FOREIGN INVESTORS COUNCIL IN LATVIA

Position Paper No 2

24 September 2015

Position Paper on Availability and Quality of Labour Force

1. Executive Summary

Latvia keeps facing shrinking labour supply (via skills loss, ageing, poor health status, low birth rates, and emigration), which in combination with fragmented and financially small territorial units will undermine country's ability to attract investment and create sustainable and well-paid jobs. We have entered a vicious circle of financially-ever-weaker regions with persistent emigration, which is also weakening currently stronger centres.

Recent survey of member organisations of the Foreign Investors' Council in Latvia (FICIL) reveals a widening gap between supply and demand of labour force – for most the shortage of needed labour force will increase within next 3 to 5 years and will have negative impact on business performance. There are also concerns regarding the quality of the labour force, including underdeveloped social competences.

To mitigate the situation, we propose to concentrate on Education reform and promotion of innovation as well as develop smart immigration policy. We have also formulated a list of proposals relating to legal framework of labour related issues (Annex I).

2. Recommendations

There are several areas that government and parliament of Latvia should address in order to stop/ slow-down these trends and help Latvian economy, society and entrepreneurs to lay a foundation for more sustainable development. We think the key areas of action should be:

1) Centralisation of economic activity;
2) Educational reform and promotion of innovation through internationalization, inter-cooperation and individualization (please refer to the position on Educational reform);
3) Extension of productive working life;
4) Smart immigration policy;
5) Improvement of labour related legal framework (Annex I).

3. Rationale for Recommendations

Recent survey of FICIL member organisations reveals a widening gap between supply and demand of skilled (and also unskilled) labour force particularly with ITC and technical engineering skillsets. More than 85% of survey participants indicate that they see the shortage of needed labour force increasing within next 3-5 years, which, according to 44% of respondents forecast, will have significant negative impact on their business performance.

The Survey also reveals that largest supply gaps will appear with Technical/ Engineering roles (33%), ITC (24%), Product development/ R&D (12%) and Client service (12%) roles. Vast

majority (67%) of respondents also stress the increasing demand for IT and engineering related technical competences as well as mounting issues with the underdeveloped social competences (communication, interpersonal relationships, cultural awareness etc.) among the younger generation entering the labour market.

These findings once again lead to the conclusion that despite the fact that educational reform in Latvia has been on public discussion and government agenda for many years, and changes have been produced, these efforts clearly have not been sufficient. Modernization and optimization of the Latvian educational system both in terms of quality and size have critical importance in both short- and long term competitiveness and sustainability of the national economy and thus social stability in our country.

Our members also indicate the need to explore changes in the current legal framework of labour related issues since in some cases the current regulatory framework undermines competitiveness of businesses and creates extensive financial and administrative burden to employers and investors (please refer to Annex I).

1) Centralisation of the economic activity – both human and financial resources, and administrative capacity must be pooled around a significantly smaller number of economic activity centres to build up critical mass, improve efficiency and sustainability of growth. Industrial policy should strive to create level ground for all major regions of Latvia, both correcting for market and government failures.

2) Educational reform and promotion of innovation – the long term growth potential of a nation's economy and society as a whole is closely correlated to the quality of its education system (the one that helps reducing the structural unemployment risks) and the degree to which the education system includes and supports innovation. We therefore encourage a resolute reform of the education system, to significantly raise the effectiveness and quality of Latvia's vocational training and higher education as well as scientific research. We invite Latvian leaders to seek the definition of a vision for the whole educational system. A vision could have important practical consequences at the time of driving the needed changes and improvements.
   Understanding the monumental enterprise ahead, we suggest creating a task force with experience in change and education, which could bring this long plan into action. The task force should include participants from the private and public sector, from local and international organizations, and from educational players from Latvia and other countries. The education system is to be optimized via smaller number of infrastructure units and improved quality where financing mechanisms foster innovation.
   While we support and appreciate the efforts of the Ministry of Education on key issues as the new funding model, salary level of teachers and consolidation of schools' network; we also encourage considering the educational reform from other perspectives: internationalization, inter-cooperation and individualization. We have elaborated our proposals in a separate position paper on Education.

3) Extension of productive working life – the retirement age must be increased. Effective access to quality health care must be ensured to reduce the costs of work absenteeism and overall relatively poor health condition as only a healthy workforce can produce sustainable improvement in productivity and living standards. We encourage the government to work on execution of health care road map as discussed during the last year's High Council meeting (Position Paper: Development of the Health Care System in Latvia 2014). Nation-wide life-long education initiatives should be supported and organisations encouraged keeping senior staff at service for longer time. Similarly the

efficient youth employment mechanisms have to be developed. Possible actions involve temporary tax breaks/reductions when hiring youngsters (i.e. first employment) and long term unemployed. Mass jobs must be created, as skill levels of those unemployed are fairly low.

4) Smart immigration policy – such policy has to be developed to enable attraction of larger scale labour intense investment, which would significantly improve the labour supply and the quality of the labour market on one hand, and on the other would facilitate sustainability of Latvia's social welfare system. We suggest to focus on three main areas that would help closing the workforce supply – demand gap in short-to-long term:

    a. Improving the quality of both professional and academic education system in combination with the establishment of effective funding model would allow bringing in better quality of students who could make significant contribution to the labour market both short-term via internship and terminated employment framework, as well as long-term via offering jobs to the best talent.
    b. Easing the legal and administrative restrictions for bringing in skilled workforce from countries outside EU and EEA would solve some burning workforce shortages and allow for growth and scaling of existing business activities in different sectors of economy (e.g. production, shared services and outsourcing, ITC, hospitality etc.).
    c. Facilitated re-emigration and skilled talent attraction programs (incl. tax benefits, scholarships, relocation support, cultural and social integration and adaptation activities etc.) for the industries and jobs with the highest growth potential would create a long term supply of skills and competences.

