisions of Section 88 of the State Administration Structure Law) it would be deemed that such person has prevented, limited or distorted competition as a result of their actions. Whereas, in case such evaluation is not carried out and no effort is made to ensure that the most favourable solution has been selected in terms of competition, a public person is taking a risk of breaching Section 14^1 of the Competition Law that way further minimising the legal burden for the mechanism provided under Section 88 of the State Administration Structure Law and increasing the administrative burden of the competent competition authorities. Having regard to the extended scope of control of operations by public persons and their capital companies under the Competition Law, it is necessary to assess the mechanism included in the State Administration Structure Law.

Rationale for Recommendations

The best value for money in correlation with free and fair competition in the public interest

Legal framework for public procurement is not self-contained and isolated from other areas of law. For this reason, since it serves as an instrument for achieving two important overarching objectives of public administration, it is important to be aware of a wider common framework where public procurement is used by periodically determining and assessing their efficiency and suitability for implementation of the set goals and tasks.

While discussing only the most relevant context for interpretation and application of the legal framework for public procurement, FICIL would like to highlight the following three aspects:

1. State Administration Structure Law (SASL). State administration at large shall be governed by law and rights, hence, it shall observe human rights and may use its powers only in conformity with the **meaning** and **purpose** of the authorisation. [1] State administration shall act in the **public interest** and shall observe the **principles of good administration**.[2] The principles of State administration shall be applied in interpreting the legal framework covered by any legal act (including the SASL) and in examining the **lawfulness** and **usefulness** of actions of institutions (officials). [3]
2. Law on Prevention of Squandering of the Financial Resources and Property of a Public Person (Squandering Prevention Law). Financial resources and property of a public person shall be used **lawfully** and **in conformity with the public interest**, by preventing their squandering and ineffective use. In order to recognise that a public person is dealing with the financial resources and property **rationally,** (i) actions shall be such as to achieve the objective with the minimum use of financial resources and property; (ii) property shall be alienated in favour of another person at the **highest price possible**; and (iii) the property shall be acquired for the **lowest price possible**.
3. Competition Law. In general, the main purpose of the legal framework in respect of competition is **to protect**, **maintain** and **develop free, fair** and **equal** competition **in the interests of the public** in all economic sectors.

Synergy with the aforementioned three aspects provide a deeper insight into the role of public procurement in the common system of law. More specifically, the objectives of the legal framework for public procurement include (i) **transparency** of procurements; (ii) **free** competition of economic operators, as well as **equal** and **fair** treatment thereof; and (iii) **effective** use of the funds of the contracting authority, minimising the risk thereof as far as possible. [4]

When interpreting and applying these objectives even in conjunction with the SASL, Squandering Prevention Law and Competition Law, we can observe several areas of perception, action and interpretation: (i) meaning and purpose (in other words – substance over form), (ii) public interests, (iii) lawfulness and usefulness, (iv) free, fair and equal competition, and (v) efficient use of resources by ensuring, *inter alia*, the best value for money.

Rationale for Recommendations

Summarising the aforementioned, public procurement should be implemented so that the contracting authority could reasonably and pursuant to the procedure set by the law find a solution that ensures free competition and the best value for money. Formalism should not serve as an appropriate instrument for governing and resolving so significant and internally dynamic processes, constantly considering the increasing public needs and evolutionary understanding of public interests.

Selection of the most economically advantageous tender bid is an important tool for achieving the aforementioned objectives and tasks. However, it can only be efficient and lead to the desired solution on condition that the criteria for the most economically advantageous tender bid are very detailed and at the same time the contracting authority is aware of the aforementioned overarching tasks and objectives to be achieved by such public procurement, as well as of the actual public needs, real market situation and the necessity to balance accurately the potential price with the quality and quantity of the potential service or goods.

One of the driving forces for the development of competition is a constant improvement of the contents and quality of goods or service. Competition with goods or services of the same contents and quality that may be provided or delivered within the same period of time, would not serve as a reliable and endorsable indicator for the development of competition. For this reason, within the context of the best value for money, growth and sustainability become obvious aspects of competition because they ensure the necessary stimulus for the development and growth. Public resources that are spent on payment for goods or services provided by the economic operators, create value added for meeting public interests if they stimulate the development of competition (contrary to its stagnation or degradation).

