FICIL

Position Paper No. 6

FOREIGN INVESTORS' COUNCIL IN LATVIA
POSITION PAPER ON RULE OF LAW

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EXECUTIVE SUMMARY

Foreign investors make their decisions to invest in a particular country by evaluating its overall economic situation and the business development opportunities of the specific field, as well as the legal environment, which also includes the stability of the legal framework and options to protect their rights and investments. The more stable and predictable the legal environment, the more opportunities investors have to plan their investments in the long-term, which significantly motivates them to decide on large-scale, long-term investments in a particular country. Businesspeople also assess by comparing circumstances and situations in the region's neighbouring countries and, in similar conditions, choose to make investments in favour of one or the other country.

Although there are noticeable improvements towards strengthening the legal environment, entrepreneurs in Latvia are still significantly less confident[1] than the entrepreneurs on average in Lithuania, Estonia, and the European Union (EU) that their investments would be protected if necessary (legislatively and judicially). Entrepreneurs indicate frequent changes in legislation, concerns about the quality of the legislative process, unpredictable and non-transparent administrative actions, and difficulties in challenging administrative decisions before the court as the most significant reasons for such mistrust. The "FICIL Sentiment Index 2022" results also indicate a similar point of view – only 9% of the surveyed foreign investors see positive changes in the quality of legislation[2].

Work must continue to strengthen the quality of legislation and the efficiency of the courts, thereby increasing the confidence of entrepreneurs in the laws and courts as much as possible. Also, FICIL would like to remind that the rules must be kept constant for foreign investors who have made investments, while calculating them in the long-term. Regular and unpredictable changes to the legislation or rules of the game, which can have a negative impact on investments and the decisions of investors to continue (or not continue) doing business in Latvia, are not acceptable.

Legal certainty is one of the cornerstones for society and businesses to trust the state and to plan and conduct their activities in accordance with legal norms and their consistent application. It is not always necessary to simply change the law. There are many options to improve the application and practice of the existing regulation, as well as improve the qualifications and skills of public sector employees for them to apply legal norms consistently and uniformly.

FICIL wants to draw attention to several recommendations with the aim of strengthening the quality of legislation by implementing an effective "*ex post*" evaluation and integrating good legislative practices in the Parliament commissions throughout the process of adopting legislation and improving the efficiency of the courts, primarily focusing on expanding the competence of the Economic Affairs Court (EAC) and the performance of judges and judicial officers.

1 Only 39 % of the surveyed Latvian entrepreneurs are confident, while the average of EU member states shows that 54 % of entrepreneurs are confident. (Source)
2 https://www.ficil.lv/wp-content/uploads/2023/04/LV-2022-FICIL-Sentiment-Index-buklets.pdf

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- Establish prerequisites to include the "*ex post*" assessment requirement in draft laws for significant law amendments and reforms. To develop uniform criteria for putting ex post evaluations into practice.
- Improve the principles of good legislation by setting mandatory prerequisites for the admissibility of proposals in Parliament's third reading and their compliance with the Constitution of the Republic of Latvia (Satversme). To limit the submission of late proposals and require written reasoning to justify each proposal, including information about the consultations held and their objectives.
- Include preambles in new laws. Following the principle of good legislation, develop uniform criteria and terms for the content of preambles.

Strengthening the efficiency of courts

- Strengthen the competencies and performance of the EC, expanding as much as possible the areas of competence of the EC, which are related to other categories of cases that the court is already examining.
- Promote broadening the points of view of judges and improve the training/knowledge of court support staff.
- Continue introducing comprehensive court digitalisation which would strengthen the efficiency and ability of courts to handle cases.

RATIONALE FOR RECOMMENDATIONS

Improving the quality of legislation

To establish mandatory prerequisites for including a requirement for "*ex post*" assessment in the drafts of significant law amendments and important reforms, setting quality, efficiency, and cost standards for such assessments. To develop uniform criteria for implementing "*ex post*" assessment in practice, preparing the conditions, and defining at least the minimum mandatory prerequisites and methods for assessing quantitative and qualitative indicators.

