



FICIL
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Position Paper No. 6

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

16 September 2021



Executive Summary

The Foreign Investors' Council in Latvia (hereinafter - FICIL) welcomes the work undertaken by the Latvian Government so far in strengthening court efficiency and investment protection through, for example, establishing the Economic Affairs Court and improving the commercial legal framework to make it more aligned with the modern market. At the same time investors are still concerned about issues such as legal uncertainty, non-transparent decision-making process of regulators, abuse of insolvency proceedings and legal protection proceedings, litigation costs etc. This is also reflected in the FICIL Sentiment Index 2020, where half of the foreign investors participating in the survey noted at least some improvements in court efficiency and quality of legislation, while the other half of them argued that no improvements could be seen.

Taking further its continuous work in identifying the current problems affecting investors and the development of solutions for court efficiency and investment protection, FICIL proposes recommendations in the following categories:

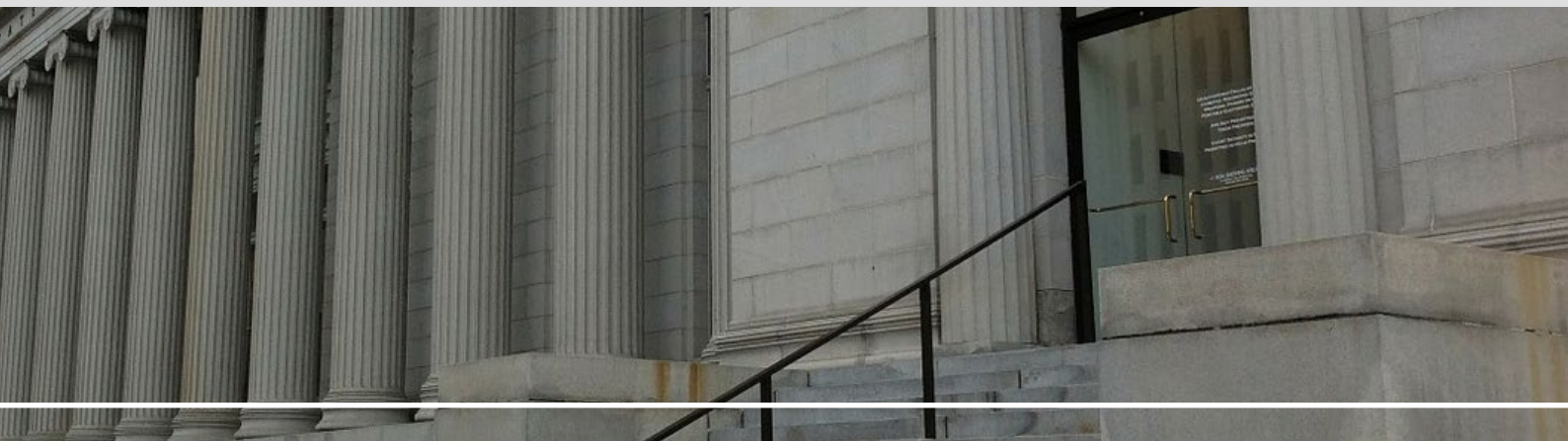
1. Quality of the legislative process;
2. Court efficiency;
3. Commercial legal framework;
4. Restructuring and insolvency.

FICIL emphasises the need for a transparent, predictable, and well-considered legislative process through, for example, continuing work on the regulation of lobbying activities and developing it so that it not only serves as a formal register but also provides comprehensive

information on the reasons for taking specific decisions. FICIL also reminds of the impact of a fair and predictable investment environment on attracting foreign investments, and the negative consequences caused by abrupt legislative changes which significantly deteriorate the position of investors. The Position Paper puts forward, once again, a recommendation for improving the procedural efficiency of courts through, for example, introducing bifurcation of proceedings and continuous improvement of procedural laws. FICIL also calls for extended use of technologies in proceedings and promoting the availability of case law.

FICIL believes that development of the capital market will play a significant role in the future economic growth of the country. Hence it is necessary to facilitate the education of entrepreneurs in the opportunities of the capital market. Inclusion of State and local government controlled capital companies in the regulated market may also have an important role in the development of the capital market.

This Position Paper also contains recommendations related to the transposition of Directive 2019/2013 of the European Parliament and of the Council of 20 June 2019 into national law, calling for greater attention to be paid to the protection of legal interests of creditors in the restructuring process. FICIL would also like to draw attention to the transfer of undertakings' assets, which is still a relevant problem. FICIL encourages the Government to continue working towards upgrading the competence of judges in legal protection and insolvency proceedings.



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Recommendations

Quality of the legislative process

Regulation of lobbying activities. Although lobbying or representation of interests is a phenomenon already present in Latvia, the representation of interests lacks a unified regulation covering all relevant issues. In FICIL's view, only a clear and predictable regulation which is effectively introduced and followed in practice will help to address the public scepticism about the relevance of the representation of interests in a democratic country. FICIL supports the progress made by the Defence, Internal Affairs and Corruption Prevention Committee of the Saeima towards the regulation of openness of the representation of interests and hopes that the regulation will ensure a predictable and inclusive decision-making process.

