



FICIL Position Paper No. 10

Foreign Investors' Council in Latvia on Court Efficiency and Investment Protection

10 September 2020

Executive Summary



The Foreign Investors' Council in Latvia (hereinafter-FICIL) has continued to identify problem areas and propose solutions to facilitate judicial efficiency, and notes the need to continue the positive progress already achieved.. Concrete solutions are put forward to achieve this goal, namely, specialisation of various courts and judges, strengthening the judicial authority by improving the accessibility of court judgments, as well as higher procedural efficiency, for example, by introducing the possibility for bifurcation of proceedings and continuing to improve the procedural laws. Further development of digital solutions and use of technologies during proceedings have a specific role in improving judicial efficiency. FICIL notes that considerable progress has already been achieved in supervision of insolvency administrators. The insolvency supervisory body has made significant improvements in this area both with regards to supervision of administrators and general operations of the body. During the last few years noteworthy improvements have taken place in operations of administrators, as well as in the general supervision of insolvency processes. At the same time, only small progress has been achieved in limiting the practice of bad faith defaults (for example, the Senate has made several important decisions that change the case law; insolvency administrators also regularly bring actions at the courts). However, this practise is still quite widespread and causes considerable harm to the general business environment, as well as individual creditors, including the state budget.

2020 FICIL recommendations concern the following areas:

1. Digitisation of court proceedings;
2. Specialisation of courts and judges;
3. Strengthening the judicial authority;
4. Bifurcation of proceedings;
5. Improvement of the insolvency system.

The report proposes specific solutions to overcome the identified problems that hinder, obstruct or impede business in Latvia both for the local and foreign investors. Each recommendation is accompanied by a rationale that stems from the experience of FICIL members, as well as from the study of foreign practices.

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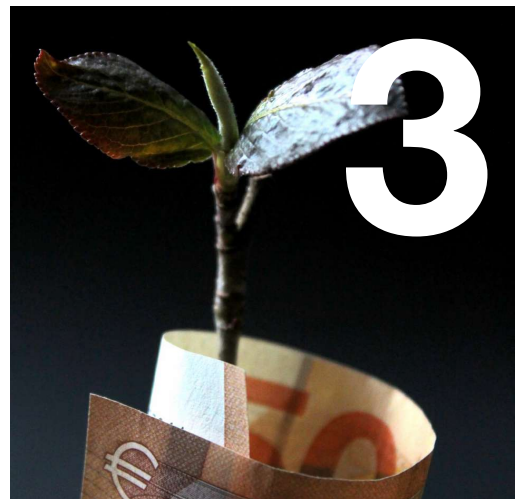
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Recommendations

Digitisation of proceedings

Facilitate digitisation of court proceedings by ensuring the availability of electronic documents and furthering more often use of video-conferencing tools.

Specialisation of courts

Continue high quality training of judges by creating specific curricula for judges who specialise in economic and financial crime cases.

Strengthening the judicial authority

Strengthen the judicial authority by further training assistants to judges and court secretaries, publishing relevant judgments and improving the digital judgement selection tool.

Bifurcation of proceedings

Facilitate due preparation of civil cases for hearings by introducing bifurcation of proceedings in the procedural law, this option being made available upon agreement by both parties.

Insolvency

Facilitate restructuring and insolvency process fair, lawful and efficient operation, while expanding the involvement of Insolvency controls service (ICS) in the identification and elimination of violations in the insolvency area by creating a central system that identifies financially unstable or essentially insolvent companies, as well as applies various measures to drive the conduct of these companies and their owners in the right direction.



Rationale for Recommendations



Digitisation of proceedings

More extensive use of electronic documents.

As it is already possible to bring an electronic action at the court, FICIL believes that the requirement for the parties to provide hard copies of documents related to the case is obsolete. Positive developments have occurred as to electronic circulation of documents, thus, digital solutions would significantly ease and improve the accessibility of proceedings and courts.