Herewith we would not only indicate changes that are necessary to be made but also show our commitment to engage and support Latvian government and politicians to get these reforms moving and succeeding.

ANNEX 1
Detailed proposals for availability and quality of labour force

FICIL Labour Issues Group work group proposes the following conclusions and proposals regarding necessary improvements in the Labour Law (LL) and laws regulating access to the Latvian labour market for foreigners outside EU and EEA.

Outline:

1. SMART MIGRATION
1.1. Attraction of foreigners with higher education
1.2. Removal of formalities related to registration of minor changes
1.3. Health insurance of foreigners
1.4. Efficiency of processes
1.5. Prevention of potentially discriminating requirements

2. LEGAL FRAMEWORK ON LABOUR RELATED ISSUES
2.1. Recovery of employer's training expenses
2.2. Issues related to working time and rest time:
2.2.1. Reduction of extra payment for overtime work
2.2.2. Transitional period in respect to compensation of leave

2.2.3. Limiting the compensation for paid annual leave to the time period for which respective annual paid leave has not expired
2.2.4. Transfer of supplementary leave
2.3. Trade union representation
2.3.1. Termination of an employment contract of an employee - member of a trade union
2.3.2. Failure to provide true information on trade union membership
2.3.3. Unjustified denial of consent by the trade union
2.3.4. Duty to consult with the trade union

2.4. Limitations and restrictions related to Employment
2.4.1. Retention of confidentiality obligations after termination of employment contract
2.4.2. Extending restrictions on the employee's performance of supplementary work
2.4.3. Extension of the maximum time period for suspension of an employee from work
2.5. Non-typical employment forms
2.5.1. Temporary employment agencies
2.5.1.1. Fixed-term employment contracts
2.5.1.2. Minimum wage requirement between assignments
2.5.2. Posting of employees

Having assessed the present CPA provisions and the practice of their application in Latvia, FICIL has arrived at the conclusion that the following changes are necessary:

1. SMART MIGRATION

Immigration matters are closely related to political events and decisions and, therefore, at the moment there is a lack of legitimate expectations in respect of the government's long-term immigration policy, because it should always be kept in mind that the legal framework on any specific matter could be unexpectedly changed. The planners of the government's immigration policy should think about long-term solutions, which would not be subject to rapid changes.

The practice shows that it is very complicated to hire and employ foreigners residing outside of the European Union, because the bureaucratic burden relating to solution of employment matters lies right on the employers.

The majority of the other European Union countries certainly try to protect the internal labour market, nevertheless, there are countries that have a much more liberal system for foreign nationals' accessing the labour market than Latvia and their experience can to some degree be successfully used and introduced also in Latvia.

1.1. Attraction of foreigners with higher education

When thinking about development of the Latvian labour market and external competitiveness, in the best interests of Latvia to attract qualified labour force with higher education from abroad, including outside of the European Union. Higher education is a guarantee that such labour force can do the work with higher added value, contributing significantly to the economic development of Latvia compared to low-skilled labour.

Pursuant to Section 16.3 of the Cabinet of Ministers Regulation No. 564 "Regulations regarding Residence Permits", an employer, when executing invitation for a foreigner who will be employed in unregulated profession in the Republic of Latvia, shall submit to the Office of Citizenship and Migration Affairs (hereafter, OCMA) a copy of the legalised education document or document confirming 3-year experience in the profession in which the employer plans to employ the foreigner.

It can be concluded from the above provision that it is practically impossible to employ the employee who has obtained higher education in a field not directly related to the work performed in a specific position if he does not have at least three years of work experience in the respective profession.

To ensure that educated foreigners could enter the labour market, it is advisable to amend this requirement of the Residence Permit Regulations, stating that completed higher education in any country constitutes sufficient basis for employment of a foreigner in Latvia, without directly linking this education to the profession in which the foreigner will be employed in Latvia. Work experience in the specific field could be retained as an alternative criterion.

Introduction of the procedure described above would provide the Latvian employers with wider possibilities to choose the most suitable employees with higher education without imposing so strict restrictions on selection of personnel where the education is mandatorily tied to the potential job position.

Furthermore, this procedure would not result in any threats to the social security system in Latvia. In case it would turn out that the employee is unable to perform his job duties, the employer will be able to dismiss the employee by terminating the employment contract which, in turn, would serve as a basis for losing the employee's residence permit.

Other European Economic Zone countries have adopted the described approach and it has achieved impressive success regarding it.

For example, in Belgium, there many long-term corporate work permits that are received via the "fast-track" procedure (they are exempt from the resident labour test). Specific categories of employees, such as highly skilled and executive-level personnel earning a salary exceeding certain thresholds (39,802 EUR gross and 66,406 EUR gross respectively in 2015) are eligible to apply for these procedures. To be considered highly skilled, an employee must have at least a bachelor's degree.

Similarly in Austria despite rigorous labour market protection there are categories of employees that have simplified access to the labour market. Among those categories are also the university graduates. Via a specific simplified procedure they are authorized to take up residence and to be employed by one specific employer for a period of 12 months. No direct link between the education and the prospective job position is required.

