



Position Paper No. 9

FOREIGN INVESTORS' COUNCIL IN LATVIA POSITION PAPER ON COURT EFFICIENCY, FAIR COMPETITION AND INVESTMENT PROTECTION

08.09.2022

Executive summary

The Foreign Investors' Council in Latvia (hereinafter – FICIL) welcomes the work done to strengthen the court efficiency and investment protection, for example, the continued court digitalisation processes and Saeima approving the reforms for joint stock companies to increase their transparency¹. Also, FICIL highlights the positive decision to continue specialisation in courts by establishing the Economic Affairs Court, that has proved to be effective and has had faster court proceedings in comparison to other first instance courts².

Nevertheless, investors are still concerned about issues such as legal uncertainty, non-transparent decision-making processes of regulators, unfair competition from state owned companies and public procurement processes. Latvia ranks below the EU average in the opinion of the business world on the independence of courts and judges, and also the level of confidence that businesses have that their investment is being protected by the laws and courts in Latvia is below the EU average³. Moreover, examples are often highlighted that damage the credibility of fair competition, such

as the unjustified delay of investment projects by municipalities, as seen recently in Tukums⁴, a lack of transparent public procurement processes and changes in legislation that favour state-owned enterprises. Examples like this fail to muster trust in a fair, transparent, and open business environment which only increases uncertainty and lowers Latvia's competitiveness. In an environment where investors are already uncertain⁵, it is essential to work hard towards establishing fair, balanced, open and clear rules for all businesses operating in Latvia or those wanting to enter.

In this Position Paper, FICIL recommends actions to increase court efficiency, ensure fair competition, effective governance over state owned companies. Also, this year, FICIL continues to reiterate the need to ensure the above-mentioned characteristics to reduce uncertainty, increase investment protection and as a result build better overall trust between the public and private sector. FICIL also encourages the continued working towards upgrading the competence of judges in legal protection and insolvency procedures.

1 <https://www.tm.gov.lv/lv/jaunums/saeima-galigaja-lasijuma-atbalsta-akciju-sabiedribu-reformu>

2 <https://www.lsm.lv/raksts/zinas/latvija/ekonomisko-lietu-tiesas-pirmaja-gada--negaiditi-daudz-kriminallietu.a450508/>

3 <https://europa.eu/eurobarometer/surveys/detail/2290>

4 Administrative district court decision on 10 May 2022 in case no. Nr. A420181220.

5 With growing inflation, uncertainty about energy availability, ongoing Russia's invasion of Ukraine.





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Recommendations

1. Continue court specialisation and improving court efficiency.

- Increase the jurisdiction and capacity of the Economic Affairs Court. More categories of civil matters, for example matters regarding the board members' liability for damages and other matters, including the analysis of financial data, should be under the jurisdiction of the Economic Affairs Court of Latvia.
- Continue the discussion about further court specialisation in other areas such as contractual law, property law, family, and inheritance matter etc.
- The Ministry of Justice must ensure and assist the court digitalisation process, while implementing more digital solutions in all court proceedings.
- Introduce a stricter discipline, in line with the existing regulation, or a new regulation to prevent intentional prolongation of the court proceedings and underprepared cases whereby parties are informed properly on their procedural rights and obligations.

2. Ensure strong and effective governance over state-owned companies.

- Ensure that management of state-owned companies is strengthened and aligned with the ownership goals. There is a need to have professional and engaged supervisory councils and management boards that have clear short to long-term financial and non-financial goals.
- In the new letters of expectations FICIL emphasises the need to include ambitious goals for the transition of economy and strengthening resilience of economic sectors and intentions of possible financing of state-owned companies.

3. Protect and promote widespread fair competition in all sectors.

- Competition Council must present a proactive, repeated, and comprehensive opinion leadership in the fields of competition, especially when new legislations that regulate market conditions are debated.
- Assess and improve the efficiency of control mechanisms that monitor the participation of public persons in commercial activity.
- New state-owned companies in the field of renewable energy, should have an even playing field with private investors that are looking to enter the market. As Latvia moves toward strategic energy independence, fair competition needs to be closely monitored.