On *manas.tiesas.lv*, it is already possible to access information about the progress of a case, as well as some files of documents that have also been printed and included in the case file. As circulation of hard copies of documents increases litigation costs due to their printing and mailing and demands additional administrative resources from the courts, FICIL proposes to ensure that the claim and its annexes are made electronically available to the defendant, for example:

- via *manas.tiesas.lv*.
- At the same time, the defendant should be notified about the claim in the regular way informing them about the place where the digital case file can be accessed.

If the defendant is unable or unwilling to read the case file by relying on the electronic service, it should still be possible to do that at the court or use a chargeable service: a printout by mail pursuant to Cabinet Regulation No. 96 "Regulations on paid judicial services" of 19 February 2013. This Regulation already stipulates in which cases and how a person should be exempted from paying for such services.

Changes in the common uniform approach would considerably facilitate the circulation of electronic documents in the digital environment. There are already persons that provide their e-mail addresses for communication with the court, as well as confirm online registration (for example, lawyers, insolvency administrators). This practice should be also promoted in the future by involving as many individuals as possible and avoiding circulation of hard copies of documents.

Video-conferencing at courts. The caseload of Riga courts still significantly differs from the number of cases elsewhere in Latvia. Thus, one of the solutions for a faster review of cases would involve assigning these cases to courts in other districts, and courts can more so hear the cases by means of video-conferencing technologies. At the same time, courts in Riga often deny such requests as they are unable to provide for such services. The current legal framework does not regulate cases when video conferences should/should not be held, and it depends on individual decisions of judges. Thus, FICIL is of the opinion that it should be recommended to promote more extensive use of video conferences, in particular, when a case that is in the jurisdiction of a Riga court is forwarded to a court in another region for a quicker resolution. Furthermore, FICIL believes that conference platforms that individuals can use remotely without a need to be present at the court should be duly considered (for example, *MS Teams*). Thus, court facilities that ensure video-conferencing for other courts would be freed. The current video-conferencing regime from the court facilities could be continued for those persons that require it.

Rationale for Recommendations



Specialisation of courts

FICIL is of the opinion that specialisation of courts in specific domains could be one of the solutions for quality and timely review of cases. Both of these aspects are very important to ensure effective protection of the infringed rights.

FICIL supports a decision to assign jurisdiction in specific commercial disputes to the Economic Affairs Court, for example, in disputes that are related to:

- Application of the Financial Instrument Market Law;
- Application of the Group of Companies Law;
- Private claims brought due to violations of the Competition Law;
- Application of the Financial Collateral Law; collateral entered in public registers (disputing the validity and applicability of such tools fully or partially);
- Issues related to the regulatory framework for investment protection (to the extent such issues are in the jurisdiction of the Latvian courts);
- Large claims in commercial disputes (an assessment of signs of a large commercial dispute is needed);
- Legal protection proceedings.

Rationale for Recommendations

FICIL appreciates the progress already achieved with regards to specialisation of courts and the creation of the court specialising in commercial matters, namely, the Economic Affairs Court. FICIL is of the opinion that the quality training of judges by creating high quality curricula for judges who specialise in economic cases should be continued and the following topics should be included in the curricula:

- **Insurance and reinsurance cases**, and their specific features. Topical/new types of insurance transactions entering the market (for example, insurance of liability for warranties and guarantees provided during the sale and acquisition of companies: W&I insurance; insurance of the council, management board and directors: D&O insurance);
- **Capital markets**. Operational peculiarities of publicly traded joint stock companies. Rights and protection of investors. Issues related to the issue, regulation and responsibility for shares, bonds and other securities. Derivatives. Close-out netting transactions and their peculiarities. Signs of concerted action among shareholders, typologies and consequences. Framework for redemption of shares, practice;
- **Corporate governance**. Allocation of rights and obligations, and best practices on all management levels to create a well-functioning system for interaction between members, the council, the board and employees. Ensuring compliance, decision-making processes, balance of authority, ensuring compliance and management of risks;
- **Ensuring compliance in companies**. System for controlling money laundering and terrorism and proliferation financing, and practice. Sanction risk management and consequences, liability for sanction violations. Regulatory framework and control systems for preventing commercial bribery and the risk of conflicts of interest;
- **Investment operations**. Investment companies, their operations, and risks. Brokerage firms. Management companies;
- **Financial collateral** and its peculiarities. Validity. Subject-matter and special subjects;
- **Member/shareholder relations**. Contractual framework for members/shareholders, validity, applicability, termination. Options contracts. Conditional sales agreements. Regulatory framework and practice for protection of minority members;
- **Reorganisation**, restructuring processes and practice. Transition of companies, legal framework, and practice. Liability. Framework and practice of cross-border mergers;
- **Legal framework for investment protection**, and practice (an important, yet a very wide and complex topic);
- **Construction** contracts and liability. FIDIC agreements. Other standards. Peculiarities and allocation of risks;
- **Competition claims** (private enforcement of the Competition law) and practice.