A good quality legislative development process is one of the prerequisites for demonstrating excellent governance skills of state institutions. The transparence of public sectors and following principles of good governance are determining factors of sustainable investment attraction. In a constantly changing environment, the ability to effectively adapt and improve policies can become a determining factor for attracting new investments. Therefore, justified, high-quality, and effective reforms are an important aspect shaping the country's overall growth, development, and prosperity. The purpose of introducing amendments to the legislation and reforms is not only to settle the existing practical issues, but also effectively manage state resources.

When carrying out impactful reforms in the state administration or modernising processes, it is common in the draft law to outline several arguments for the need of such reform or law amendments. In such cases initial, or "*ex ante*", assessments are often prepared. Often in "*ex ante*" assessments, reference is made to process improvement, reduction of administrative costs, and other significant aspects that justify making changes.

At the same time, there is currently no unified approach to evaluating the impact, achievements, or shortcomings of the reform after its completion or introduction of regulation, in other words, "*ex post*" assessment. The lack of a unified approach increases the possibility of inefficient use of funds and creates uncertainty regarding the integration of principles of transparency.

According to the Organisation for Economic Co-operation and Development (OECD), clarifications regarding regulatory policy and good governance, "*ex post*" assessment should at least include the following criteria that would define:

- whether the objectives of the regulation are clear,
- what data will be used to measure performance, and
- information on the allocation of institutional resources.[3]

The OECD explanation also notes that it can be difficult to channel limited policy resources into revising the existing framework. Accordingly, a regulatory review should be systematically planned to ensure that the "*ex post*" assessment is carried out. Practical methods include:

- incorporation of continuity clauses or requirements for mandatory periodic assessment in the regulations,
- planned review programs, and
- permanent mechanisms through which the public could provide recommendations for amending the existing regulation.[4]

There are no benchmarks for the public to assess larger or smaller reforms and processes. By setting clear quantitative and qualitative indicators for "*ex post*" assessment, both the State Audit Office and other state institutions, as well as any individual, would have the opportunity to evaluate the indicators and quality of introduced reforms.

FICIL highlights the advantages of "*ex post*" assessment:

- **Increased confidence.** "*Ex post*" assessment at the drafting stage demonstrates a commitment to evidence-based decision-making.
- **Informed investment decisions.** Transparency and clarity in evaluating policy outcomes help foreign investors make informed investment decisions.
- **Risk mitigation.** "*Ex post*" assessment helps investors anticipate potential risks associated with policy changes.

3 Council of the OECD "Recommendation of the Council on Regulatory Policy and Governance." Section 5, p. 26., available at: https://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm

4 Ibid, p. 26.

- **Accountability and transparency.** "*Ex post*" assessment promotes a culture of accountability and transparency in management.
- **Efficient allocation of resources.** The lessons learned from "*ex post*" assessment help efficiently allocate resources for optimal public benefits.
- **Continuous improvement.** Regular "*ex post*" assessment would contribute to developing adaptive policies and improve reforms.

To introduce "*ex post*" assessment and its prerequisites in Latvia, FICIL recommends:

- continuing the discussion on the integration of "*ex post*" assessment mechanisms in the legislative process;
- highlighting the importance of accurate data collection and its analysis in development of meaningful and reliable "ex post" assessment;
- developing regulations that invite and involve both professional experts and interested parties in the "ex post" assessment process;
- introducing a long-term strategy, efficient resource planning and management, in order to achieve effective resource allocation in "*ex post*" evaluations;
- ensuring clear methodology and reliability of conclusions in the "*ex post*" assessment process.

FICIL recommends setting mandatory prerequisites to improve the promotion of compliance with good legislative principles, especially when evaluating the admissibility and compliance with the Constitution of the Republic of Latvia (Satversme) of the proposals submitted to the Parliament for the third reading.