Likewise, determination of the best value for money is also supported by as smooth procurement procedure as possible which is not subject to unnecessary formalities that create a disproportionate administrative burden. For this reason, FICIL encourages to consider a possibility to eliminate in two-stage procurement procedures examination of applicants against the exclusion criteria within the scope of the first stage (except if it is expected to reduce the number of interested economic operators at the end of the first stage) and envisaging to perform such examination only at the end of the 2nd stage before announcing the winning bidder which has been selected for contract award. For this reason, the European Single Procurement Document could serve as sufficient grounds for the bidder's participation also in the second stage of the procurement procedure. The same applies to those cases when a tender bid is submitted by a foreign company rather than its representative office in Latvia, and a procurement commission is obliged to comply with the requirement under the Public Procurement Law to verify non-existence of grounds for exclusion also in respect of such foreign company's representative office in Latvia. FICIL encourages to discuss commensurability of this requirement with an aim to reconsider it to achieve smoother procurement procedure and faster decision-making regarding procurement contract award.

Rationale for Recommendations

Active opinion leadership by the Procurement Monitoring Bureau in the field of public procurement

In view of the essential aspects of public procurement related to the best value for money, selection of the most economically advantageous tender bid, as well as free and fair competition, FICIL feels there is a need for more active and extensive public discussion about the values underlying each public procurement in a wider context. The Procurement Monitoring Bureau should become an active and oftentimes a proactive leader of public opinion in respect of public procurement.

It would be advisable for the Procurement Monitoring Bureau to come forward with and explain publicly various guidelines and recommendations regarding organisation of public procurement procedures, their structuring, implementation and supervision of their performance after procurement contract award so that (i) substance prevails over form in the legal framework for public procurement, (ii) contracting authorities select the most economically advantageous tender bid, and (iii) the public procurement system in general develops dynamically and taking into consideration constantly changing public needs, different competition situation in each particular market and other essential aspects.

One of the initiatives in this regard would be prevention of misusing the possibility to challenge the procurement terms of reference. More specifically, there are cases when some of the potential bidders dispute the procurement documentation several times within the deadline set by the laws and regulations. That way smooth implementation of the procurement procedure is delayed considerably. FICIL would highly appreciate proactive action by the Procurement Monitoring Bureau considering a possibility to include a prohibition in the Public Procurement Law for each interested economic operator to submit several consecutive arguments for challenging the procurement documentation, except when each next complaint arises from the amendments made to such procurement documentation.

Likewise, FICIL also encourages the Procurement Monitoring Bureau to take initiative to deal with the cases when due to technical limitations the interested economic operator has been unable to upload qualification documents or their tender bids onto the electronic procurement system in due time. It would be advisable to develop a common practice for action in such situations that all contracting authorities and economic operators are aware before procurement, providing an opportunity for a commensurately minimal period of time to ensure the option for repeated submission of such documents electronically.

FICIL believes that the purpose of procurement commissions is to ensure focused and responsible consideration of the common public interests in the procurement procedure. For this reason, FICIL encourages the Procurement Monitoring Bureau to discuss the necessity to include in the Public Procurement Law a clause that a procurement commission may also be set up for implementation of such procurement commissions which do not meet the mandatory threshold for establishing a procurement commission.