Rationale for Recommendations

Strengthening the judicial authority

Effective and fair judicial power with judges being highly qualified professionals who specialise in specific areas, as well as effective and fair judiciary are the cornerstones of any independent and democratic state. To continue strengthening the judicial authority in the environment where the law, proceedings and technologies rapidly develop, FICIL invites to consider the following proposals.

- **Training of assistants to judges and court secretaries.** Opportunities for skill top-up, as well as individual study of the law, judicial practice, case law and legal writing by employees would significantly strengthen individual knowledge of each employee with regards to the current substantive and procedural law. Considerable strengthening of professional knowledge of the support team could improve judicial efficiency, as well as contribute to wider use of digital solutions. Furthermore, it would facilitate the judges' work as they would need to invest less time in individual training of peers/employees of the court.
- **Case law: publication of judicial decisions.** Currently, a database of anonymised decisions is publicly available, and a case law archive is made public on the homepage of the Supreme Court. Generally, only those judicial decisions are published where the cases are decided by means of a judgment. However, quite often the courts make decisions, and in these decisions the court and the judges tend to refer to the current case law established in similar cases. However, the public does not have access to these decisions. Thus, FICIL proposes to publish anonymised decisions about various important procedural issues, incl. *inter alia* about the following (in civil cases):
 - Issues related to securing the claims (incl. before they are brought).
 - Issues related to dismissal of claims, or rejections that are decided by means of a decision of the court or a judge.
 - Issues related to termination of proceedings that are decided by means of a decision of the court or a judge, unless they are related to the refusal of the claimant/applicant to maintain the claim, approval of a settlement, or payment of the debt by the respondent in recovery cases.
 - Issues related to termination of insolvency proceedings, or legal protection proceedings that are decided by means of a decision of the court or a judge.
 - Cases related to recognition/enforcement of foreign decisions/foreign arbitration decisions that are decided by means of a decision of the court or a judge.
 - Cases related to forced enforcement of decisions of permanent arbitration courts that are decided by means of a decision of the court or a judge.
 - Issues related to recognition of incapacity that are decided by means of a decision of the court or a judge.
 - Decisions of the court or judges in cases during which important procedural issues are decided, incl. regarding requests/no requests to submit evidence or incorporate/do not incorporate it in the case.
 - All decisions of the court or judges in cases where procedural applications of the parties are rejected, incl. concerning rejection of applications, rejection of requests for expert examination, refusal to suspend litigation, non-replacement of a party to the case, etc.
 - Decisions of the court or judges in cases where the court relies on uniform case law concerning similar procedural issues if the said case law is not available/not published, in particular, if this case law was used to reject procedural requests.

Rationale for Recommendations



Improvement of the decision selection tool. To make the functionality for selecting and searching for court decisions more effective, more extensive involvement of district/city and regional court judges and assistant judges in the development of the uniform case law should be considered; this involvement would take the form of comments on the respective decision and a possibility to voluntarily recommend the decision for review by the *Division of Case-law and Research of the Supreme Court* as a potential case law decision.

FICIL is of the opinion that involvement of district/city and regional court judges and/or assistant judges in developing the uniform case law could provide a significant contribution to this process and the availability of a database for anonymised court decision to the public. Provision of a short comment about the nature of a court decision and its compliance with the uniform case law or the judicature when the decision is entered in the CIS (which already is a mandatory requirement) would considerably facilitate development of a uniform judicial practice, and would significantly assist in interpreting decisions.

