

# Regulatory Competition in the Eurasian Economic Union

**ALEKSEY YEFREMOV,**

*Ph.D. in Law, Associate Professor at the Department of State and Law Theory, International Law and Comparative Legal Studies, Voronezh State University; Senior Research Fellow at the Centre for Public Administration Technologies at the Russian Presidential Academy of National Economy and Public Administration*

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# Regulatory Competition in the Eurasian Economic Union

## 1. The Phenomenon of Regulatory Competition: Concept, Advantages and Disadvantages in Integration Associations

The development of Eurasian integration is increasingly becoming the subject of various assessments and discussions. The recent publication of Report No. 43 by the Eurasian Development Bank (titled *Eurasian Economic Integration*), which focuses on the insufficient level of regulatory competition within the framework of the Eurasian Economic Union (EAEU), makes it necessary to analyse this phenomenon and the factors that affect it. It also prompts a deeper discussion on whether or not regulatory competition is necessary for international (and regional) integration.<sup>1</sup>

Regulatory competition as a phenomenon is linked to the processes of globalization and regional economic integration. It is the subject of research in various scientific fields, including jurisprudence, political science and economics.

At the same time, the term “interjurisdictional competition” is used in western economic science (new institutional economics), while “regulatory competition” is used in works on jurisprudence. In economic research, this term is used alongside such categories as convergence and divergence,<sup>2</sup> regulatory conversion and dispersion, and “race-to-the-top” or “race-to-the-bottom.”<sup>3</sup>

In order to understand the economic substance of regulatory competition in integration associa-

tions it is necessary to note that in the academic discourse a distinction has long been made between so-called “negative integration” (i.e., the removal of inter-state barriers for the movement of goods, services, human resources and capital, and the creation of a single economic space)<sup>4</sup> and “positive integration” (the harmonization of institutions, including legal regulation and the creation of national [and international] organizations and their attendant regulatory bodies).<sup>5</sup> At the same time, while positive integration at the supranational level establishes the general rules of behaviour, negative integration merely transforms the economic space in such a way that business can choose from among various governments offering (“selling”) public goods and institutions of varying “prices” and “quality.” And it is precisely in this “market of public goods and institutions” where competition arises among states (jurisdictions) to attract private business.

Generally, jurisdictions compete for mobile resources (capital in the form of direct or portfolio investments); however, in today’s conditions, it extends to the placement of production, human resources, entrepreneurial skills and the development of innovations.

Since the mid-1990s, the western economic science has described the specific models of the regulatory competition phenomenon not only in relation to taxes (tax competition),<sup>6</sup> but also with respect to other spheres of regulation (for example, financial reporting standards,<sup>7</sup> deposit insurance,<sup>8</sup> and issuing corporate

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### AUTHOR:

**Aleksey Yefremov**, Ph.D. in Law, Associate Professor at the Department of State and Law Theory, International Law and Comparative Legal Studies, Voronezh State University; Senior Research Fellow at the Centre for Public Administration Technologies at the Russian Presidential Academy of National Economy and Public Administration

<sup>1</sup> Eurasian Economic Integration – 2017. St. Petersburg: Eurasian Development Bank Centre for Integration Studies. 88 p.

<sup>2</sup> Barkin J.S. Racing All Over the Place: A Dispersion Model of International Regulatory Competition // *European Journal of International Relations*. 2015. Vol. 21, no. 1, pp. 171–193.

<sup>3</sup> Carruthers B.G., Lamoreaux N.R. Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards // *Journal of Economic Literature*. 2016. Vol. 54, no. 1, pp. 52–97.

<sup>4</sup> Liebmann A.M. Negative Integration and Jurisdictional Competition // *Economics of Contemporary Russia*. 2005, no. 2.

<sup>5</sup> Strezhneva M.V. Multi-Level Financial Management in the European Union // *Moscow University Bulletin. Series 25. International Relations and Global Politics*. 2011, no. 4, pp. 106–125.