To ensure that legal norms are adopted in accordance with the principles of good legislation and the proper legislative process, a thorough analysis of the necessity of the proposed legal norm and an assessment of its potential impact must be carried out. Often the legislative process is rushed by adopting insufficiently analysed and undeveloped proposals submitted in the second or third reading. Accordingly, well-considered decisions by the legislators are the basis for a country governed by the rule of law that ensures quality legislation.

After the submission of the draft law to the Parliament, its examination takes place, which involves discussing the draft law primarily in three readings (or in an urgent procedure - in two readings), as well as refining and supplementing the text of the draft law. During the examination of the draft law in the Parliament, the initially submitted draft law can be clarified and supplemented by submitting proposals.

Currently, the Parliament's Rules of Procedure do not provide for a requirement to attach a justification to the proposals, which in turn leads to a lack of thorough analysis of the proposed legal norm's necessity and an insufficient assessment of its potential impact. Already in 2016, the former President of Latvia, R. Vējonis brought up the issue of rushed decisions. He sent a letter to the Parliament with suggestions for improving the quality of the legislative process, stating:

1. in the third reading, prevent the submission of proposals that are outside the purpose and scope of the draft law already discussed in the previous readings;
2. consider solutions for aligning the annotation of the draft law with the version of the law as it is in the final reading, or prepare an explanatory article or explanatory report for all draft laws in the third reading;
3. set the obligation for all draft law submitters to attach an annotation to the draft laws;
4. justify the submitted proposals in writing;
5. promote the availability of law-making materials.[5]

Taking poorly-considered decisions of the legislator is contrary to the principles of good legislation, which are derived from the principle of the rule of law and are an integral part of a democratic state governed by the rule of law. Such actions by the legislator directly affect public trust in the state and the rights that it guarantees.

In the "OECD Regulatory Policy Review 2015", the OECD has compiled the views of countries themselves on the most important goals to be achieved by regulatory policy; one of them is the recommendation to reduce inconsistency, unpredictability, and lack of evaluation.[6]

Firstly, it is important to note that legal (transparent) lobbying, respecting the legislative process, is necessary in a democratic, rule-of-law state, and promotes more qualitative decision-making, thereby ensuring the activities and involvement of various societal groups in the legislative process.

5 Viļuma I. Legislation quality improvement solutions in Latvia. Jurista Vārds, 11.10.2016., No. 41 (944).
6 OECD Regulatory Policy Outlook 2015, OECD Publishing, Paris. Available at: https://www.oecd.org/publications/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm

Therefore, it is essential during the drafting of the bill to listen to the opinions of various organisations, experts in the relevant fields, scientific consultants, and other stakeholders to thoroughly assess the justification for the legal norms. Additionally, the consultations conducted should be reflected in the materials for the development of regulatory acts.

Secondly, amendments to the Parliament's Rules of Procedure should be considered, stipulating that for each proposal submitted before the second or third reading, a justification for its validity must be prepared, evaluating it in the context of the draft law's objective. Such legal mechanism would facilitate consistent and evaluation-based decision-making. Although parliamentarians are free to make decisions, the Constitutional Court has recognised that the Parliament, when exercising their legislative rights, enjoy freedom of action only to the extent that the general principles of law and other norms of the Constitution are not violated.[7] Therefore, it should be noted that the principles of good legislation also include well-considered, balanced, and thoroughly analysed decision-making through discussions.[8]

Thirdly, rushed decisions on conceptual issues by the legislator at the final stage of the legislative process do not contribute to legal certainty and compliance with good legislative principles. Moreover, non-transparent legislative processes undermine public trust in the legal system. To prevent inconsistencies in the legislative process, it is recommended to submit proposals in the third reading only for technical amendments that do not affect the essence of the draft law in any way and do not require a detailed assessment of its impact.