Thus, FICIL would like to propose several potential models for involvement of district/city and regional court judges and/or assistant judges in commenting the content of decisions that could be considered:

Minimum involvement: upon entering a court decision in the CIS, the district/city or regional court judge and/or assistant judge notes the following (by means of a check box or a button):

- ✓ "the decision deviates from the general case law/judicature" or
- ✓ "the decision complies with the general case law/judicature"

Furthermore, we recommend to introduce a voluntary mechanism that would allow to use the system to propose/recommend a court decision to the *Division of Case-law and Research of the Supreme Court* as a potential case law decision; for this purpose a check box or a button could be made available in the CIS:

- ✓ "court decision is recommended as a case law decision"

Rationale for Recommendations



Optimum involvement: when a court decision is entered in the CIS, the district/city or regional court judge and/or assistant judge makes notes or in the designated field (or a card) enters a summary on the nature of the decision and its compliance with the general case law or the judicature, or provides reasons for why the respective decision deviates from the general case law or the judicature (for example, specific or notably different circumstances).

Thus, by selecting (a) the minimum involvement model or (b) the optimum involvement model, better systematisation of court decisions would be achieved, and voluntary involvement of judges and/or assistant judges in developing the case law would be made convenient and efficient.

Furthermore, we recommend to introduce a voluntary mechanism that would allow to propose/recommend a court decision for review by the *Division of Case-law and Research of the Supreme Court* for potential inclusion in the case law, if a district/city or a regional court judge and/or an assistant judge makes a respective note or an entry in the designated field(s) (or cards). Thus, the *Division of Case-law and Research of the Supreme Court* would be informed about potential case law decisions proposed by judges that district/city or regional court judges and/or assistant judges consider well reasoned and fit for inclusion in the case law, and the division could take these initiatives into consideration when it prepares case law summaries.

The above proposals would allow to resolve situations when practicing lawyers have a different interpretation of the same decisions irrespective of the fact that some decisions have deviated from the established judicial practice (sometimes, such deviations are not discussed in the respective decision).

Rationale for Recommendations

Bifurcation of proceedings

FICIL believes that careful preparation of civil cases for hearings is required to improve the effectiveness of proceedings, and an introduction of a possibility for splitting the proceedings in several stages (bifurcation) if both parties agree should be considered with regards to the procedural law. Namely, in cases where progress primarily depends on establishing one or several circumstances (a violation or a fact, etc.) and if the parties agree, the court could decide about a separate review of one or several issues eventually saving the time and means of the court and the parties.

If this procedure were applied, the court would move to the second stage only if e.g. the fact or the violation was established, and during the second stage, issues of liability and the scope of damages would be decided. FICIL believes that this approach would be especially efficient in complicated cases, for example, in cases relating to competition breaches or intellectual property disputes, as well as disputes concerning patent rights. At the same time, it should be noted that requests for separation of specific aspects should be decided at the very beginning of proceedings by considering if the respective aspects can be separated from the case and if the evidence concerning the reviewable issues does not overlap (making the procedural economy non-existent), and if there are real grounds for separating the respective aspect from the rest of the case or the request is made only to delay the proceedings. If there are reasonable doubts about a possibility to decide the respective issue during separate proceedings, the court should deny such requests. According to the Civil Procedure Law, there is an obligation to prepare a civil case for a hearing and decide about procedural issues (requests for evidence, etc.) separately from the primary proceedings, there is also an institute of a preparatory hearing, however, separation of the proceedings in several stages (bifurcation) is impossible, considering the current procedural law. Savings of time and procedural costs are the main benefits of a bifurcation.