<sup>6</sup> Gérard M., Weiner J.N. Cross-Border Loss Offset and Formulary Apportionment: How do they Affect Multijurisdictional Firm Investment Spending and Interjurisdictional Tax Competition? CESifo Working Paper. 2003, no. 1004. URL: [https://www.econstor.eu/bitstream/10419/76504/1/cesifo\\_wp1004.pdf](https://www.econstor.eu/bitstream/10419/76504/1/cesifo_wp1004.pdf)

<sup>7</sup> Sunder S. Regulatory Competition among Accounting Standards within and across International Boundaries // *Journal of Accounting and Public Policy*. 2002. Vol. 21. P. 219–234.

<sup>8</sup> Engineer M.H., Schurea P., Gillis M. A Positive Analysis of Deposit Insurance Provision: Regulatory Competition among European Union Countries // *Journal of Financial Stability*. 2013. Vol. 9, no. 4, pp. 530–544.

bonds<sup>9</sup>) and separate branches and sectors of the economy, such as innovation.<sup>10</sup>

Russian economic science has also proffered economic analyses of the phenomenon of regulatory competition.<sup>11</sup> According to these studies, there are serious doubts in the post-Soviet space about whether or not regulatory competition can actually ensure that institutions operate at a high quality.<sup>12</sup> In other words, can it achieve its goal of improving the investment and business climates in each country? And can it ensure greater economic integration as a whole?

In American scientific legal literature, competition among jurisdictions is divided into intrajurisdictional, or competition between different regulatory organs within the same state; interjurisdictional, or competition between regulatory organs in different countries; and multinational regulatory competition, when a group of regulators from more than one sovereign state forms a partnership with a multinational regulator and then seeks to compete with other groups of regulators that are also made up of more than one sovereign state.<sup>13</sup>

In the legal science of EAEU states, regulatory competition has a narrow definition and is primarily used in the settlement of disputes in international judicial bodies.<sup>14</sup> Russian legal experts define regulatory competition among states as the simultaneous establishment of jurisdiction by different states over one and the same person (persons) or entity, as well as the exercising, or attempt to exercise, their jurisdiction over the respective person (persons) or entities.<sup>15</sup> Only Kazakh scholars demonstrate a significant

degree of interest in the legal aspects of state competitiveness.<sup>16</sup>

According to foreign studies, at the global level, removing trade and investment barriers creates the potential for competition among regulatory jurisdictions, thus forming the three “trajectories” of regulatory trends:<sup>17</sup>

- convergence between countries with regard to less stringent rules (the rules of production processes);
- convergence towards stricter rules (rules governing market access);
- preservation of differences between countries (with regard to specific investment projects).

However, the most interesting studies are those that look at the influence of regulatory competition on regional economic integration, the most vivid example of which is the European Union (EU).

It is a rather controversial topic in European research papers due to the “competition” between the two paradigms mentioned above – “positive” and “negative” integration, or, as they are referred to in some papers, the concepts of “*regulatory neutrality*”, which ensures equal conditions for businesses to compete on the basis of unified rules, and “*regulatory competition*,” which ensures competition among states.<sup>18</sup>

It should be noted that both the agreements that underpin the European Union and the activities of the EU’s bodies were always intended to *harmonize* regulation, rather than promote regulatory *competition*. This is what differs it from the

<sup>9</sup> Eidenmüller H., Engert A., Hornuf L. Where do Firms Issue Debt? An Empirical Analysis of Issuer Location and Regulatory Competition in Europe // *International Review of Law and Economics*. 2015. Vol. 41, pp. 103–115.

<sup>10</sup> Rauscher M. Interjurisdictional Competition and Innovation in the Public Sector // CESifo Area Conference on Public Sector Economics. May 7–9, 2004. URL: [https://www.cesifo-group.de/portal/pls/portal/!PORTAL.wwpob\\_page.show?\\_docname=67753.PDF](https://www.cesifo-group.de/portal/pls/portal/!PORTAL.wwpob_page.show?_docname=67753.PDF)

<sup>11</sup> Liebmann, A.M. Jurisdictional Competition and Overcoming the Ineffective Imbalance in the Context of Globalization // *Society and Economics*, 2004, nos. 5–6. URL: <http://www.cemi.rssi.ru/jsae/content/2004/5-6/an5-604-15.html>; Liebmann, A.M. Negative Integration and Jurisdictional Competition // *Economics of Contemporary Russia*, 2005, no. 2; Liebmann, A.M. Problems of Multi-Level Management, Economic Power and Jurisdictional Competition in the Contemporary Global Economy // *Bulletin of Scientific Information. Russian Academy of Sciences Institute for International Economic and Political Studies*, 2008, No. 2.