1.2. Removal of formalities related to registration of minor changes

Pursuant to Section 11 of the Cabinet of Ministers Regulation No. 55 "Regulations regarding the Employment of Foreigners", it is permitted to employ a foreigner only in a profession or position in respect whereof he or she has been granted a right to employment. In the event that the conditions, which served as a basis for granting the aforementioned right change (for instance, employer, profession, position, working hours, workplace would change), the foreigner has a duty to obtain new right to employment under the procedure set out in this Regulation. In the respective case, in accordance with Section 18 of the Residence Permit Regulation, a new invitation shall be executed for the foreigner as well.

This procedure is burdensome for the employer, moreover, there are often situations where the changes in the occupation are minimal, for instance, from the expert to senior expert; however, technically also in the described case it is necessary to undergo the whole procedure for obtaining the right to employment. This legal framework cannot be considered as attracting foreign investments and favourable to development of working environment.

1.3. Health insurance of foreigners

From the perspective of employees – foreigners and social security system of Latvia, a requirement for the employers to provide the foreigner with health insurance for all the risks normally covered for nationals of Latvia for the entire period of stay in Latvia should be considered, not just insurance for the costs of employers related to repatriation of these employees (this provision should be applicable also to the family members of these employees). At the same time, these insurance costs should not be subject to personal income tax, and hence would be lucrative for the employers. It would ensure that the health of these employees is protected and it is not a burden for the healthcare system of Latvia.

1.4. Efficiency of processes

- Mutual relationship and information exchange between OCMA and the State Revenue Service (hereafter, the SRS): in practice, there are cases where OCMA gets paid for accelerated review of documents when persons apply for repeated issue of residence permit. In its turn, OCMA does not review the documents under the accelerated procedure while it has not received the confirmation from the SRS that the employer has paid all taxes during the period of validity of the previous residence permit. To make the information exchange process more efficient, OCMA should be provided with access to the tax database to the extent that would be necessary to obtain confirmation regarding payment of taxes.

- The procedure for granting residence permits and rights to employment should be considerably faster, because at the moment this process on the average takes 2 months (including notification to the State Employment Agency regarding vacancy).

- When applying for the residence permit, the employees have to submit the documents for obtaining the residence permit and right to employment to the Latvian Embassy in the country of his citizenship. There are cases where there is no Latvian Embassy or consular office in that country and then this employee has to go to the embassy or consular office in the neighbouring country, even though the employee himself is already in Latvia. For instance, the foreigner studies in Latvia and resides in Latvia on the basis of a student visa and concurrently with the studies, in compliance with the statutory requirements, works part-time (up to 20 hours a week). Such an arrangement is unjustified, and the funds of the employee are spent inefficiently. The employees should be able to settle all these matters here in Latvia.

- In respect to translation of documents, it should be noted that there are languages the translations from which cannot be certified by the Latvian notaries in Latvia, but the documents should be translated in the country where they were issued, for instance, diplomas issued by the educational establishments of China. This provision is incommensurable taking into consideration that the document is already in Latvia and has been duly legalised.

- It would be advisable for OCMA to electronically notify in case it would find any deficiencies in the documents in the process of their review. It would accelerate the process itself, because it would allow the employer to respond to the deficiencies in the documents faster and eliminate them

1.5. Prevention of potentially discriminating requirements

In accordance with Section 87 of the Cabinet of Ministers Regulation No. 564 "Regulations regarding Residence Permits", in the event that the foreigner's stay in the Republic of Latvia us related to employment or business activity, or the foreigner is a self-employed person, payments of personal income tax and state social security contributions in respect of the foreigner shall be made from the income specified by the foreigner when submitting the documents to apply for residence permit.

It is essential that according to the practice of OCMA, this legal provision does not differentiate the total amount of income of the foreigners and is equally applicable to the foreigners who receive minimum permitted salary and those who receive several times more.

Even though the purpose of this provision is substantiated in its terms – to prevent situations where the foreigner is hired or launches business activity himself, but soon quits while still continuing to reside in Latvia, in certain cases this requirement can lead to unreasonable discrimination of foreigners.

For instance, due to this requirement the foreigners are denied the possibility to receive the leave without retaining the salary provided for in Article 153 of the LL. During the unpaid leave, not personal income tax and no social security contributions will be paid in respect of the foreigner, as a result whereof the requirement of Regulation No. 564 of the Cabinet of Ministers that they must be paid from the income specified in the documents for receipt of residence permit will not be met.

To prevent this unjustified inequality among the citizens of Latvia and EU and residents of third countries, FICIL proposes to amend Section 87 of the Cabinet of Ministers Regulation No. 564 providing that the OCMA has a duty to verify whether during the year the personal income tax payments and social security contributions for the foreigner have been made in the amount which is not less than the minimum payments which must be made for the foreigner within a year. Such provision would prevent the possibility to exercise the rights in bad faith, at the same time eliminating discrimination of foreigners

2. LEGAL FRAMEWORK ON LABOUR RELATED ISSUES

2.1. Recovery of employer's training expenses

FICIL proposes amending Article 96, paragraph 2 of the LL that distinguishes between training expenses that shall be fully covered by the employer and those that might be subject to an agreement entered into by and between the employer and employee, and thus under certain conditions be recoverable by the employer. Currently the LL among other establishes that an agreement on recovery of the training expenses can be concluded where the respective training or qualification raising does not have significant effect on performance of work, and the respective training expenses under no circumstance can be recovered by the employer where employment legal relationship is terminated by employer's notice (e.g., even in case of breach of the contract by the employee).