Rationale for Recommendations

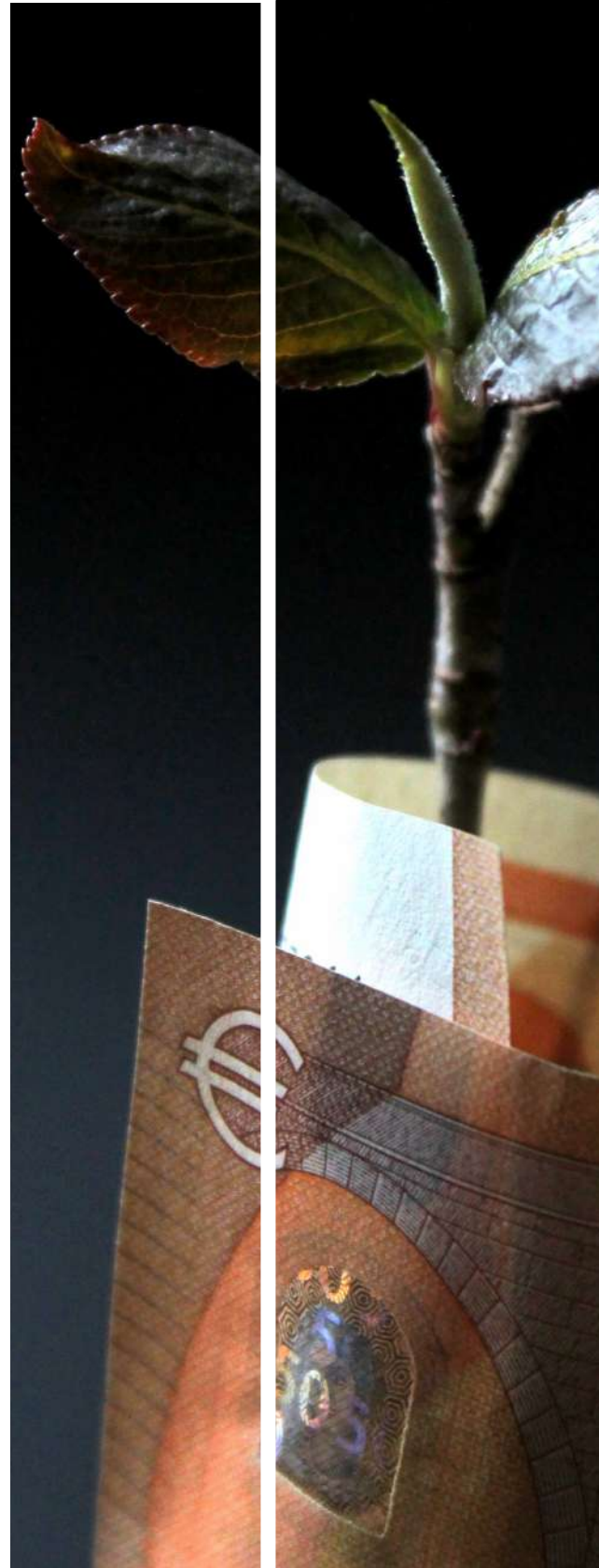
Insolvency

FICIL appreciates the measures implemented by the Insolvency Control Service (ICS) with regards to stricter supervision of administrators. As the ICS is a specialised body with an in-depth understanding of insolvency, FICIL invites to ensure more extensive involvement of the ICS in identifying and preventing violations in this area.

Lawful, fair and effective restructuring and insolvency proceedings are essential for the attractiveness of the investment environment and the overall development of the national economy. Public trust in the judicial power plays an important role in achieving the described goal.

At the end of 2017, the standing of the judicial system was publicly questioned due to the very critical assessment of insolvency proceedings. The Council for the Judiciary, responding to the concerns voiced about judges not acting in good faith during insolvency proceedings, invited the Supreme Court to cooperate with legal experts and compile and analyse data about insolvency and legal protection cases where appeals were satisfied from 2008 to 2014. The report of the expert group was sent to the Prosecutor General for review, and made public. The report found that errors were made in several decided cases, and that some circumstances allowed to seriously doubt the reputation of involved judges and their ability to ensure the rule of the law.

Irrespective of the public outcry and conclusions of the report, all judges whose conduct was reviewed still continue working in the judicial system, and representatives of the judiciary have not provided sufficient explanations to the public on how they intend to restore the standing of the judiciary and prevent similar occurrences in the future.