It can be concluded that the promotion of the principles of good legislation not only cover the obligation to carefully evaluate the necessity of the draft law, but also to prepare an evaluation of its potential impact. Therefore, it is critical to look for solutions that prevent rushed and thoughtless decisions from being made in the legislative process.

- **Submission of late draft proposals should be limited, especially in the third reading in the Parliament. FICIL recommends imposing an obligation to prepare a written argumentation for the justification of each proposal submitted before the second or third reading, including information about the consultations that took place during the preparation of the proposal and the purpose of the proposed legal provision.**

The identified problem has not been addressed for a long time; therefore, more attention should be paid to strengthening the legislative culture to achieve an ever-present sense of ethics. Introduction of good legislative processes would ensure the efficiency of all processes, improve quality, and provide the adequate involvement of stakeholders, which, in turn, would also promote public trust in the legislative process.

To promote good legislation, FICIL recommends:

- continuing to constantly and carefully observe all the directions of the Constitutional Court Law to exclude any parliamentary discussion at the level of laws, as well as to collect and implement good practice examples of the Parliament's commissions;
- continuing the discussion on limiting the submission of late proposals for draft laws and determining the obligation to prepare written arguments for the validity of each proposal submitted before the second or third reading, as well as consider the necessary amendments to the Rules of Procedure of the Parliament;
- developing criteria for preparing a written justification for a draft law proposal, setting minimum requirements, namely, the purpose and necessity of the proposal, an assessment of the potential impact, a reflection of the conclusions of the consultations conducted, legal justification, etc.
- ensuring that consultations of stakeholders take place legally and openly, reflecting all considered issues and main conclusions in the documents for the development of regulatory acts; in addition, the need for legal regulation of lobbies should be considered.
- **To include preambles in new laws, thereby promoting public trust in the legal system, as well as helping all stakeholders to understand the legislator's intent and interpret the new legal norms accordingly.**

A clear definition of the legislator's intentions is integral to good legislative principles and a democratic state that is governed by the rule of law. Considering the rapid changes in legislation, a lack of a clear formulation of the legislator's goals and a lack of legal justification can create difficulties for the legal interpreter to apply the legal norms according to the legislator's intent.

7 Constitutional Court judgment of March 6, 2019 in the case No. 2018-11-01.
8 Already in 2016 and 2017, the Constitutional Court outlined the importance of the principle of good legislation in legislation. In 2019, however, the content of the principle of good legislation was further specified, revealing several important aspects.(Source)

Although there is a legal instrument in the Latvian legal system for defining the goals of the legislator, namely, draft law annotations, which help individuals and legal practitioners understand the new regulation, draft law annotations are often prepared before the draft law is discussed in the first reading in the Parliament. As a result of discussions in the Parliament, the draft law text can be supplemented with new legal norms, and as a result its purpose can significantly differ from what was initially indicated in the "original" annotation.

At the same time, the Parliament's Rules of Procedure do not require the submitted proposals for amendments to the draft law to add a legal basis and define their purpose. A lack of a clear definition of the legislator's intentions complicates the process of applying the legal norm and thus negatively affects the observance of the principles of legal certainty and good legislation.

The "OECD Regulatory Policy Review 2015" specified criteria for evaluating the quality of regulation.[9] Including preambles in international and EU legislation is a recognised practice. The jurisprudence of the Court of Justice of the EU acknowledges that considerations contained in the preambles of legal acts can help determine the purpose or scope of a legal act and clarify how to interpret a legal provision. However, the considerations contained in the preamble are not legally binding and cannot have priority over the legal norms contained in the legal act.[10]

Therefore, the most important criteria for the quality of regulation are clearly and directly identified objectives of the laws, effective achievement of them, and simple application of legal norms. This can be promoted by including a preamble in new laws. The preamble's purpose is to enable the legislator to clearly state the legislative intent for the legislation as a whole and to state the reasons and comments on each provision of the legislation. Moreover, unlike the annotations of draft laws, preambles would be refined in each case of law amendments, formulating the legislator's intent for the legal act as a whole, rather than just for the respective law amendments in their initial (original) development stage.