Rationale for Recommendations

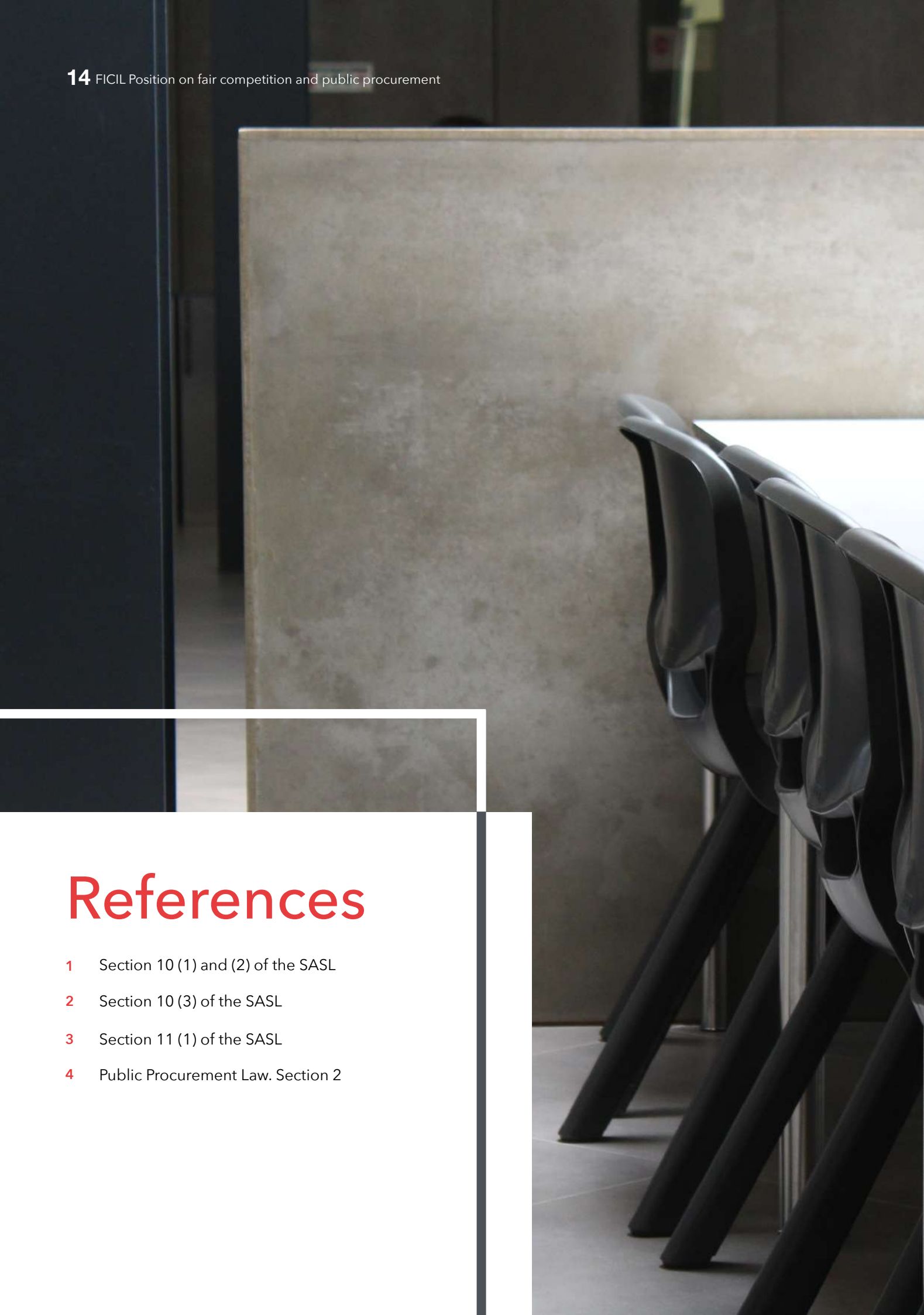
Extensive database of anonymous decisions by the Procurement Monitoring

Each public procurement contributes to the overall development of the public procurement system. Each situation matters and each decision creates understanding of the common practice or position. When considering complaints about procurement procedures, the Procurement Monitoring Bureau, in fact, exercises first-time specialised control of a particular matter. Public access to such decisions (including decisions to refuse to consider a specific matter) would also enable courts to check more easily the Procurement Monitoring Bureau's understanding and practice in certain matters by controlling such decisions within the scope of its competence and ruling about the impact of the resolution applied in the specific case on the overall practice at large.

The requirement to issue all documents regarding the 2nd stage of the procurement procedure also to those applicants who followed by the 1st stage screening have not been invited for participation in the 2nd stage, would also contribute to the uniformity of practice in two-stage public procurements. That way the refused applicants would have an additional possibility to exercise control over the technical and financial requirements set for tender bids or their assessment methodology in the 2nd stage. This would enable a wider audience to participate in combatting such procurement practice that is organised with a purpose to implement the procurement in the interests of a specific manufacturer of goods or service provider. For this reason, FICIL encourages to include a provision in the Public Procurement Law that the 2nd stage procurement documentation should be accessible for any stakeholder free of charge or without any other limitations.

Based on similar considerations, FICIL believes that a possibility to implement a procurement procedure in a foreign language would also add more value. At the moment the existing legal framework requires that all procurement documentation, as well as any qualifying documents and tender bids should be translated in Latvian. Substantial time, human and financial resources are invested to ensure translation of the procurement documentation for the needs of foreign companies. Besides, considering the requirement to translate also all qualifying and tender bid documentation, it is much more challenging for foreign companies to meet the deadlines for submission of the documents.

The extensive translation of documents in such procurements that feature, for example, cross-border character, high ratio of foreign companies in the list of potential bidders, minimal (if any) local competition, considerably encumber and delay the whole process of the procurement procedure. For this reason, FICIL encourages to include a clause in the Public Procurement Law that the contracting authority may, at its own discretion, prepare procurement documents, implement the procurement procedure and enable submission of tender bids in another official language of the EU if that is required for implementation of a cross-border procurement or in any other reasonably justifiable case.