Although the aim of this Article 96 of the LL is rational, it is subject to broad interpretation. Instead, the LL shall strictly define which training categories shall be strictly covered by the employer and which are related to employee's personal benefit and therefore might be subject to parties' agreement. We support the approach adopted by several other EU countries (including - the draft Labour Code of Lithuania as of 4 August 2015) where recovery of such training expenses is not permissible only if those expenses relate to training of minimum requirements necessary for performance of the respective activity.

Therefore FICIL proposes the following wording of Article 96, Paragraph Two of the LL:

"*The employer and the employee may conclude an agreement for the reimbursement of the related expenses for occupational training or raising qualification, except where the same concerns development of minimum level of skills or knowledge strictly indispensable for performance of the employment duties.*"

FICIL proposes amending Article 96, paragraph 3 of the LL that regulates the settlement of employees' training expenses, allowing the employers to benefit from the "agreement clause".

The employer shall be entitled to request compensation for the paid trainings of the employee, where training agreement exist, in the following cases: (i) if the employee terminates the employment contract on his/her initiative before the expiry of the training agreement[1], and (ii) if the employer issues a termination notice to the employee due to his/her unacceptable behaviour. Currently the LL provides an opportunity of recover only if the employment contract is terminated on the initiative of the employee.

Therefore FICIL proposes the following wording of Article 96, paragraph 3 of the LL:

"*Employer is entitled to request an employee to compensate the expenses of the employer for the occupational training or raising qualifications, which has been executed pursuant to the agreement mentioned in Paragraph Two of this Article, if the employee terminates the employment contract before the expiry of the agreement, except cases of Article 100,*

[1] Except employee's initiated termination of employment contract due to important reason (termination of employment contract pursuant to Article 100, Paragraph 5 of the LL).

Paragraph Five, or if the employer terminates the employment contract before the expiry of the agreement pursuant to Article 101 Paragraph 1, Clauses 1 , 2, 3, 4 and 5 of this Law."

We note that the proposed amendment corresponds to the practice of other EU countries. In particular, opportunity to recover in case of termination notice issued by employer due to serious breach of employment terms/due to fault of the employee exists in the neighbour countries Lithuania (in the existing Labour Code and draft Labour Code as of 4 August, 2015), and Estonia. We have identified that the recovery as described in the proposal is also available in Luxembourg, Belgium, Romania, Poland, Slovakia and Germany. In order to attract investments, which require modern labour environment, in particular, when comparing with the nearest countries, it is necessary to include the proposed terms in the LL.

2.2. Issues related to working time

2.2.1. Reduction of extra payment for overtime work

FICIL proposes amending Section 68 of the LL by reducing the amount of the extra payment for overtime work.

FICIL recommends initiating a dialogue with social partners on reduction of statutory minimum extra payment for overtime work. Currently, pursuant to Section 68(1) of the LL, this extra payment shall not be less than 100 per cent of the time wage or lump-sum payment rates set for the employee.

To facilitate improvement of competitiveness of employers and development of business environment, it is advisable to reduce the extra payment for overtime work to 50% of the employee's salary. This way the Latvian legal framework would be analogous to the Estonian legal framework on payment for overtime work which has proven itself to be economically substantiated and efficient instrument balancing the interests of the employer and employee.

At the same time, FICIL would like to note that in order to facilitate social protection of employees the government should pay special attention to ensuring that the employers would carry out registration of the overtime work performed by the employees in good faith and in accordance with statutory requirements. This could be achieved, for instance, by organising informative campaigns for the employees on their rights to receive extra payment for all overtime work, as well as encouraging the employees to report all cases where overtime work is not registered to the State Labour Inspectorate.

It would also boost competitiveness among the employers, because all employers would be in the same position. At the moment the employers who do not keep proper records of overtime work are taking unfair advantage over the competitors who duly comply with the statutory requirements.

FICIL considers that at this point the amount of extra payment for the overtime is considerably more relevant than the extra payment for work on public holidays. Therefore the extra payment for the work on holidays could remain the same – 100 per cent of the employees' wage.

2.2.2. Reduction of extra payment for overtime work

To facilitate improvement of competitiveness of employers and development of business environment, the extra payment for overtime work should be reduced to 50% of the employee's salary. This way the Latvian legal framework would be analogous to the Estonian legal framework on payment for overtime work which

has proven itself to be economically substantiated and efficient instrument balancing the interests of the employer and employee.

2.2.3. Transitional period in respect to compensation of leave

Amendments to the LL which took effect as of 1 January 2015 supplemented Article 149(5) of the LL with a provision stating that the employer has a duty to pay compensation for the entire period for which the employee has not used the annual paid leave.

Before these amendments to the law, a conclusion drawn in the judgment dated 10 November 2010 of the Senate of the Supreme Court in Case No. SKC-667 predominated in employment-related matters, which ruled that when the right to the actual use of leave is lost, the right to compensation for it is lost as well.

The new legal framework applies not only to the period of time after 01.01.2015, but also to the period before the effective date of the amendments. Therefore, if, for instance, the employee has not used the annual paid leave since 2005, but the employment relationship with him is terminated in 2015, the employer will have to pay compensation for the entire period since 2005.

If the employment relationship would be terminated on 31 December 2014, the compensation, based on conclusion drawn from the case law, would have to be paid only for the last year and a half.

Considering the above, the latest amendments to the LL have imposed significant additional duties on the employers compared to the previous legal framework.