<sup>12</sup> Liebmann A.M. Models of Economic Integration: Global and Post-Soviet Experience: Dissertation Abstract for a Ph.D. in Economics. Moscow, 2009, p. 36.

<sup>13</sup> Partnoy F. Multinational Regulatory Competition and Single-Stock Futures // *Northwestern Journal of International Law and Business*. 2001. Vol. 21, p. 643.

<sup>14</sup> Solntsev A.M. Golubev V.V. WTO and Regional Integration Associations: Regulatory Competition and the Applicable Principles of the Law in the Settlement of Inter-State Disputes // *Volgograd State University Bulletin. Series 5: Jurisprudence*. 2013, no. 1. URL: <http://www.cyberleninka.ru/article/n/vto-i-regionalnye-integratsionnye-obedineniya-konkurenciya-yurisdiksiy-i-primenimyh-printcipov-prava-pri-razreshenii>; Malashko, A.P. The Correlation between Dispute Resolution Mechanisms provided for in Article 19 of the Agreement on the Commonwealth of Independent States Free Trade Area dated October 18, 2011 // *Pravo.by*. 2016, no. 2, p. 98.

<sup>15</sup> Chernichenko O.S. International Legal Aspects of a State’s Jurisdiction: Dissertation Abstract for a Ph.D. in Law. Moscow, 2003, p. 11.

<sup>16</sup> Smagulov A.A. Legal Integration of Kazakhstan as an Element of the State’s Legal Competitiveness // *Business, Management and Law*. 2014, no. 2, pp. 135–137.

<sup>17</sup> Murphy D.D. Interjurisdictional Competition and Regulatory Advantage // *Journal of International Economic Law*. 2005. Vol. 8, no. 4, pp. 891–920.

<sup>18</sup> Sayde A. One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law // *Cambridge Yearbook of European Legal Studies*. 2010–2011. Vol. 13, pp. 366–367.

competitive federalism adopted in the United States.<sup>19</sup> However, the judicial practice demonstrated by the Court of Justice of the European Union, specifically the *Centros Ltd. vs Erhvervs- og Selskabsstyrelsen* case (1999), which allowed inter-country mobility for European companies, is regarded by European scholars as the moment the Union transitioned to regulatory competition.

Supporters of regulatory competition in Europe point to the fact that it encourages experimentation and innovation in legal regulation and allows for the formulation of rules that take new ideas and local specifics into account more fully. Critics argue that it negatively impacts business competition, creating advantages for businesses, depending on their location, and also leads to a decrease in social standards (which are essentially business expenses and which it also seeks to minimize, migrating to jurisdictions with fewer social requirements).<sup>20</sup> At the same time, a number of researchers rightly point out that competition and coordination (harmonization) of regulation are “two sides of the same coin” which provide dialectical improvement of both regulation itself and the processes of its development.

Studies of regulatory competition within the framework of the European Union demonstrate that in order to properly assess the advantages of a given country’s jurisdiction, it is not enough to take one factor, or a small number of factors – for example, taxation or the simplicity of procedures for establishing a company or reporting financial results – into account.

For example, the 2008 reform of German company law, which abolished the minimum level of capital for closed corporations, did not itself bring about a reduction in the number of foreign firms being set up by German entrepreneurs. More important were the costs associated with setting up a new company and the stringent requirements with regard to the disclosure of information in other jurisdictions.<sup>21</sup>

Also, the largest number of corporate bonds are issued by Germany, while there is a pre-

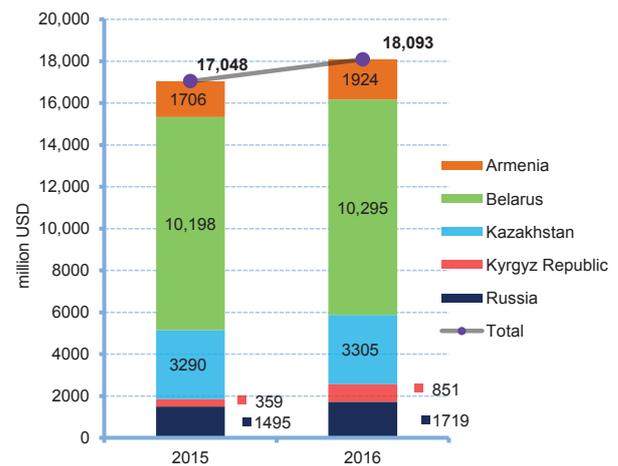


FIG. 1. MUTUAL ACCUMULATION OF DIRECT INVESTMENTS IN EAEU MEMBER STATES AS OF END-OF-YEAR 2016.