Rationale for Recommendations

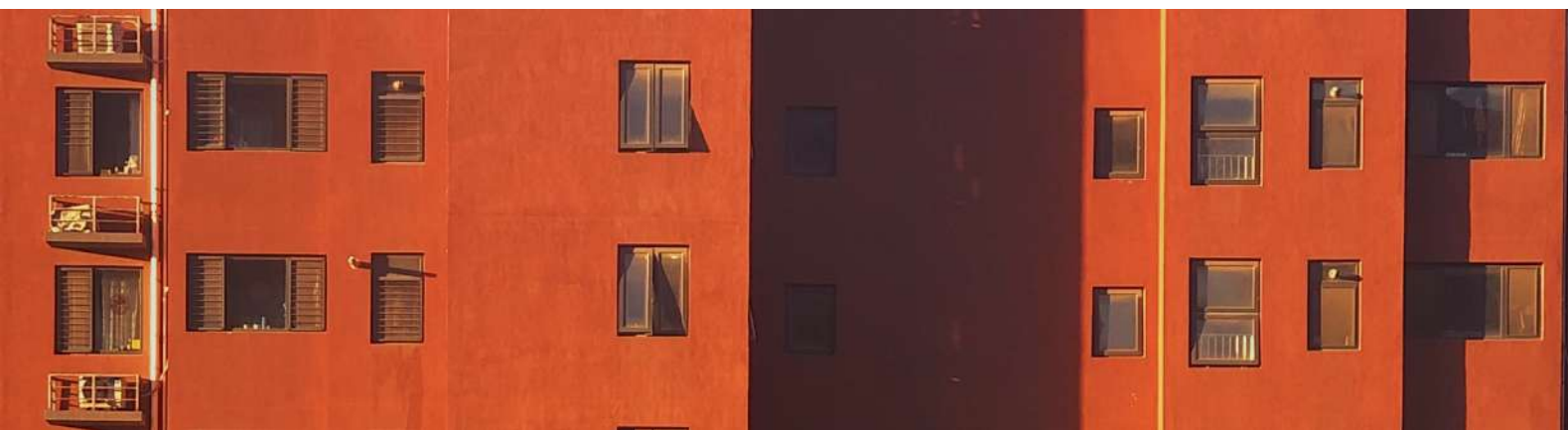
Furthermore, FICIL is of the opinion that at the moment special attention should be paid to restructuring and insolvency as:

- Due to the crisis caused by Covid-19 pandemics it is reasonable to expect that the number of legal protection and insolvency applications will increase that will put the legal framework regulating insolvency and the issue of procedural efficiency in renewed spotlight;
- Latvia has to transpose Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

FICIL has already underlined the problems that are related to the legal protection proceedings (LPP), namely the LPP is used belatedly or on some occasions in bad faith, experts are not involved in developing the LPP action plans, and the debtors usually lack financial skills to proceed with restructuring, and the supervision of debtors tends to be formal. It should be noted that the current awareness of board members and owners of the available mechanisms for solving financial difficulties is quite limited. Furthermore, entrepreneurs still shy away from solving their financial difficulties by relying on legal mechanisms; unfortunately, it often happens due to the desire to hide information about the actual situation from business partners, as well as state agencies.

In the context of the described problems, FICIL appreciates the requirement for introduction of early warning tools to ensure timely identification and resolution of financial difficulties. It is necessary to set up a centralised system that would use public data to identify financially unstable or essentially insolvent companies and use various measures to drive the conduct of these companies and their owners in the desired direction. The companies should be able to access user friendly information about what financial indicators should be monitored, what points to potential insolvency, what is considered correct action in case of financial difficulties (best practice examples), what kind of professional help is available, as well what are the consequences if financial problems are ignored. Maximum use of those information channels that entrepreneurs use on daily basis is needed, for example, EDS, the Commercial Register, etc.

Transfer of company assets to another company is a popular alternative to legal means for solving financial difficulties thus undermining the interests of the state and creditors. While such opportunities are not considerably curtailed, the culture of restructuring will not develop. It is necessary to study the phenomenon of asset transfer and develop effective countermeasures and efficient sanctions making board members, owners and beneficial owners liable. It is also necessary to consider inclusion of asset transfers in the legal framework that would allow such transfers taking into consideration the interests of all creditors.





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Foreign Investors' Council in Latvia on Court Efficiency and Investment Protection

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.