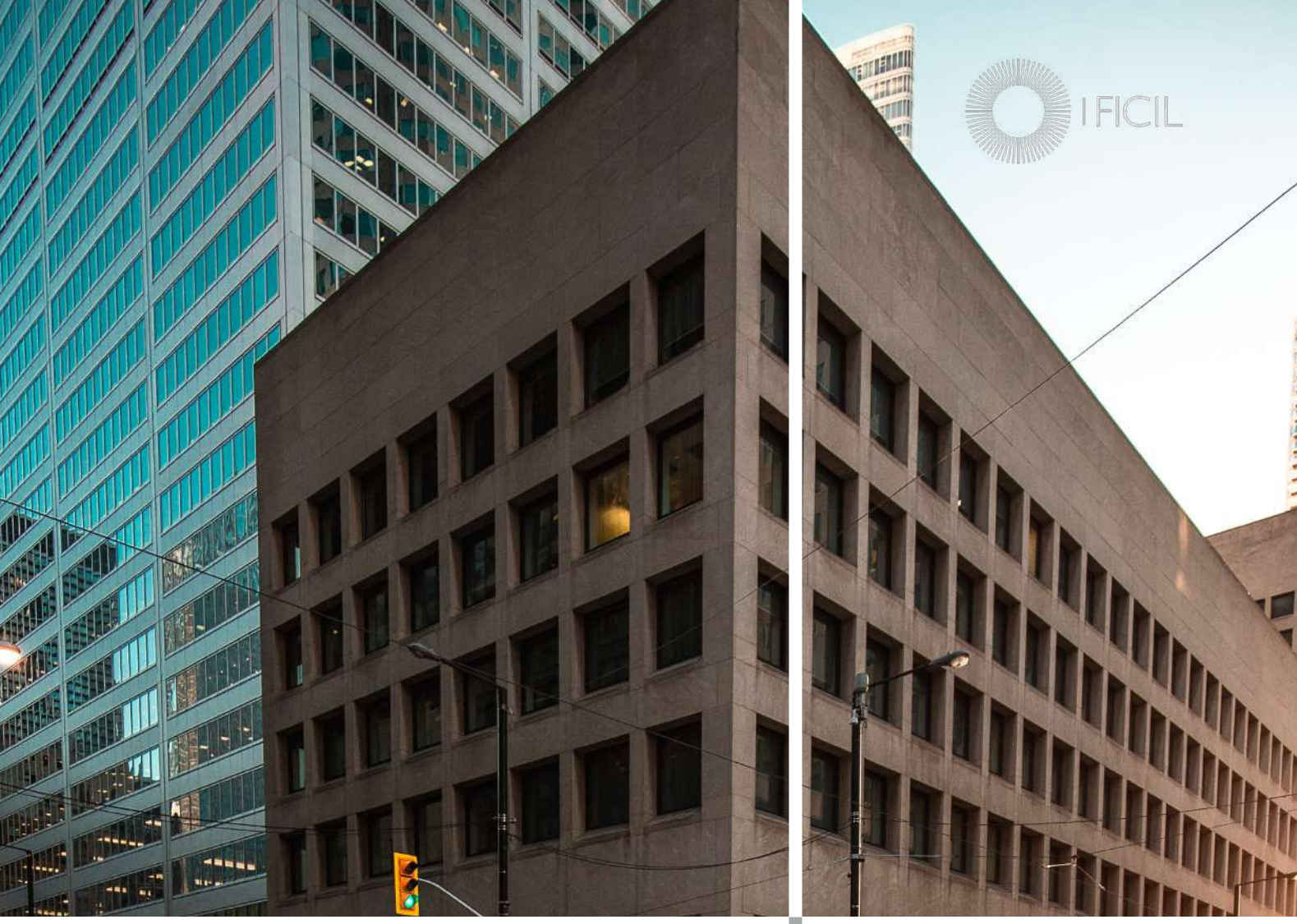
References

1 Section 10 (1) and (2) of the SASL

2 Section 10 (3) of the SASL

3 Section 11 (1) of the SASL

4 Public Procurement Law. Section 2



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FICIL is a non-governmental organisation that unites 37 largest foreign capital companies from various industries, 10 foreign chambers of commerce in Latvia, French Foreign Trade Advisers and Stockholm School of Economics in Riga. The goal of FICIL is to improve Latvia's business environment and overall competitiveness in attracting foreign investment, using the experience and knowledge of its members to provide recommendations to Government and state institutions.