SOURCE – EURASIAN ECONOMIC COMMISSION

dominance of borrowers in the Netherlands, the United Kingdom, Luxembourg and Ireland. The reason why these jurisdictions are so attractive is the low income tax (in this case for bond owners), while the differences in terms of protecting creditors’ rights in these countries does not matter.<sup>22</sup>

*Thus, studying the experience of the European Union allows us to make two key conclusions. First, regulatory competition is dialectically interrelated with the coordination (harmonization) of legal regulation at the supranational (international) level, and together, they provide both improved regulatory quality and economic integration. Second, the economic and legal assessment of actual regulatory competition should be based on an analysis of the aggregate of factors and the law (tax law, corporate law, anti-monopoly law and social security law).*

It should also be noted that the development of so-called “multinational regulatory competition” – that is, *regulatory competition among integration associations themselves, rather than individual countries* – looks most promising.

<sup>19</sup> Deakin S. Legal Diversity and Regulatory Competition: Which Model for Europe? Centre for Business Research, University of Cambridge, 2001. Working Paper No. 323.

<sup>20</sup> Davies G.T. The Legal Framework of Regulatory Competition (May 18, 2006). URL: <https://www.ssrn.com/abstract=903138> or <http://dx.doi.org/10.2139/ssrn.903138>

<sup>21</sup> Ringe W.-G. Corporate Mobility in the European Union – A Flash In The Pan? An Empirical Study on the Success of Lawmaking and Regulatory Competition: University of Oslo Faculty of Law Legal Studies Research Paper Series. 2013, no. 19. URL: [https://www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2247323](https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2247323)

<sup>22</sup> Eidenmueller H., Engert A., Hornuf L. Where do Firms Issue Debt? An Empirical Analysis of Issuer Location and Regulatory Competition in Europe (September 1, 2010). ECGI – Finance Working Paper No. 292/2010. URL: <https://www.ssrn.com/abstract=1678442> or <http://dx.doi.org/10.2139/ssrn.1678442>

## 2. Regulatory Competition in the EAEU

Experts have long been assessing capital mobility and jurisdictional competition within the framework of the EAEU (and earlier, the Customs Union).<sup>23</sup>

Report No. 43 by the Eurasian Development Bank (entitled Eurasian Economic Integration) notes that, despite the serious differences in the tax burdens of the member states (see Table 1) there has not been a serious cross-flow of business.<sup>24</sup>

*However, according to western economic and legal research, the assessment of regulatory competition cannot be based on tax competition alone.*

Studies published outside of Russia that compare regulatory competition in the European Union and the Eurasian Economic Union demonstrate that assessing the current state of, and prospects for, the development of regulatory competition to a large extent depend on the specific sphere of legal regulation (for example, tax law, corporate law and social security law) and the state of

TABLE 1. AVERAGE TAX BURDEN ON THE ECONOMY (% OF GDP, CALCULATED AS AN AVERAGE FOR THE PERIOD 2008–2014) AND THE MAXIMUM VAT RATE IN EAEU COUNTRIES

Country	Average Tax Burden, %	Maximum VAT Rate, %
Russian Federation	34	18
Republic of Belarus	28	20
Republic of Kazakhstan	14	12
Republic of Armenia	22	17
Kyrgyz Republic	21	12

Source: Eurasian Economic Integration – 2017.

regulatory competition in these industries can differ.<sup>25</sup>

In order to assess the regulatory competition, we can compare indicators of the establishment of companies or of the volume of investments between EAEU member states.