4. Upgrade and improve the public procurement system in Latvia.

- Institutions responsible for monitoring public tenders should publish guidelines, opinions, and recommendations on best practices with the aim of fostering the rapid and broad transition of Latvia in its efforts to implement the EU's Green Deal and Taxonomy.
- Promote further education for public sector institutions, including the judicial sector and the Public Procurement Monitoring Office, on the combination of competition and state aid law that is related to public procurement in the areas of EU's Green Deal and Taxonomy.



Rationale for recommendations

Continue court specialisation and improving court efficiency.


FICIL notes the significant progress made towards modernisation and digitalisation of the judicial system, administrative reform, and specialisation. FICIL would like to particularly recognise the work of the recently established Economic Affairs Court of Latvia. FICIL believes that professional and efficient judicial proceedings are the key for the continuing authority of courts. FICIL acknowledges that the high-quality ongoing work should be continued by further court specialisation. The Economic Affairs Court has shown good results in the legal work and the capacity to review cases in such a short time. FICIL believes that the Economic Affairs Court could increase its jurisdiction with additional categories of civil matters in the economic field, such as matters regarding the liability of a company's management board for damages, and other relevant categories which includes the analysis of financial data. In addition, FICIL considers that it would be beneficial and efficient that matters arising from different legal fields, such as contractual law, property law, family law and inheritance law would be considered by judges specialising in such matters. This would allow the legal professionals and court personnel to gain in-depth knowledge and qualifications in specific fields of law, and in addition obtain other essential and specific knowledge such as economics, management, psychology etc.

During the last few years, FICIL has observed considerable progress in the digitalisation of legal proceedings in Latvian courts that has involved the introduction of "e-cases" (*e-lietas*), new procedural regulations and continuous work to use online hearings when it is practically possible. Both the legal community and investors recognise that the started initiatives should be continued, and new technical tools and regulations could be introduced to develop dispute resolution as a simple, fast, and cost-effective resolution mechanism for small and uniform cases, and to use effective court examination in more complex cases. The latest change in format also involves improvements in quality of the court rulings and the court system.

- FICIL recommends that the Ministry of Justice ensures, continues, and assists the court digitalisation process, whilst implementing more digital solutions in all court proceedings.

It is important that the responsible authorities continue the education and training of existing and potential users of the digital dispute resolution tools to make them more accessible. Technical improvements should be continued to develop digital court files, to facilitate the use of only digital files during hearings in a user-friendly manner. Involvement of the stakeholders and potential users is recommended in the development process to better understand the needs and challenges of the individuals and businesses. Considering the successful practices of the neighbouring countries (Estonia and Lithuania) it is recommended to evaluate if their knowledge and practices can be adapted and introduced in Latvia. Broader use of digital tools for the management of court files and court hearings will promote formation of the court document databases and should improve court efficiency. In line with the increased application of digital solutions, the court might consider involving additional staff to perform preparatory work for hearings. This would allow the resolving of cases or specific parts of them by written procedure either before the hearing or removing the need for a hearing, thus only leaving the main issues for adjudication by the judge. Whilst the legal community is familiar with various alternative dispute resolution mechanisms to solve disputes without court involvement, they are not used as a practical alternative to courts. Digitalisation could be used to introduce alternative dispute resolution in practice and to motivate the interested parties to solve their disputes without involvement of the judges.

- FICIL recommends introducing stricter discipline, in line with the existing regulation, or a new regulation to prevent intentional prolongation of the court proceedings and underprepared cases whereby parties are informed properly on their procedural rights and obligations.



Current practices show that many court hearings are postponed due to discipline issues of the involved parties. The existing procedural regulation grants rights to the judges to manage proceedings in a way that all the preparatory work is performed before the hearing and no new evidence is submitted during the hearing or shortly before it, if there are no special, justified grounds. FICIL recommends considering adapting the successful practices of our neighbouring countries (Estonia and Lithuania) to make the court proceedings faster and more efficient.

Ensure good governance over state owned companies.

While significant improvements have taken place in recent years to promote best practices and international recommendations in the corporate governance of state owned companies and their role in commercial activities, further steps should be taken to achieve optimal management. State-owned companies, in addition to purely profit-making goals, are used as tools to achieve policy goals where market failure exists. Whilst the policy goals for various ministries may be different, they should be aligned and provide a consistent list of goals for the company to integrate in their business and execute in its operations, especially where state ownership is represented by more than one representative. State ownership at its essence should be represented in a consistent manner. Where there is no single representative of the state, any alignment of positions, opinions or views must be resolved prior to making decisions on the appointment of company management and voting in shareholders' meetings. Where companies have supervisory boards, their members should be selected in transparent procedures that ensure they have the necessary skills and resources to independently supervise the management and company's affairs. Supervisory boards, while acting in the interests of the shareholders, should provide guidance that is free from any signs of political impact on the management of the company.