Predictability and fairness of legislation. FICIL would like to emphasise that any changes in regulation which have adverse consequences for investments made previously should be well-considered, transparent, reasonable, and balanced, since this is the only way to ensure a fair and predictable investment environment that is attractive to foreign investors. Special consideration must be given to retroactive changes. The expected changes in the regulation of mandatory procurement of electricity can be used as an example. FICIL agrees that the exacerbated persistent problems in the industry should be addressed. However, FICIL emphasises that it should be done in a legal and balanced manner taking into account all stakeholders involved and affected.

Decision-making process of regulators. The development of a regulation for the existing decision-making process of the Public Utilities Commission is required in order to promote transparency of the decision-making process, taking into consideration that this authority appointed by the Saeima takes decisions which have a significant long-term impact on the Latvian society and economy. A process similar to the Rules of Procedures of the Cabinet of Ministers would ensure a wider participation not only by the society, but also by state and municipal institutions.

Court efficiency

Continued work on the improvement of judicial proceedings is needed. FICIL recommends considering proposals in the following directions:

Digitalisation - promotion of electronic documents and environment. FICIL calls for continued promotion of digital solutions and the introduction of e-case in judicial proceedings, further extending the range of people who receive notices sent by court electronically, thus avoiding documents in paper format as far as possible.

Promotion of the availability of case law. In the next few years, FICIL suggests working on solution to introduce and use the latest digital and artificial intelligence tools in order to improve the database of case law and anonymised rulings and also involving not only the

Division of Case-law and Research of the Senate of the Supreme Court in the establishment of case law, but also judges and assistants to judges of all Latvian courts, thus creating a voluntary mechanism where quality rulings of lower courts containing scientific studies could be subject to evaluation as potential rulings of case law/good practice. FICIL also maintains its position that the database of anonymised rulings needs supplementing with a greater amount of published court rulings by anonymising and publishing also those rulings where issues have been decided by a decision, in particular on important procedural issues.

Making the proceedings more effective. In FICIL's view, it is necessary to promote even more thorough preparation of civil cases for hearing in order to make the proceedings more effective, by employing as far as possible the mechanisms already envisaged in the Civil Procedure Law, and also introducing the option to split proceedings in several stages (bifurcation) with the consent of both parties.

Litigation costs. FICIL calls for consideration of the issues related to the amounts of the State fee, other litigation costs, expenses of the enforcement of judgements etc., introducing single, fair, and proportionate procedures for calculating expenses. FICIL brings attention to the necessity to determine the maximum limit for State fees to avoid unfair situations in cases with large claim amounts and where the State fees are not reasonable compared to the administrative resources used by the court.

Investment protection against the State. FICIL encourages a debate on addressing the issue related to cases of this category, since the cases of this category are surrounded by uncertainty, both at national and EU level.

Other proposals related to proceedings. FICIL calls for the modernisation of the regulation for presenting evidence according to the latest developments in modern technologies, public space, and social networks, and also for solving issues which have so far been left unsolved in the arbitration proceedings - i.e. the issues of evidence (in particular the statements of witnesses) and also the issues related to security for a claim (currently security is only available prior to initiating arbitration proceedings).

Commercial legal framework

Commercial legal framework. FICIL proposes developing more flexible provisions of the Commercial Law which would be applicable to the shares and structure of the capital of limited liability companies (including by simplifying transformation of a limited liability company

into a joint stock company). Overall, the Law still requires improvements in order to promote the implementation of projects for raising capital and other projects for financing commercial activities.

Development of laws for the improvement of capital markets. In order to encourage owners and management of companies to select capital markets as a source of raising financing, it is necessary to continue working on both improvement of the existing regulation and introduction of financial support mechanisms for the inclusion of companies in the regulated market in line with the rules of competition and State aid.

Inclusion of the public sector capital companies in the regulated market.

In FICIL's view, inclusion of State and local government controlled capital companies in the regulated market would significantly promote attraction of private capital, effective management of such companies and development of capital markets in Latvia.

It is recommended to:

- 1) Carry out or actively continue an evaluation of capital companies owned by public persons, including in respect of suitability of the company's operational model, capital structure, need for additional capital, and corporate governance for the inclusion in capital markets.
- 2) Develop an appropriate action strategy to prepare companies to be included in the regulated market, if these companies need to attract capital in the market.
- 3) Define the key indicators, the achievement of which would show whether the inclusion of the company in capital markets has been successful. For example, definition is required of the following results to be achieved in the process: the minimum amount of capital to be raised, participation rate of institutional investors, participation rate of private investors etc.

Restructuring and insolvency

FICIL calls for development of the restructuring culture. On the one hand, it is necessary to ensure that the management and owners of companies are held liable in a more effective manner for unfair or negligent actions during financial difficulties of a company that harm the creditors' interests. On the other hand, positive motivational tools are necessary for debtors which help them to identify their financial problems and provide practical assistance in solving them. FICIL also calls for facilitating a legal, fair, and effective course of restructuring and insolvency proceedings, where the interests of the parties concerned are well-balanced and infringements committed are identified and prevented effectively.

Rationale for recommendations

Quality of the legislative process

▶ Regulation of lobbying activities

Open, transparent, and effective expression of opinions by persons who are influenced by a decision as well as hearing these opinions are the basis for a modern democracy, since it can promote more comprehensive and information-based decision-making. Discovering the views of industry professionals and other persons allows decision makers to identify all relevant circumstances and optimise their decision in order to implement the public interests while also taking account of and respecting the reasonable interests of persons to whom such decision will apply.