For the sake of ensuring legal certainty and balancing the interests of employees and employers, *supplements to the transitional provisions of the LL could be considered, stating that these amendments to Article 149(5) of the LL apply to the period after 1 January 2015.*

2.2.4. Limiting the compensation for paid annual leave to the time period for which respective annual paid leave has not expired

The Amendments to the LL, which came into effect on 1 January 2015, introduced amendments to Article 149, paragraph 5 of the LL, providing for, among other, that an employer shall pay compensation to an employee for the entire period, for which the employee has not used his or her annual paid leave (i.e. irrespective of whether the right to annual paid leave has or has not expired). Thus in practice there are occasions where employees are not motivated to take the annual paid leave, rather opting for the so-called 13th salary at the end of their employment relationship with the given employee. The situation described above is not compatible with the aims and objectives of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, and respective case law of the Court of Justice of the European Union.

For the purposes of ensuring conformity of Section 149, paragraph 5 of the LL with Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, as well as promoting the use of the annual paid leave in kind (instead of receiving compensation for it), we propose to amend Article 149, paragraph 5 of the LL, excluding the last sentence therein and providing that an employer shall pay compensation to an employee for the entire period, for which the employee has the right to the annual paid leave *in kind*

2.2.5. Transfer of supplementary leave

Article 149 of the LL regulates compensation of annual paid leave in cash and transfer thereof to the next year; however, it does not regulate matters concerning supplementary leave. In practice the lack of regulation on supplementary leave has raised a number of concerns. It would therefore be necessary to identify and establish by law the steps that can be taken in respect to supplementary leave, adjusting them to the legal framework on annual paid leave.

Therefore FICIL proposes to supplement Article 151 of the LL, with paragraph 4 in the following wording:

"*(4) In relation to granting and transfer of the statutory supplementary leave, provisions of Article 149, para 3 and 5 shall apply.*"

2.3. Trade union representation

2.3.1. Termination of an employment contract of an employee - member of a trade union

Under Article 110 of the LL, an employer is prohibited from giving a notice of termination of an employment contract to an employee — member of a trade union — without prior consent of the relevant trade union. Exceptions apply in the following cases: (i) termination during the probation period, (ii) termination due to the employee being under the influence of alcohol, (iii) termination due to reinstatement of the previous employee or (iv) liquidation of the employer.

In practice FICIL members often face situations, where trade unions exercise these rights in bad faith, without a justified reason refusing consent to giving a termination notice even in cases of breach of employment contract, redundancies etc. Moreover, trade unions sometimes use these rights to "blackmail" the employer, trying to achieve an increase of severance pay to employees even in cases, when termination is based on grounds related to gross breach of employment contract, extended absence from work etc.

In case a trade union refuses its consent the only option for an employer provided by the LL in this situation is to apply to the court, pursuing a claim regarding the termination of the specific employment contract. As any litigation, this entails significant amount of additional expense and time of the employer and the duty to pay salary to the employee during entire period of legal proceedings before the court.

In this regard, we propose the following:

1) to restrict additional legal protection provided for under Article 110 of the LL only in relation to the elective representatives of a trade union, who represent the interests of employees in relations with the employer;

2) to exclude Article 101, Paragraph one, Clause 11 of the LL, when the employer's note of termination is given due to the long-term incapacity of an employee (since in such a case, the only condition for issuing a notice of termination is the particular period of employee's incapacity) from the list of cases provided for in Article 110 of the LL, when the prior consent of a trade union is required;

3) to impose a duty on trade unions to provide a motivated refusal, subject to legal review, in cases when an employee trade union does not agree to the employer's notice of termination;

4) to provide for liability of a trade union (for instance, recovery of employer's losses) in the cases when employment legal relationships are terminated as a result of legal proceedings, thus, by the court judgement, it is actually established that the refusal of a trade union was unjustified.

2.3.2. Failure to provide true information on trade union membership

Pursuant to Article 101(6), prior to giving notice of termination of employment contract, the employer has a duty to check if the employee is a member of a trade union.

Even though the law provides for the duty of employer to check if the employee is a member of the trade union prior to giving notice of termination of the employment contract, the employer is not protected against situations where the employees act in bad faith.

Based on conclusions stemming from the case law, if the employee has provide negative response in respect to the trade union membership, Article 110 of the LL will not be violated even if the employee actually is the member of the trade union, but the employee can prove the fact that the employee provided false information.

The situation becomes a lot complicated if the employee has provided false information on the membership with any trade union while in fact he is not a member of the trade union or has refused to provide such information.

Pursuant to the comments on the LL, the employer can obtain information on the employee's membership with any trade union not only from the employee, but also from the trade union. However, obtaining information from the trade unions cannot be considered as proper alternative to obtaining the information from the employee.

In Latvia, there are several dozen trade unions. Contacting them all with a question if the specific employee is their member would be unreasonably complicated and time-consuming process. While waiting for the response from the trade union, there would be a considerable risk that the employer may miss the term for giving notice of termination of the employment contract. Likewise, there is also a risk that the trade unions may refuse to provide information on their members.

To balance the rights of employers and employees, it should be specifically stated in the LL that in case if the employee refuses to provide information on his or her membership with the trade union or provides false information that he or she is not a member of the trade union, the employer shall be deemed to have complied with the requirements of Article 110 of the LL and the employee's trade union membership is not a basis for declaring the notice of termination null and void.

In the event that the employee has provided false information on the trade union membership, the law should expressly stipulate that the period within which the employer shall give the notice of termination of the employment contract, for instance, in case of gross violation of the employment contract by the employee, shall be extended for the period of time spent by the employer to obtain consent of the trade union.

2.3.3. Unjustified denial of consent by the trade union

Article 110(2) of the LL imposes an obligation on the trade unions to inform the employer regarding their decision not later than within seven business days as of receipt of the employer's request.