According to the Eurasian Economic Commission, accumulated direct foreign investments into EAEU member states totalled \$634.9 billion for the start of 2017, which represents an increase of \$134.6 billion, or 27%, from the same period in 2016.<sup>26</sup> Mutual accumulated direct investments for the reviewed period increased by 6.1% to more than \$19 billion. Belarus accounted for more than half of all mutual accumulated investments (\$10.6 billion).

In the Republic of Armenia, the flow of direct foreign investments reached 62.6 billion drams in 2016 (around \$128 million), compared to 69.4 billion drams in 2015 (around \$144 million). According to the National Statistical Service of the Republic of Armenia, the largest flows of cumulative foreign investments into the country during the reporting period came from Luxembourg, Cyprus and the United Kingdom. A total of 48.4 billion drams (about \$100 million) in cumulative foreign investments came from Luxembourg alone, with direct foreign investments totalling 10.8 billion drams (about \$22 million). Cumulative investments from Cyprus totalled 44.3 billion drams (\$92 million) for the same period, with 34.5 billion drams (\$71.5 million) coming from direct investments. Cumulative investments from the United Kingdom reached 33.7 billion drams (70 million), of which 32.8 billion drams (\$68 million) was in direct investments.<sup>27</sup> According to 1H 2017 results, the most significant amount of direct foreign investments came from the island of Jersey (a British Crown dependency), totalling 31.6 billion drams (around \$65.5 million). Significant flows of direct foreign investments into Armenia for the reporting period also came from Germany (7.6 billion drams, around \$16 million), Cyprus (2.6 billion drams, or \$5.3 million) and

<sup>23</sup> Kheifets B.A. Competition for Foreign Investments in the Customs Union of Belarus, Kazakhstan and Russia // Russia and the Modern World. 2011, no. 4, pp. 131–144.

<sup>24</sup> Eurasian Economic Integration – 2017. St. Petersburg: Eurasian Development Bank Centre for Integration Studies. 88 pages.

<sup>25</sup> Klofat A. Regulatory Competition within the Eurasian Economic Union and the European Union: A Comparative Legal Analysis // Legal Issues of Economic Integration. 2017. Vol. 44, no. 2, pp. 173–196. URL: <https://www.ssrn.com/abstract=2737369>

<sup>26</sup> Mutual Investments of EAEU Member States. Express-Information. July 3, 2017. URL: [http://www.eurasiancommission.org/ru/act/integr\\_i\\_makroec/dep\\_stat/fin\\_stat/express\\_information/Documents/mutual\\_investments/express\\_mi\\_4Q2016.pdf](http://www.eurasiancommission.org/ru/act/integr_i_makroec/dep_stat/fin_stat/express_information/Documents/mutual_investments/express_mi_4Q2016.pdf)

<sup>27</sup> Foreign Investments in the Real Sector of the Armenian Economy Totalled 81.6 Billion Drams in 2016 // NovostiNK. April 1, 2017. URL: <http://www.novostink.ru/commerce/novosti/economynews/196121-inostranye-investicii-v-realnyy-sektor-ekonomiki-armenii-za-2016-god-sostavili-816-mlrd-dramov.html>

**TABLE 2. CURRENT LEGAL ENTITIES, BRANCHES AND REPRESENTATIVE OFFICES WITH THE PARTICIPATION OF EAEU COUNTRIES IN THE REPUBLIC OF KAZAKHSTAN**

Country	Number as of January 1, 2013	Number as of January 1, 2017	Change, %
Republic of Armenia	87	162	86.2
Republic of Belarus	126	230	82.5
Kyrgyz Republic	322	646	100.6
Russian Federation	5029	7236	45.7

Source: CA Portal. Central Asian Portal.