Various state-owned companies have monopolistic and strategic positions, either managing strategic assets or holding exclusive rights. As important business partners, state-owned companies hold an essential role in further sector development and the transition to a sustainable economy. The strategic role also encompasses responsibility for the business ecosystem and involvement in further research and development. To achieve the

high expectations in fostering growth of national economy in turbulent conditions across sectors management of state-owned companies have to be strengthened and aligned with ownership goals. The proposed (soon to be implemented) letters of expectations should provide more aligned strategic developments of state-owned companies and their financing. FICIL expects that not only ambitious goals for transition of the economy and strengthening resilience of economic sectors are included in letters of expectations, but also that clear intentions of possible financing of these entities are expressed. Where companies have or are expected to be of a purely commercial nature, any subsidies or support from the government should be limited and growth should be achieved through efficient management and alternative financing, e.g., from public capital markets. Letters of expectations from the state for the existing companies should be introduced as soon as the current mid-term strategies are reaching completion and for newly established companies, they have to be issued from the onset to provide the new management with clear guidelines of ambitions and goals of the shareholders

This can only be achieved with professional and engaged supervisory councils and management boards which have clear financial and non-financial goals for the short-term and long term. Management evaluations and remuneration should be carried out using best practices that are applied in national and comparable international companies. Commercial state-owned companies should be managed in line with ownership commercial expectations, rather than public governance, and as such management accountability and rewards should focus on business growth and operational improvements. This also requires revision of an applicable legal framework for commercial state-owned companies and their clear separation from state-funded companies operating under different circumstances. FICIL recommends ensuring that management of state-owned companies is strengthened and aligned with the ownership goals. There is a need to have professional and engaged supervisory councils and management boards that have clear short to long-term financial and non-financial goals.

Protect and promote widespread fair competition in all sectors.

Recently, Saeima adopted amendments to the Competition Law which stipulate that in the future, the Competition Council of Latvia (hereinafter - CC) will be under the supervision of the Cabinet of Ministers and also there are plans to strengthen the



operational independence of the CC⁶. In line with the amendments, the Head of the CC is entitled to participate in the meetings of the State Secretaries, the meetings of the Cabinet Committee and the Cabinet of Ministers with the rights of an advisor. Considering the current developments in the various sectors of the economy in Latvia and Europe, it is expected that with additional guarantees of independence, the CC will once again become an opinion leader in matters concerning fair competition, and state aid, as a more active role for the institution is essential to ensure a level playing field among companies and the overall development of the market. Although the authority is actively involved in communicating its decision and providing general training to companies, FICIL considers that there is a need for a more active role for the CC in preparing guidelines, recommendations for companies and policymakers regarding aspects of the application of the competition law, best practice and creating a fair competitive environment. Public and objective opinion is important to ensure that the principle of competition neutrality is respected, especially by policy and decision-makers. To attain the said role and position of the opinion leader, the CC requires full respect and support from policymakers and the public sector during the decision-making process.

There is a need to ensure wider, more comprehensive cooperation between the institutions and industry. In addition, amendments to the Competition Law envisage the establishment of an advisory council for the CC for closer and more effective cooperation with partners on the issues of development and application of the competition policy, including provision of recommendations on the strategy and directions of competition supervision and work improvement. The advisory board will also provide opinions on the guidelines prepared by the CC, the case prioritisation strategy, the institution's operational priorities and the activity report. FICIL is very positive about expanded CC cooperation with the industry, at the same time taking into account the risk that there may be different interests between the members of the advisory board; it should be the CC that plays an active role in balancing opposing interests to ensure the best outcome for the public. At the same time, this new cooperation platform will be a major asset for fostering mutual cooperation, a common understanding and goal-oriented strategy.