Although lobbying or representation of interests is a phenomenon already present in Latvia, the representation of interests lacks a unified regulation covering all relevant issues. The lack of a clear and predictable regulation, which would ensure that all have equal and effective rights to participate in a democratic process and that representatives of interests have an opportunity to present their arguments, undermines confidence in decisions taken and creates the impression that decisions are taken as a result of a secret agreement rather than an open discussion based

on sound arguments. Only a clear and predictable regulation which is effectively introduced and followed in practice will make it possible to address the public scepticism about the relevance of the representation of interests in a democratic country.

FICIL notes that the regulation of openness of the representation of interests developed by the Defence, Internal Affairs and Corruption Prevention Committee of the Saeima is relevant to ensuring that the principles above are complied with. In this regard and in addition to the establishment of a public list of formal representatives of interests, FICIL supports in particular improvements in indicating a "legislative footprint" and other considerations providing information about the reasons for a specific decision. This initiative not only improves the possibility of identifying the purpose and meaning of a decision, but also provides a sense of responsibility for the decisions supported by the representatives of interests and taken by decision makers.



In FICIL's view, the regulation should not only provide a formal system to account for contacts, namely disclosure of the calendars and agendas of the members of parliament, but it should also be aimed towards creating a possibility for anyone to verify the accuracy of the information disclosed by a representative of interests, as far as reasonably achievable and in compliance with the principle of proportionality.

This principle could be ensured through, for example, the following:

- ▶ Indicating the topic and issues discussed in a specific meeting in order to ascertain which decision initiative has been discussed and link it with the position of a specific representative of interests expressed publicly.
- ▶ Publishing, as far as possible, all opinions and data which the decision maker has received.

FICIL also invites other institutional representatives of interests to publicly state their position about any legislative initiatives represented by them, including providing the considerations on which their position is based. This would not only enhance confidence in representatives of interests and trust in the accuracy of information disclosed by them, but also enable clarification of the considerations forming the basis for any decision defended by them.

FICIL emphasises that the regulation should respect other fundamental principles of a democratic country and human rights. From this point of view, although it is not necessary to exclude lawyers and other legal aid providers from the scope of regulation, it should be noted that the regulation must be brought in line with the protection of confidentiality and undisclosed information of a client.

▶ Predictability and fairness of legislation

When making investments, investors rely on the existing legal framework of a country and the current laws and regulations play an important role in the financial analysis of investment projects. It is understandable that changing economic and market trends, as well as development of new products and services bring about changes in the regulation. FICIL, however, would like to emphasise that any changes in the regulation which have adverse consequences for investments made previously should be well-considered, transparent, reasonable, and balanced, since this is the only way to ensure an investment environment that is attractive to foreign investors.

The expected changes in the regulation of the mandatory procurement of electricity can be used as a negative example. FICIL agrees that the exacerbated persistent

problems which have been identified in the industry should be addressed. However, FICIL also emphasises that it should be done in a legal and proportionate manner taking account of all the stakeholders involved and affected. On the one hand, efforts to take different measures and act in order to minimise the burden created on economy and society by this State aid instrument are understandable. On the other hand, the Government came up with this aid instrument in order to promote electricity production from renewable energy sources or in cogeneration. As a result, a number of entrepreneurs were granted the right to sell a specific amount of electricity per year, specified in the mandatory procurement, while raising financing for the implementation of such projects from credit institutions, investment funds, or foreign investors. FICIL believes that regulation changes with adverse retroactive effects on previously made investments are not acceptable without providing adequate compensations to investors. In addition, the State must bear responsibility for the interpretation of legal acts performed by its institutions and public officials.

Changes should also be made by bringing as much clarity as possible for investors who have already made investments in the relevant sector. In the context of the mandatory procurement component (OIK), contradictions can now be observed in various draft laws examined at the same time, such as amendments to the Electricity Market Law, the Energy Law, and also the Cabinet Regulations No. 560 and 561 each of which provides for a different development scenario of OIK. Such situations paralyse the development plans of companies and hamper the influx of additional investments in Latvia.

▶ Decision-making process of regulators

The Public Utilities Commission, which is an authority appointed by the Saeima, takes decisions that have a significant long-term impact on the Latvian society and economy. Some of the decisions are taken in the form of administrative acts that have specific addressees, for example, decisions to determine obligations regarding regulation of different tariffs, decisions to impose various obligations on merchants in regulated sectors etc. Although such decisions are addressed to merchants operating in the relevant regulated sectors, they also have a significant impact on other parties concerned – service users, other merchants, policies of the relevant sectors of economy (in fact, not only policies of separate sectors but also of the economy as such (for example, energy tariffs)).

The decisions can affect the external balance-of-payments of the Republic of Latvia in millions of euros, since they also impose obligations on Latvian merchants against merchants of other countries. Some of the decisions are taken in the form of legislative

instruments which have legal force equal to that of Cabinet regulations. Moreover, part of such legislative instruments is later used as the basis for the issue of the Regulator's administrative acts which leads to a situation where the Regulator itself lays down the mandatory rules of conduct for merchants, controls their enforcement, and even penalises for failure to comply with them.