When responding to the employer's request, the trade union does not have an obligation to provide reasoning for its decision. The trader union can simply say no to the employer's notice of termination without explaining what were the considerations behind the adoption of the specific decision.

This leads to a situation where the trade union can exercise the rights vested upon it in bad faith by prohibiting to dismiss the employee also in those cases when the notice of termination of the employment agreement is totally substantiated, The trade union could be encouraged to act this way in order to attract more and more new members, using the "inability" of the employer to dismiss the members of the trade union as an advertisement.

The above, in turn, leads to situations faced in practice where the employees who suspect the potential dismissal (for instance, for gross violations at work), join the trade union with the sole purpose to avoid the expected dismissal. This cannot be considered as adequate protection of person's interests, rather the gaps in the legal framework being used in bad faith.

Considering the above, the law should state that, when refusing to give consent to dismissal of the employee, the trade union should provide substantiated response.

Furthermore, the law shall provide for a mechanism how to punish the trade unions in case the powers are exercised in bad faith. For instance, compensation of litigation costs to the employer if the employer's claim regarding invalidity of the notice of termination is satisfied by the court (this would also protect the employee from considerable additional expenses). In case significant violations by the trade union would be determined on a regular basis, liquidation of the trade union could be considered.

2.3.4. Duty to consult with the trade union

Pursuant to Article 10(1) of the LL, the employee representatives can be either individual elected representatives or trade unions.

Consequently, at the moment there is a situation that even if just one employee of a company is a member of the trade union, the employer needs to consult with the trade union, for instance, when preparing the internal working policies.

In the event that a small proportion of the company's employees are members of the trade union, such consulting process can be considered as unreasonably restrictive in respect of the employer.

Given the above, it is advisable to state in the law the minimum threshold for the trade union membership of the employees against the total number of employees, from which the employer would incur the obligation to consult with the trade union. This threshold, of course, may not be unreasonably high in order to not disproportionately limit the rights of the employees to the representation and consulting.

2.4. Limitations and restrictions related to Employment

2.4.1. Retention of confidentiality obligations after termination of employment contract

For the purposes of protecting the assets, trade secrets and other confidential information belonging to the undertakers the LL should explicitly provide for an obligation of the employee that information containing a commercial secret of the employer shall be preserved for employees also after the termination of their employment legal relationships

FICIL proposes amending Section 83, Paragraph 1 of the LL by providing that the obligation of the employee to ensure that the information containing a commercial secret of the employer shall be preserved for employees also after the termination of their employment legal relationships in Section 83 of the LL (similarly as it has already been regulated, for instance, in Section 11, Paragraph 5 of the LL).

Currently, Section 83, Paragraph 1 of the LL provides for that an employee has a duty not to disclose any information brought to his or her knowledge, which is a commercial secret of the employer. The employer has a duty to indicate in writing what information is to be regarded as a commercial secret.

In practice, employers tend to listen to instructions of law enforcement authorities (particularly, State Labour Inspectorate) in relation to that this duty not to disclose information containing a commercial secret may be imposed on and be binding to employees only within the period of the employment legal relationships. Upon the expiry of an employment contract, an employee is released from information confidentiality obligations.

2.4.2. Extension of the maximum time period for suspension of an employee from work

In order to prevent circumvention of the regulation of the LL and unjustified impairment of the employer's legitimate interests the restrictions on the employee's performance of supplementary work should be extended also to entering into other civil contracts or activities in the interests of another, competitive business company, insofar it is justified by the substantiated and protected interests of the employer.

FICIL proposes amending Section 91 of the LL providing that the restrictions on the employee's performance of supplementary work extend also to entering into other civil contracts or activities in the interests of another, competitive business company, insofar it is justified by the substantiated and protected interests of the employer referring restrictions on the performance of supplementary work within the framework of employment legal relationships also to entering into other civil contracts or activities in the interests of another, competitive business company.

Currently, Section 91 of the LL provides for the employer's right to restrict the performance of supplementary work by an employee, implying only entering into employment contracts with several employers.

However, in practice, there tend to be situations, when the legitimate interests of an employer are restricted as employees enter into other types of agreement, such as a services' agreement, a contract of authorisation or other civil contracts, or establishes or represents competitive business company.

2.4.3. Extension of the maximum time period for suspension of an employee from work

For the purposes of protecting legitimate interests of the employers and balancing the rights of employers and employees the suspension period of an employee from work should be extended for cases, when legal proceedings regarding the termination of employment are in progress in relation to specific violations committed by the employee, as an exception from the three-months' maximum period of suspension from work.

FICIL proposes supplementing Section 58, paragraph 3 of the LL, providing for cases, when legal proceedings regarding the termination of employment based on Section 101, Clause 1-5 and Section 101, Paragraph 5 of the LL are in progress, as an exception from the three-months' maximum period of suspension from work, thus incorporating the conclusions already set out the case law of the Supreme Court.

Section 58, paragraph five of the LL provides for a prohibition to suspend an employee for more than three months, except in the cases when it is accordingly requested by an authorised state institution.

In practice, there are situations when an employer cannot issue termination notice with immediate effect to an employee — member of a trade union, who, in performing his or her work, has acted illegally and, thus, has lost employer's trust, due to the refusal of a trade union to give its consent to such a notice of termination. Hence, employment legal relationships still continue during the entire period of legal proceedings.

However, taking into account that an employer has a justified interest in not admitting an employee, who has lost employer's trust due to illegal actions, to fulfilling his or her employment duties, the employer shall be entitled to suspend the employee from work. Unfortunately, the Law allows for such suspension from work for no more than three months.