■ **FICIL recommends assessing and improving the efficiency of control mechanisms in place for monitoring the participation of public persons in commercial activity.**

FICIL wishes to once again refocus on the need to assess the efficiency of control mechanisms for monitoring participation of public persons in commercial activity. According to the Annual Report of the CC for 2021⁷, the CC has issued 95 opinions on the participation of public persons in a capital company (Article 88 of the State Administration Law) and 131 opinions on other activities of public persons. In comparison, 42 opinions were delivered on sectoral regulatory framework proposals (in 24% of cases the opinion of the CC has been taken into account). Only in 4 cases has the CC used the negotiation procedure to prevent a breach of competition neutrality. As FICIL already pointed out in the previous position paper on fair competition⁸, consultations with the competent competition authority and associations or foundations representing the merchant are only deemed recommendatory by nature, which may not necessarily prevent unreasonable involvement of public persons in commercial activity. Considering that there has not previously been assessments of whether and to what extent the recommendations made by the CC are taken into account in the activities of public bodies and capital companies, the use of the institution's resources for those recommendations may not be commensurate with the benefits for the market. At the same time, there is a relatively low level of activity in the investigation and prevention of breaches of competition neutrality and a low level of cases where the opinion of the authority is taken into account on regulatory framework issues. This may be related to the consumption of the institution's resources for the alternative mechanism and having regard to the extended scope of control of operations by public persons and their capital companies under the Competition Law (Section 141 of the Competition Law); it is still necessary to assess the mechanism included in the State Administration Structure Law. In addition, it should not be overlooked that given that the CC has almost exclusive rights to decide on breaches of competition neutrality in the activities of public entities (compared to other violations of the Competition Law (competence of the courts)), adequate planning and resources should be devoted to this area.

6 https://www.kp.gov.lv/lv/jaunums/saeima-ar-grozijumiem-konkurences-likuma-stiprina-konkurences-padomes-neatkaribu?utm_source=https%3A%2F%2Fwww.google.com

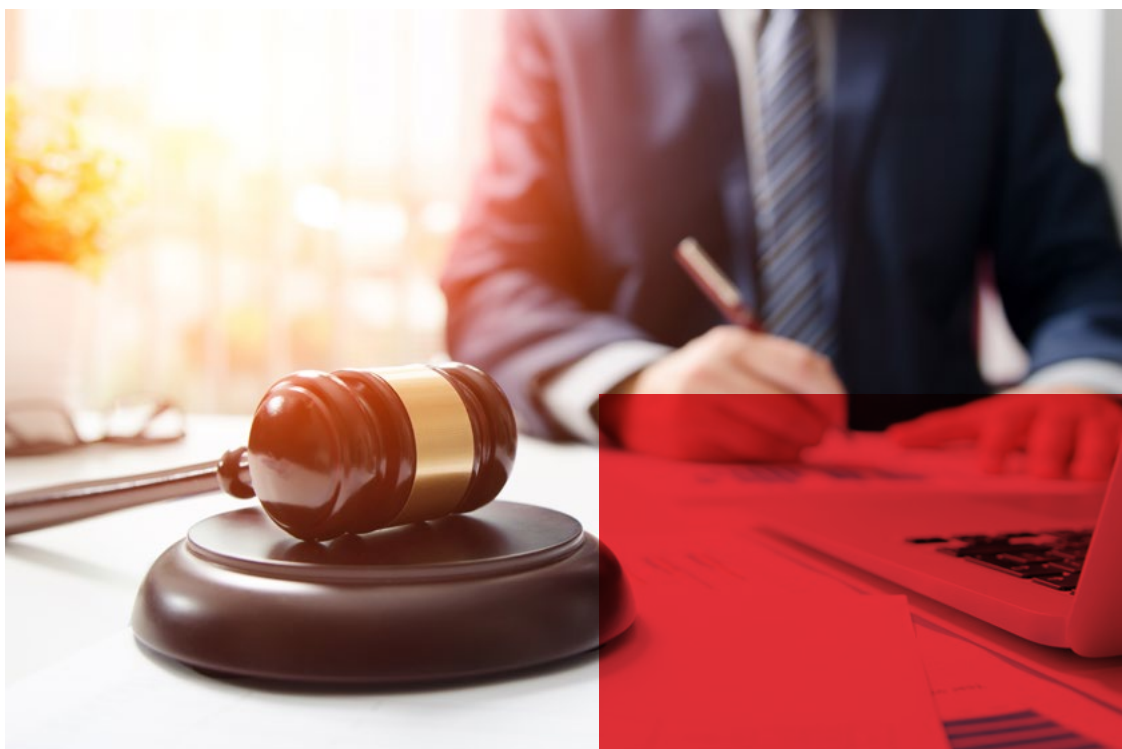
7 https://www.kp.gov.lv/lv/jaunums/konkurences-padome-publisko-parskatu-par-iestades-darbu-2021-gada?utm_source=https%3A%2F%2Fwww.google.com

8 2020 Position paper No.10 "Foreign Investors' Council in Latvia on Fair Competition and Public Procurement".