Not all European Union countries delegate such wide powers to issue legislative instruments to the Regulator. In classical Western democracies, the Regulator's legislative instruments have more of a technical nature in order to implement the obligations of merchants already specified in laws. The Latvian legislator, however, often chooses to delegate the issue of legislative instruments to the Regulator without specific aims, criteria, or other boundaries, as a result of which the Regulator has a wide margin of discretion to decide on the content of such legislative measures and consequently even a wider margin of discretion to issue administrative acts on the basis of such legislative instruments.

It is important in such a situation to ensure that the decision-making process respects the rule of law in order for the parties concerned to understand the following:

- ▶ Exactly what regulation is being planned by the regulator – it requires a specific draft legislative instrument or a draft administrative act. The Regulator's practice to conduct consultations with market operators without making specific wordings public in a timely manner is not sufficient in this regard.
- ▶ What is the purpose of this regulation or what problem it prevents, how it affects the parties concerned, competition and the macroeconomic situation. An annotation of a draft law is used for this purpose in the Cabinet and the Saeima, and its content is regulated, while the Regulator often does not justify the adoption of a legislative instrument or changes made to its substance.
- ▶ Why the considerations of the parties concerned put forward in the coordination process are not taken into account or are taken into account partly. A statement is used for this purpose in the Cabinet and the Saeima, and its content is regulated and examined at an inter-institutional meeting, while the Regulator does not have such a practice.
- ▶ What will be the procedural steps and deadlines for the decision-making – some of the decisions end up at a meeting of the Regulator's Council without any consultations, in other cases, consultations are started but not taken forward for months or even years. Not all parties concerned are given an equal and sufficient time period for the submission of proposals and objections or commenting on the objections of other parties.

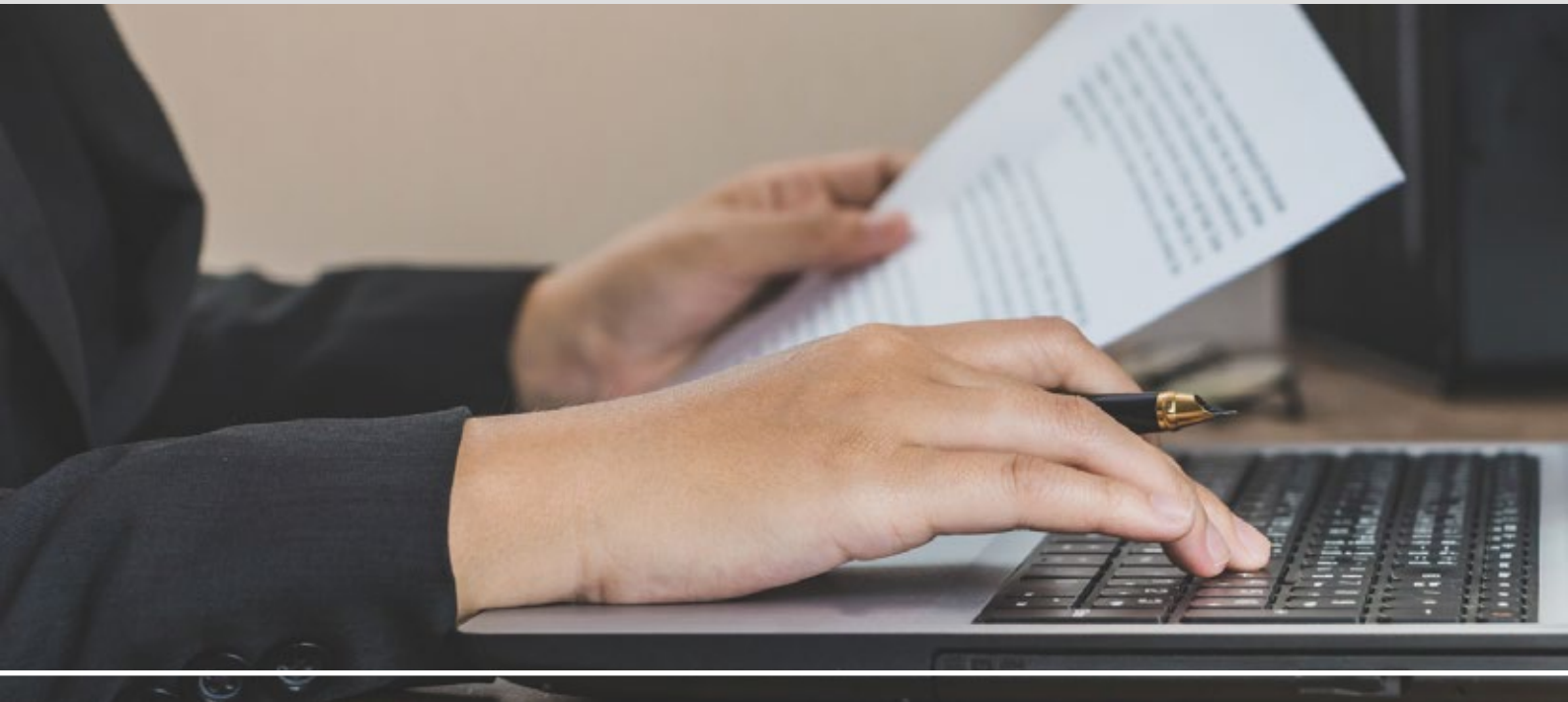
The process of issuing the Regulator's administrative acts and legal instruments addresses these challenges only remotely. Some important administrative acts are not even published prior to adoption and their issue has to be specially requested, which shortens the time allowed for preparing proposals and objections. Acts have neither an annotation, nor a statement, the content of which would be equivalent to the decision-making processes of the Saeima and the Cabinet. The hearing of opinions of the parties concerned, justification of their rejection, and a transparent process are the only way of ensuring the quality of decisions which would correspond to their significant impact on the economy. A quality decision-making process would help addressees and society to better understand the decisions taken and increase respect for their enforcement. Advisory councils and other additional solutions justifiably introduced by the Regulator fail to address the fundamental lack of transparency. A regulation equivalent to the Rules of Procedure of the Cabinet is necessary for the decision-making process of the Regulator which would ensure that not only individuals but also other public administration authorities and ministries are able to become engaged in taking decisions of national importance. A transparent process and reasoned decisions would reinforce the Regulator's independence and authority rather than diminish them.