For the purposes of balancing the interests of an employer and an employee, to consider the need to provide for an employer's duty to pay the employee the minimum salary for the period of suspension from work, which exceeds three months, in these cases

2.5. Non-typical employment forms

2.5.1. Regulation of the temporary employment agencies

The demand for services provided by temporary employment agencies (TEA) has been increasing all over Europe for a number of years. The growing demand for short-term and fixed-term employment, as well as for flexibility in employment relationships have been the driving factors for this trend. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work aims at establishing a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working. The Directive also encourages member states to cope in a flexible way with the diversity of labour markets and industrial relations.

2.5.1.1. Fixed-term employment contracts (Paragraph 1 of Section 44)

The current legal framework in Latvia does not permit TEAs to enter into fixed-term employment contracts. This forces them to reject applications from workers looking for a short-term and seasonal work, which does not at all help to cope with the diversity of labour market in a flexible way.

There is a necessity to make amendments to Paragraph 1 of Section 44 of the LL including a new subclause, which provides that employment contracts for a specific period of time, i.e. fixed-term employment contracts, can be entered into with temporary employment agencies.

In principal TEAs offer temporary employment usually for just a couple of months or for another specific period such as for summer season in case of students. It can also be a longer period like in cases when companies hire specialists for the duration of a specific project or shorter period like a specific holiday season (Christmas, Easter) when extra workers are required. The Labour Law, however, does not currently permit TEAs to enter into fixed-term employment contracts. This can force agencies to fire employees at the end of the probation period or more often – to reject applications from workers looking for a short-term and seasonal work. The means of firing the employees (the termination of employment contracts or reduction of number of employees' procedure) are due to business reasons and would be solved by the proposed amendment.

Even the State Labour Inspectorate recognizes the problem and acknowledges that the current edition of Labour Law does not permit entering into a fixed-term employment contract, even though it is in fact a fixed-term employment, which is being carried out.

The proposed amendment would give job opportunities for students and persons already permanently employed since the current framework limits such possibilities. Internal development, overall expansion of business and creation of new products and services requires access to professionals with diverse experiences and such access is occasionally required only for the duration of company's need. The need to increase capacity to meet a temporary demand also requires access to professionals whose availability matches the demand cycle. The inability to adapt in order to meet market demand and opportunity causes companies to turn to services in other countries where this flexibility exists. Hence, the proposed amendment would also significantly improve the flexibility of businesses and the overall competition in the market.

Taking into account the experience of other countries with similar provisions as the proposed amendment, the amendment is not going to have a negative impact on the State's budget. Lithuanian Labour law, for example, clearly provides TEAs the right to enter into fixed-term employment contracts. Other examples include countries, which have forbidden entering into permanent employment agreements for temporary employment or have set a maximum duration period for such agreements. These limitations are set in order to avoid "permanent" temporary employees and are completely opposite of current Latvian legislation, which is unique in this sense between euro zone countries. Latvian approach seems to be entirely in contradiction of the underlying idea of TEAs.

FICIL's Labour Law working group has arrived at conclusions and proposals regarding necessary changes in the Labour Law regarding TEAs, thus also achieving improvement in the business environment in Latvia. The new subclause (e.g. No.9) to Paragraph 1 of Section 44 of the LL should be read as follows:

44. (1): "An employment contract may be entered into for a specified period in order to perform specified short-term work, such as:

9) entering into a labour contract with the temporary employment agency."

(LAT: 44. (1): "Darba līgumu uz noteiktu laiku var noslēgt, lai veiktu noteiktu īslaicīgu darbu, ar to saprotot:

9) darba līguma noslēgšanu ar pagaidu darba aģentūru.")

2.5.1.2. Minimum wage requirement between assignments (paragraph 7 of Section 74)

Article 74 Section 7 of the Labour Law currently provides that TEAs must provide employees with minimum wage in-between the time periods when employees are being posted regardless of the agreed working hours. This provision causes unfair conditions for temporary employment agencies and unequal conditions for employees. Furthermore, the provision excludes from temporary employment groups persons, who are most likely to benefit from temporary employment – persons who are not willing or not able to work full-time – exactly where temporary work is needed as it is not substitute for permanent employment directly at the client company.

There is strict necessity to exclude the Subparagraph 7 of Section 74 from the LL or alter it significantly in order to fix the situation where the same minimum wage requirement applies to all workers independent of their legal situation (even if an employee works part time, he or she receives payment for periods when he is working at another job. A situation like this is unfair against a person who is only employed in one TEA).

FICIL believes that these proposals can help establish a suitable framework for the use of temporary agency work and to ultimately contribute to the creation of jobs and to the development of flexible forms of working.

Article 5.2 of the Directive 2008/104/EC provides that Member States may provide that an exemption may be made to the principle where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments. Namely, the Article 5.2 of the Directive defines pay between assignments only as a condition, which allows derogation from equal pay (it means that provisions of payment between assignments and permanent contract are the conditions that allow to pay less for workers than the client would pay). For example, if a worker is with better conditions than client workers, the former can receive less. But it is not stated anywhere in directive that pay between assignments should be implement if there is no derogation from equal pay.

The aforementioned section of Labour Law is disproportionate. In one instance, it already caused an undertaking to go bankrupt and fire almost 200 employees after it was fined with more than 100'000 lats (approx. EUR 142'000) in a dispute against the State Revenue Service regarding the interpretation of this provision.

The proposed amendment is either to eliminate the provision as such or to amend it so TEAs would be required to provide wage between assignments only if the employees are working full time, i.e. the regular working time. The proposed amendment would have a positive impact on the competition in the market, since

it would take off the burden of excess expenses for TEAs, which could be targeted at new job searching. There is no direct negative impact on the State budget.