It is important to ensure fair competition as Latvia moves toward strategic energy independence. New state-owned companies in the field of renewable energy, should have an even playing field with private investors that are looking to enter the market. There is a need to find immediate solutions without distorting competition in the long run. With the current challenges of ensuring energy independence and faster transition to renewable energy, the Government has multiple initiatives across the areas to address the direct impact on increased energy prices. Current developments deal with both improving interconnectivity with neighbouring countries and increasing the direct supply of gas and generation of additional renewable energy within the territory of Latvia. Rapid improvements cannot be achieved without the public sector being active, with regulatory improvements and aligned strategies of state-owned enterprises. Expansion of commercial activities by state-owned enterprises should be aligned with level playing field conditions for private companies. While state-owned companies have the most assets and strategic positions in overall energy production and distribution cycles, their active

involvement in pursuing public goals is necessary. The means to achieve this should be chosen on a transparent and inclusive basis to ensure that no special treatment is granted without objective grounds and involvement of non-governmental institutions and other stakeholders. An increase in production (capacity and new power plants) should be organised in such a way to protect fair competition of suppliers and access to the same terms for other companies seeking expansion in their own energy production (connectivity to high voltage grids and building permits). A situation where only public sector companies are deemed capable of developing projects of overall energy independence needs should be avoided. There should be an equal opportunity for the private sector to develop such projects. All technically, financially and economically reasonable projects strengthen energy self-sufficiency and independence. Where project development cannot be pursued with own capital, cooperation with private investors and funding from financial institutions should be carried out on a transparent and equal treatment basis. At the same time, the regulatory framework for private businesses seeking the same energy





production expansion and access to markets should be improved and prioritised on the agenda of authorities. Various approval processes should be simplified and expedited to ensure predictable and goal-oriented project development. Where exemptions are applied from regular approval processes (environmental impact assessments or consent requirements) clear guidelines should be issued to balance and protect the legitimate and substantial rights of society and ownership. Coordination and information exchange among public authorities should take place to promptly address any significant obstacles to project developments and allow for legal certainty.

Upgrade and improve the public procurement system in Latvia.

The public procurement system should not become an obstacle for the rapid and wide-spread introduction of the green and circular economy principles. This refers not only to the situations where financing from different EU Funds, for example, the Recovery and Resilience Facility, or other, are to be distributed to the private sector using public procurement process, but also in general to all public funding that is to be distributed to private sector by municipalities and other public sector institutions. Availability of the EU funding in most cases will be conditional on the efficacy of results for each project. Therefore, municipalities and other public bodies will receive funding only if they can prove that certain goals are met by the performed project. This, in turn, requires a different, more dynamic, and far-reaching approach to the selection and award criteria, content and construction of

the public tender contracts. Lastly, such change requires a sound knowledge of both competition and state aid law aspects to better prepare accurate public tenders and public tender contracts so that no competition law breaches occur at the part of the public bodies, as well as that financing is not afterwards deemed unlawful or a part of an illegal state aid.

Foremost, to avoid an informal creation of two types of parallel markets, an overall approach to public tendering should be aligned between the EU funds and Latvia's budget's financed projects. This approach would help push the private market to adapt to a new level playing field that requires an equal investment of time, effort, resources, and technology. Secondly, it is of utmost importance that at the very outset of this challenging transition period all stakeholders - municipalities, other public sector bodies, Public Procurement Monitoring Office, the CC, judges and private sector are on the same page about the underlying principles and approaches - how one or another type, or groups of selection and award criteria, or public tender contract provisions, will be evaluated by the controlling public institutions and possibly the courts. Neither municipalities, nor any other public or private institution should be left to manage projects as they wish, risking recrimination at later stages that could result in a loss of public finances or an obligation to repay unlawful or illegal state aid. Therefore, it is important that the general framework for evaluating and implementing the EU's Green Deal and Taxonomy, and competition and state aid law in the public procurement is known in advance.



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