Court efficiency

FICIL welcomes the significant progress made towards modernisation and digitalisation of the judicial system, administrative reform, specialisation etc. and believes that the high-quality ongoing work should be continued, strengthening the authority of courts and promoting professional and efficient judicial proceedings. FICIL would like to highlight in particular the establishment of the Economic Affairs Court of Latvia.

The right to effective judicial protection is one of the factors contributing to the attraction of foreign investments and promotion of the business environment. The authority of courts among companies and society would be even more strengthened by ensuring uniform, clear, and publicly accessible case law and promoting modern and digital judicial proceedings. In light of the above-mentioned facts, FICIL believes that the ongoing work on the improvement of judicial proceedings should be continued in the following directions:

Digitalisation – promotion of electronic documents and environment. Promotion of a digital environment and electronic documents and establishment of a user-friendly e-case would reduce the amount of paper documents, and also improve the quality and effectiveness of judicial proceedings, since arguments of the parties, documents, evidence etc. would be available for data processing in a digital format. The use



of electronic documents makes communication faster and more effective, and also saves administrative and financial resources of both the State and individuals. Hence FICIL calls for continued facilitation of digital solutions and e-case in judicial proceedings by further extending the range of people who receive notices sent by court electronically, thus avoiding documents in paper format to the extent possible. Several improvements are possible without large additional financial resources or IT developments and can be implemented through changes in the civil procedure and setting electronic exchange of information as the default option, while paper format would remain as an exception with the costs being covered by the party requesting such a format.

Promotion of the availability of case law. It is important for the existence of a uniform, clear, and high-quality base of case law rulings that such rulings are available to society and legal scientists. FICIL suggests introducing and using the latest digital and artificial intelligence solutions in order to create a database of case law rulings, and also involving not only the Senate but also judges and assistants to judges of all Latvian courts in the establishment of case law.

The following proposals could facilitate development of the database of case law rulings:

- ▶ Publication of different court decisions. The database of anonymised rulings and the archives of case law rulings mostly contain only the court rulings where cases are decided by judgement. FICIL welcomes the amendments to Section 28.² of the Law On Judicial Power, which provide for the publication of judgements from courts of all instances once the final judgment has come into force. Nevertheless, court rulings are often made in the form of a decision. Moreover, the court or judges tend to refer to the existing case law in similar cases. However, such decisions are not available to the public. Hence FICIL proposes publishing anonymised decisions not only on the result of a case but also on various important procedural aspects, in particular where they concern serious procedural issues (regarding evidence, expert-examinations, security etc.) or issues related to the creation of rights (also in respect of the non-existence of the right to claim). FICIL has already published a detailed list of decisions in its Position Paper 2020, yet this list is not exhaustive¹.

¹ <https://www.ficil.lv/wp-content/uploads/2020/09/FICIL-9.Investment-Protection-Court-Efficiency-Position-Paper-2020-ENG.pdf>

RATIONALE FOR RECOMMENDATIONS

- ▶ Improvement of ruling selection tools. The current search tools offered by the database of anonymised rulings which is available to the public are rather complicated and inefficient. Search results often show judgements in cases which are not related to specific keywords at all (for example, due to a quote included in the descriptive part). Ruling selection by categories of cases often fails to work or does not show corresponding results. Thus it takes a long time to find examples of case law relevant to a specific category of cases from all the search results (by physically downloading, opening, and reading them). The archives of case law rulings published on the website of the Supreme Court are more user-friendly in comparison with the database, since they enable users to search judgements by categories of cases and topics. Unfortunately, they only contain a small part of all judgements. FICIL appreciates the user-friendly accessibility of quotes and rulings by the Senate of the Supreme Court, which are published on *www.likumi.lv* next to the specific norm of the corresponding legislative act. However, it must be taken into account that without opening the particular norm or if searching for the quote next to another norm, it may not be available. In addition, only a small part of all rulings related to the specific norm are published in this way. FICIL reiterates that it is necessary to address the situation by improving the search tools and also using, as far as possible, the latest digital and artificial intelligence solutions.
- ▶ Preparation of the database of rulings. In order to use digital opportunities to full extent, it is necessary not only to improve the ruling search and selection tools but also prepare the database of rulings in a quality manner ensuring that it not only contains ungrouped anonymised rulings, but also provides information regarding such rulings (for example, the category of cases, correspondence to case law, special circumstances, performance of a scientific study in a case etc.). Artificial intelligence and digital solutions could also be applied to such preparation of the database of rulings, leaving only the review and supplementation of pre-processed results to human resources. Overall, this would reduce the time spent by assistants to judges and legal counsels in the research of case law (for example, reducing the time required to select the necessary rulings), and at the same time improving the quality of rulings, since they would be based more on the research of case law, and also promote establishment of uniform and stable case law.
- ▶ Involvement of judges and assistants to judges of district, city, or regional courts in the establishment of case law. In order to train artificial intelligence as well as gradually take forward and develop the necessary database of rulings, it would already