- **To develop uniform criteria for evaluating the validity of legal regulation, by formulating the conditions and defining the substantive requirements for the inclusion of preambles in new laws in accordance with the principles of good legislation.**

Currently, there is a lack of legal regulation that would allow the public to ascertain the legislator's intention and its changes in the legislative process. By including preambles in new laws, public trust in the legislator and the legal system would be promoted, legal certainty would be strengthened, research costs would be reduced, and the development of legal texts would be more focused, precise, and coherent. Likewise, the work of law enforcers would be more effective by providing clear and practical guidelines for applying legal norms by the will of the legislator.

Including preambles in new laws provides several advantages - ensuring good legislative principles[11], clearly justifying the determination of goals[12], giving transparency and interpretation guidelines[13], and increasing public trust in legislation[14].

In order to implement the inclusion of preambles in new laws, FICIL recommends:

- continuing discussions on integrating preambles into new laws and to consider the need to develop an amendment to the Rules of Procedure of the Parliament. In order to continue discussions, first, the opinion regarding the inclusion of preambles in new laws of representatives of the legislator and the executive power, legal experts, scientific consultants, and other interested parties should be ascertained;
- developing basic guidelines and a legal structure for the preamble, where fundamental principles, values, objectives, and other significant aspects that are explained in the preamble would be defined;
- promote public trust in the legal system by informing the public about such an initiative.

9 OECD Regulatory Policy Outlook 2015, OECD Publishing, Paris. Available at: https://www.oecd.org/publications/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm

10 EST 20.11.1997. judgment in case C-244/95 *P. Moskof AE v Ethnikos Organismos Kapnou*. EST 26.06.2001. judgment in case C-173/99 *The Queen v Secretary of State for Trade and Industry*.

11 Including preambles in new laws would eliminate the problems associated with the shortcomings of annotations of draft laws, promoting legal certainty and coherence of the text of the law with its purpose.

12 The preamble includes the main principles and values determined by the legislator, which help the legal practitioner interpret the legal norms in connection with their purpose and the will of the legislator and ensure effective legal analysis.

13 The preamble includes the main principles and values determined by the legislator, which help the legal practitioner interpret the legal norms in connection with their purpose and the will of the legislator and ensure effective legal analysis.

14 The preamble can include arguments that explain the compliance of the law with the public interest, thereby promoting trust in the legal system.

Strengthening the efficiency of courts

The competencies and capacity of the Economic Affairs Court (EAC) should be strengthened, expanding as much as possible the areas of competencies of the EAC, which are related to other categories of cases that the court is already examining.

It is important to continue specialisation and increasing the efficiency of courts. A successful example is the activity of the EAC; thus, it is important to strengthen and increase the competence and capacity of this court. FICIL supports the initiative of the Ministry of Justice to expand the areas of competence of the EAC, which are related to the categories of cases that the EAC already examines.

The EAC is the most suitable of the Latvian courts to take on the arbitration support function, for example, to decide on claims for securing claims, requesting evidence, examining witnesses, or controlling the arbitration judgment (disputing). Foreign practice shows that the support function of arbitration courts can be delegated to a specialised court, and the EAC is the most appropriate specialised court in Latvia to perform these functions. If, at the moment, the EAC does not yet have the practical capabilities, it should be implemented in the following years, when there will be additional resources and capacity of the EAC.

To ensure unified practice and continuity, it is essential to establish an EAC appeal instance in cases where the EAC examines the case as a first instance court. A similar example that has proven and justified itself is the establishment of administrative courts and specialisation in the examination of specific categories of cases at all court levels.