In addition, in practice there are different interpretations of what is time in-between assignments as the Labour Law does not define what is a TEA's assignment. For example, an employee is being employed for 2 months for a particular client and he does actual work every second week or according to a different schedule. In practice, officials in the State Revenue Service and the State Labour Inspectorate consider that an assignment is not the 2 month period, where the employee works for the particular client according to client's work schedule, but every week or day, where the employee works for the client. Consequently, if the employee works every second week as agreed in the work schedule, state institutions incorrectly consider that time in-between assignments is the week when the employee does not work, including employee's rest period in the sense on section 141 of the Labour Law. In order to resolve this problem, FICIL proposes to supplement paragraph 7 of section 74 of the Labour Law with a more precise definition of the time between assignments. Namely, it would provide that time between assignments does not include the rest period, which is established in the work schedule arranged between the client of temporary employment agency and the employee.

Section 74 Subparagraph 7 should be eliminated. That would address situations where a TEA has to pay a full-time wage to part-time employees. For example, Person A has entered into a labour contract with TEA for part-time (20 hours a week) job. According to the current legislation, the time period in-between assignments for Person A, who has worked 10 hours in a week (out of 20 as per labour contract), will be considered to be 30 hours instead of 10h, which seems to be the logical answer. This irrationality exists because Article 74 of the Labour Law currently provides for pay regardless of the agreed working time.

Alternatively, should the elimination be impossible, FICIL proposes two versions of amendments which would provide that the pay that the employer shall pay for the time in-between assignments will not exceed the agreed working time. Consequently, if Person A has worked only 10 hours out of the agreed 20, he would be entitled to receive pay for the 10 hours in-between assignments.

Version No.1: "In-between assignments an employee of a temporary working agency is entitled to pay, in amount not less than the country's minimum wage and which is proportional to the time period in-between assignments and does not exceed the working hours as provided in the labour agreement. Time between assignments does not include the rest period, which is established in the work schedule arranged between the client of temporary employment agency and the employee."

(LAT: "Darbaspēka nodrošināšanas pakalpojuma sniedzēja darbiniekam laikposmā starp norīkojumiem izmaksā atlīdzību, kas nav mazāka par valstī noteikto minimālo mēneša darba algu, proporcionāli laikposmam starp norīkojumiem un nepārsniedzot darba līgumā nolīgto darba laiku. Laikposms starp norīkojumiem neietver atpūtas laiku, kas apstiprināts ar darbinieka un darbaspēka nodrošināšanas pakalpojuma saņēmēja saskaņotu grafiku.")

Version No.2: "An employee of a temporary working agency, *if he is employed for the normal working period*, is entitled to pay, in amount not less than the minimum wage, between assignments *regardless of the period for which the employment agreement is entered into*, in proportion to the time period between

assignments. Time between assignments does not include the rest period, which is established in the work schedule arranged between the client of temporary employment agency and the employee."

(LAT: "Darbaspēka nodrošināšanas pakalpojuma sniedzēja darbiniekam, *ja tam noteikts normālais darba laiks***,** laikposmā starp norīkojumiem neatkarīgi no nolīgtā darba *līguma termiņa* izmaksā atlīdzību, kas nav mazāka par valstī noteikto minimālo mēneša darba algu, proporcionāli laikposmam starp norīkojumiem. Laikposms starp norīkojumiem neietver atpūtas laiku, kas apstiprināts ar darbinieka un darbaspēka nodrošināšanas pakalpojuma saņēmēja saskaņotu grafiku.")

2.5.2. Posting of employees

In its recent judgements of 27 February 2015 (Case No C37108212) and 30 September, 2014 (Case No C28469512), The Supreme Court of the Republic of Latvia equated the posting of the employee with the business trip and established employer's obligation to pay daily allowances for each day spent also while posting.

Despite the seemingly correct interpretation of the concepts of "business trip" and "posting", the Supreme Court has also concluded that posting is a type of business trip. The Court has reasoned that posting is fully consistent with the concept of a business trip, and thus the employer is obliged to compensate daily allowances of its employee.

Business trip is a short trip beyond usual working place to perform specific task, which can be associated with employee training, indirect duties or other specific aim of the employer. In contrast, posting of employee is permanent transfer of the working place to another country with the aim to perform certain duties in long-term for the benefit of another person, thereby fulfilling international services agreement binding to the employer. Law already requires an employer to determine salaries in accordance with the host countries' minimum wage, which is usually considerably higher compared with the Latvian minimum wage. Therefore, the obligation to pay daily allowances when posting an employee is contrary to the law and logic considerations.

Firstly, interpretation of the law in favour of the obligation to pay daily allowances while employee is posted is disproportionate in cases when the employer has set a significantly higher salary for the work in posting than for the same work at the usual working place.

Secondly, it is contrary to the aim of the legislator. The articles of the Latvian LL are historically adopted from the Latvian USSR Codex of LLs. The latter clearly (Article 116) provided that daily allowances are applicable for posted employees only for the travel days, i.e. for the time that is spent traveling to the posted work place, but not for the whole period.

Considering the above mentioned, amendments to Latvian LL and Regulation of the Cabinet of Ministers No. 969 'Procedure under which expenses relating to business trips must be reimbursed' are recommended in order to provide: 1) definition and clear distinction between `posting of an employee` and `business trip; 2) rules on whether an employee has rights for daily allowances while posted to another country. As a result, the amendments should provide that daily allowances must not be paid in cases where the employee is being posted.