be advisable to consider options for introducing a voluntary mechanism that would enable judges and assistants to judges of courts of first instance or appellate courts to put forward/recommend that a court ruling is handed over to the Division of Case-law and Research of the Supreme Court as a potential case law ruling. After informing the Division of Case-law and Research of the Senate of the Supreme Court of the potential case law rulings put forward and considered suitable for case law by judges and/or assistants to judges of district/city or regional courts, the Division could take account of these initiatives in gathering case law. In FICIL's view, the involvement of judges and assistants to judges of district/city and regional courts in the establishment of uniform case law could significantly contribute to the establishment of uniform case law and availability of the database of anonymised court rulings to the public.

Making proceedings more effective. In FICIL's view, it is necessary to facilitate thorough preparation of a civil case for hearing in order to make the proceedings more effective by employing as far as possible the mechanisms already provided in the Civil Procedure Law (a preparatory hearing, deciding of procedural issues when preparing a case for hearing etc.).

At the same time, introducing the option in procedural laws to split proceedings in several phases (bifurcation) with the consent of both parties should be considered. In particular, in cases where further progress mainly depends on the establishment of one or more circumstances (the existence of an infringement or fact etc.), a court could, with the consent of parties, hold a separate hearing for one or several aspects of the case, thus saving the time and resources of the court and parties to the proceedings. FICIL believes that such approach would be particularly effective in complex cases, such as those related to infringements of competition law, intellectual property disputes, and patent disputes.

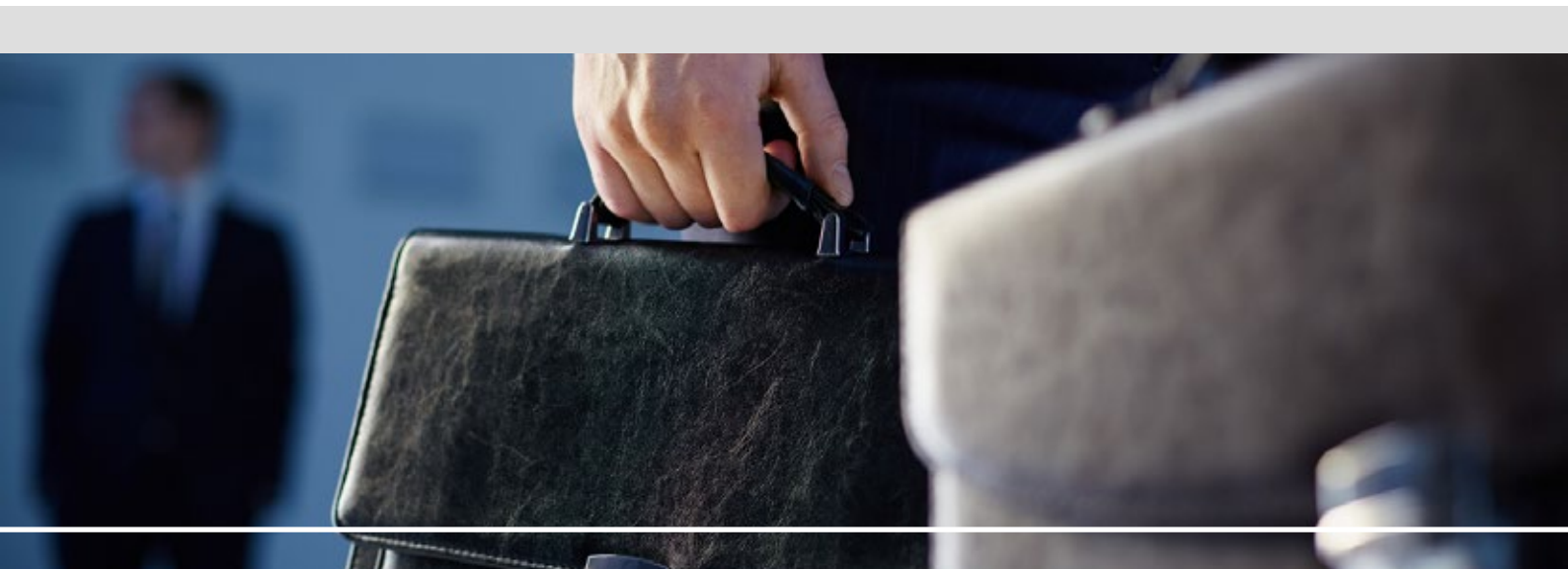
Litigation costs. FICIL acknowledges that the protection of rights in a judicial institution requires a State fee to be paid, however, the fee and other court expenses should be proportionate to the administrative resources used by courts in a specific case.

FICIL welcomes the positive trends in the reduction of State fees to a proportionate amount, for example, the law dated 25 March 2021 (in force since 20 April 2021) has provided for changes and the State fee for lodging an application for the security for a claim or temporary protection has been reduced from the previous 0.5 % of the amount of claim to the amount of EUR 70. At the same

time, Latvia has still not specified the maximum limit of the State fee, and also the State fee in an individual cases is not proportionate to the administrative resources used by courts, in particular if the amount of the claim is large in the specific case.