In a complex commercial environment and in cross-border disputes, the development and strengthening of a specialised court for quality and rapid case examination is crucial. Understanding commercial issues, including from an international perspective, is essential.

To promote the broadening of the points of view of judges and to improve the training/ knowledge of court support staff.

The new project, the *Academy of Judges* (planned to open on January 1, 2025), is an important and positive step towards providing an opportunity for professions related to the judiciary (especially judges and court staff) to acquire new knowledge and skills and to improve existing ones according to the changing environment and needs. Until the *Academy of Judges* starts working, it is necessary to foster the knowledge and skills of court employees and judges in various branches of law and to provide opportunities to acquire and supplement other specific knowledge that is important in judicial work, such as economics, use of technology, acquisition, and improvement of digital skills, communication, and psychology, as well as in the areas of process management.

It is important to strengthen the capacity and abilities of the prosecution to thoroughly investigate cases at the pre-trial stage and prepare them for court so that the courts can make fair and law-based judgments.

The weak results of the final exams of law faculties of educational institutions in recent years need to be evaluated, as they correlate with students' knowledge and the learning process in universities (and also already in the general education institutions). Recognising the shortage of knowledgeable and experienced staff in both the prosecutor's office and judicial institutions, it is crucial to ensure a high-quality learning process at all levels of education. Additionally, resources should be invested in improving the qualifications of administrative and judicial system employees to effectively implement reforms in state administration.

Certainly, the prestige of the judge's position should also be raised so that the most capable and experienced specialists choose to continue their career as judges. An important element of motivation is remuneration - it must be commensurate with education, experience, and remuneration in the private sector. At the same time, it is necessary to evaluate the balancing of the workload for the judges so that they are able to perform their work responsibly and qualitatively. The quality improvement of the judicial system must be continued, maintaining objectivity and neutrality as essential elements.

In cases where parties to a case express objections to judges and these objections are not accepted, there is a need for a clear mechanism by which parties can exercise their procedural rights to a fair trial, already at an early stage. Institutions and officials evaluating judicial misconduct must delve into the circumstances of the case to prevent the formation of systematic patterns and subjective decisions.

Although the working language of judges is Latvian, in order to participate in working groups and follow the latest trends and developments in other countries, judges and court members need to improve their knowledge of foreign languages, especially English.

Much of the court's work is and can be done by judicial officers, often students or young and inexperienced lawyers. Promoting the involvement of experienced lawyers with valuable skills in the work of courts is desirable by arranging and improving the motivation and remuneration system.

Comprehensive digitalisation of the courts should continue to be implemented, which would strengthen the efficiency and capacity of the courts to handle cases.

The Ministry of Justice, together with other involved ministries, must ensure and support the digitalisation process of the judiciary and accelerate its move towards the full implementation of "e-case". Evaluating offers and opportunities from the private sector, as well as listening to users, is an important aspect in developing and implementing appropriate digital solutions.

The reasons for the delay and the slow progress of the "e-case" implementation, as well as the postponement of the complete transition to the implementation of processes in a digital environment until May 31, 2026, are not clear.

The use of several parallel systems ("e-case", "my court", and paper format) within one case significantly hinders and complicates the rights of the parties to receive and work with case materials. In particular, this can be observed in large-scale cases and cases with foreign participants who do not know the Latvian language.

Courts, with the involvement of court staff, must actively develop a system for introducing digital innovations and convey practical needs to technical solution developers. For example, creating uniform document names, references to paper format cases if they exist during the transition period, clarity of records in "e-case", and precision of notifications (so that the recipient can understand the nature and essence of the changes made in the case). These are some of the fundamental issues that need improvement in the "e-case" system. There are a number of opportunities that can be implemented in "e-case" so that case participants and the court can use the electronic case without the need to compare it to the paper format case.

Training should be provided to court employees to improve their digital skills and ability to work with "e-case" and make recommendations for improving the system. Work is needed to motivate court employees and judges to get involved in improving the "e-case" system.

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