- ▶ Amount of the State fee. At the moment the law provides for a specific limited State fee or a State fee which can be calculated as a percentage in specific cases depending on the amount of the claim and without limiting the maximum amount of the fee. In order to guarantee the right to a fair trial, including the opportunity to bring an action and lodge an appeal which may not be restricted by the financial capacity of the party to pay the State fee, reasonable limitations on the State fees are required. In recent years, we have carried out a study in the Baltics and Nordic countries and concluded that the State fee for lodging a claim does not exceed EUR 7,000-10,000. A similar maximum fee should also be determined in Latvia.
- ▶ Reduced fee of appeal. The law stipulates that a State fee for lodging an appeal is the same as that calculated for lodging a statement of claim with a court of first instance. This means that an identical amount for both courts (double amount) is frozen for several years while a case is pending in several courts. Hence the issues regarding the maximum amount of the fee and the calculation of the fee in the amount of 100 % for lodging an appeal should be considered together. Taking into account that the State fee paid in a court of first instance is sufficiently large, a smaller fee should be determined for appeal proceedings, since most of the facts and body of evidence are often

- examined in a court of first instance (for example, witnesses are usually questioned only in a court of first instance and rarely in a court of appeal), while in a court of appeal the parties have disputes over individual legal issues or most essential evidence.
- ▶ Expenses for the assistance of lawyers. Section 44 of the Civil Procedure Law prescribes the limits on recovery of expenses for the assistance of lawyers. These amounts are disproportionately low (for claims from EUR 8,501 to EUR 57,000 - up to EUR 2,850, or for larger claims - in the amount of 5 % depending on the amount of the claim) and deny the right to a fair trial, since the actual expenses of parties to the proceedings for the assistance of lawyers cannot be recovered. Moreover, the Law does not provide for recovery of expenses of third parties. A third party can be involved in a case at the request of a party to the proceedings, and he or she may be forced to participate in the case for years, covering all costs himself or herself. Also the principle according to which 50 % of the expenses for the assistance of lawyers are recoverable in a court of first instance, is unfair, since it is the court of first instance where more hearings could be required (throughout several years) and where the most essential work is carried out for a case so that parties can reach a settlement or where the majority of the issues are resolved before appeal. In practice, there are cases where the State fee for lodging a claim and appeal, and also fees of sworn bailiffs considerably exceed the legal fees of each party separately. This is neither fair nor proportionate, since the parties to civil proceedings are those which invest the biggest efforts and resources to prepare and prove the case.



Investors' claims for investment protection against the State. Pursuant to Section 24 of the Civil Procedure Law, the Economic Affairs Court shall examine, as a court of first instance, the claims for investment protection brought by investors of the European Union Member States against Latvia. The cases of this category are surrounded by uncertainty both at national and EU level. The issue related to State fees should be addressed. The amount of investments in such claims usually reaches several millions. Thus a considerable fee would be paid in the State budget in a potential claim for losses against the State. This leads to various contradictions (for example, the State causes losses and examination of a dispute before a national court requires payment of a large fee).

► Other proposals related to judicial proceedings.

Evidence. The development of virtual communication and remote working makes it more difficult for a person, who has noticed, for example, information published on the Internet, copied it or printed it out but has not managed to record it with the help of a sworn bailiff, to secure this information in a manner prescribed by the Civil Procedure Law and comply with the burden of proof.

A new generation of evidence has emerged and it is also necessary to review and modernise the provisions regulating the burden and means of evidence. For example, evidence can often be found in Internet sources, social networks, different means of communication and applications. There are cases when information in the virtual space is related to the protection of personal data and this serves as a good cover for the party concerned, which may successfully impede the use of such information as evidence.

In order to strengthen the principle of fair exercise of rights before courts, the option could be considered to impose the burden of proof on the party which has published any information to which the other party refers. It is the publisher who controls publication, changes, deletion and availability of information. For various reasons, one party cannot prove what the other party controls. One example is an increasing trend in labour disputes. It concerns in particular the claims regarding bullying when an employee (plaintiff) has published information relevant to the case but later changes or deletes it, while the burden of proof lies with the employer, who has difficulties complying with it. Recently, the Consumer Rights Protection Centre has initiated several cases regarding information published by opinion leaders or influencers on social networks, and this trend keeps developing and requires relevant changes in laws regarding evidence issues. A principle should be followed that the burden of proof regarding content and privacy (that information was private in a specific period of time) lies with the person who has published the information.

Arbitration law. The arbitration field is experiencing a degree of stagnation, since the goal of previous reform has been achieved to some extent and the number of arbitration courts in Latvia has been reduced. At the same time, it is necessary to use the regulation in order to improve the activities of arbitration courts and extend opportunities for their use.

The Latvian law does not provide for the option to use witness statements in arbitration proceedings at all. In other countries (Finland, Germany) national courts become successfully involved in supporting arbitration proceedings in a procedural manner. For example, a national court questions witnesses (warning them about criminal liability) and draws up minutes which are further used by an arbitration court. It is also not possible to secure a claim during examination of a case.

Thus the international practice and the Lithuanian example should serve as a basis for changes in Latvia. For example, possibilities could be considered for a national court or special court (such as the Economic Affairs Court) to support arbitration proceedings.

Commercial legal framework

FICIL welcomes the progress made towards implementation of proposals in the Commercial Law (for example, staff options, conditional capital, optimisation of different procedures, categories of shares in limited liability companies etc.) and calls for cooperation in further improvement of the regulation (for example, facilitation of reorganisation processes, problems associated with the maintenance of shareholder registers in closed joint stock companies, further and balanced facilitation of procedures for attracting capital). Regarding closed joint stock companies, their problems are mainly related to the attraction of funding and registration of commercial pledges on the shares of joint stock companies. In case such commercial pledge is established (financers are reluctant to choose this security), it is complicated to enforce it for various reasons should problems arise with the fulfilment of liabilities. This concerns in particular the joint stock companies the shares of which are not traded publicly, since it is practically impossible to ascertain the owners of these shares. FICIL recommends reviewing legal requirements and seeking ways of improving this situation.

Development of laws for the improvement of capital markets. Development of the capital markets has a considerable impact on the overall economic development of the country. FICIL welcomes the progress made so far towards development of the regulatory framework for capital markets. FICIL's observations show that companies' knowledge of possibilities to attract capital on the regulated market keeps increasing every year. At the same time, FICIL

believes that in order to promote a positive trend, it is essential to also make contributions to the existing regulatory framework in order for it to become clear, understandable and applicable, and also to raise awareness and inform companies of what is required to issue shares in a public market.

Inclusion of the public sector capital companies in the regulated market. FICIL supports the development of capital markets in Latvia and the measures to promote attraction of the financing necessary for the development of companies in capital markets. It has already been indicated in Position Papers from 2018 and 2019 that in most cases Latvian companies are reluctant to attract financing by trading their shares in a public market – in recent years, it has only been done by a couple of companies. Inclusion of State and local government controlled capital companies in the regulated market would promote not only attraction of capital, but also effective management of the respective companies in line with the principles of good corporate governance and also facilitate the development of capital markets in Latvia. In addition, listing State and local government companies on stock exchanges would constitute a positive signal for large and medium companies in Latvia to seek possibilities of attracting funding and development in the capital market.

Restructuring and insolvency

Taking account of the transposition of Directive (EU) 2019/2013 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 (Directive 2019/2013), and the planned amendments to the national law, FICIL expects positive changes in the field of restructuring, provided that adequate attention will also be paid to the protection of legal interests of creditors, balancing the interests of all parties concerned. FICIL expects that the early warning system provided for in Directive 2019/2013 will be introduced on the basis of studies on social behaviour of entrepreneurs, and also by using modern technologies so that it would operate effectively and encourage entrepreneurs to act in a rational and responsible manner.

FICIL has already indicated that one of the major problems of the legal protection proceedings (LPP) and causes of LPP failure is the fact that debtors lack financial literacy which prevents them from developing a viable plan of LPP measures, while qualified experts are not usually involved in the planning, evaluation, and implementation of restructuring measures. FICIL welcomes the solution to increase the role of a person supervising legal protection proceedings (Supervisor), providing support to debtors in the development and coordination of the LPP plan. It can contribute to the development of restructuring culture in Latvia, provided

that the competence of Supervisors is checked. In FICIL's view, the most efficient solution would be to develop and introduce a certification system for restructuring specialists who could, inter alia, act as Supervisors. At the same time involvement of an expert would be necessary not only in the development and evaluation of the LPP plan but also in the process of implementation of the plan in order to monitor in a quality manner whether the debtor's actions will allow to achieve the planned cash flow forecasts and, where necessary, to help the debtor by providing consultations. FICIL finds insufficient the previous practice where the role of the Supervisor was mostly related to compliance with the schedule for covering the claims of creditors specified in the LPP plan. FICIL believes it is necessary to supervise the financial and operational activities of the debtor.

The purpose of the Directive 2019/2013 is to ensure that an effective national framework for preventive restructuring is available to operational companies in financial difficulties. In the context of creditor interest protection, it is essential to ensure that the relevant rights are enjoyed by a truly operational company, since the previous practice shows that the LPP is often used in bad faith by companies which are practically insolvent and simply try to prevent recovery processes initiated by creditors, thus harming the interests of both creditors and the State. In order to restrict abuse of rights, it would be important to confer rights to creditors, not only to dispute *post factum* the decisions taken in favour of the debtor on the basis of information provided by the debtor, but also to submit their objections during the decision-making process, for example, when a court examines an issue regarding extending the period for the suspension of enforcement activities. It would not be proportionate for the sake of potential effectiveness of the process to make the rights of creditors formal, since it would be necessary for an average creditor to involve experts in the implementation of its rights.

In addition to the improvement of restructuring regulation, it is necessary to address in a targeted manner the problem of the transfer of assets when a debtor's assets are transferred to another company. First, it is necessary to identify the spread and trends of this practice. The next step would be to develop a strategy that would allow to restrict the transfer of assets more efficiently, since it harms creditors' interests. However, being aware of the fact that this practice cannot be eliminated entirely, it is necessary to think about ways of regulating it and making it as transparent as possible and corresponding to creditors' interests.

FICIL continues to be available for collaboration in the improvement of the investment environment in Latvia.



Position Paper No. 6

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

FICIL is a non-governmental organisation that unites 38 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.

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