**TABLE 3. RUSSIAN DIRECT FOREIGN INVESTMENTS INTO EAEU MEMBER STATES (1Q 2017), MILLION USD**

Country	Direct Foreign Investments from Russia	Direct Foreign Investments into Russia
Republic of Armenia	61	9
Republic of Belarus	346	20
Republic of Kazakhstan	76	21
Kyrgyz Republic	57	-5

Source: Central Bank of Russia.

the United Kingdom (2.1 billion drams, about \$4.4 million). For the reporting period, the net flows of cumulative foreign investments into the real sector of the Armenian economy amounted to negative 24,813.9 million drams (about \$51.5 million).<sup>28</sup>

According to the data from the Ministry of Foreign Affairs of the Republic of Belarus, the breakdown of direct foreign investment inflows on a net basis (as of January 1, 2017) is as follows:

- EU countries – 53.8%
- EAEU countries – 33%
- Asian and Middle Eastern countries – 7.1%
- other countries – 6.1%<sup>29</sup>

The Republic of Kazakhstan also provides data on the number of currently legal entities, branches and representative offices with the participation of EAEU countries (Table 2).<sup>30</sup>

*We can thus conclude that the number of companies from EAEU member states operating in Kazakhstan has grown since the EAEU was established. At the same time, a much larger increase can be observed in the number of companies from other countries operating in the Republic of Kazakhstan for the same period: Turkmenistan (200%), Ukraine (115.8%) and China (107.9%).*

According to the National Statistical Committee of the Kyrgyz Republic, the main sources of direct foreign investments in 2010–2015 were Canada, which accounted for more than 22.4% of investments on average and Russia (14.7%), while the Republic of Belarus accounted for just 0.8% on average, and Kazakhstan for 3.8%.<sup>31</sup> In 2016, the Kyrgyz Republic received \$654.8 million in direct foreign investments, which was 2.4 times lower than in 2015. The largest investors in 2016 were China (\$289.651 million), Russia (\$239.064 million), Turkey (\$29.792 million), Canada (\$28.495 million) and Kazakhstan (\$22.646 million).<sup>32</sup>

Central Bank of Russia data on direct foreign investments by the Russian Federation into EAEU member states is presented in Table 3.<sup>33</sup>

It should be noted that currently there is no clear methodology for carrying out a multi-factor assessment of the real level of regulatory competition. This is manifested above all in the assessment of foreign investments. According to the World Investment Report 2016, over 40 per cent of

<sup>28</sup> The most significant direct foreign investments in Armenia in the first half of the year was in Jersey // ARKA News Agency. 7 сентября 2017 г. URL: <http://www.ambanks.am/2017/09/07/109752>

<sup>29</sup> Investments and Foreign Representations. URL: <http://www.mfa.gov.by/investments>

<sup>30</sup> Foreign Companies Operating in Kazakhstan: Market Review // CA Portal. Central Asian Portal. May 18, 2017. URL: <http://www.ca-portal.ru/article:35032>

<sup>31</sup> Where do Foreign Investments Flow in the Kyrgyz Republic // BizExpetr.kg. January 25, 2017. URL: <http://www.bizexpert.kg/2017/01/25/kuda-tekut-inostrannye-investitsii-v-kyrgyzstane>

<sup>32</sup> Why are People Investing Less in the Kyrgyz Republic? // KNews.kg. March 14, 2017. URL: <http://www.knews.kg/2017/03/pochemu-v-kyrgyzstan-stali-menshe-investirovat>

<sup>33</sup> Statistics on the Foreign Sector // Central Bank of Russia. URL: [http://www.cbr.ru/statistics/?prtid=svs&ch=itm\\_62002#CheckedItem](http://www.cbr.ru/statistics/?prtid=svs&ch=itm_62002#CheckedItem)

TABLE 4. INFLOW AND OUTFLOW OF DIRECT FOREIGN INVESTMENTS IN EAEU MEMBER STATES (2016)

Country	Inflow of Direct Foreign Investments, million USD	Outflow of Direct Foreign Investments, million USD
Republic of Armenia	338	57
Republic of Belarus	1235	28
Republic of Kazakhstan	9069	-5367
Kyrgyz Republic	467	–
Russian Federation	37,668	27,272

Source: World Investment Report 2017 (UNCTAD).

foreign branches around the world have several “passports.”<sup>34</sup> That is, the “nationality” of investors and owners of foreign branches is becoming increasingly blurred, and the erosion of state ownership for investors makes it more difficult to apply the rules for regulating foreign ownership.

The situation regarding the inflow and outflow of direct foreign investments in 2016, as per the World Investment Report published in May 2017, is represented in Table 4.<sup>35</sup>

Table 3 shows that the inflow of foreign investments exceeds the outflow in almost all the EAEU member states. Furthermore, the inflow/outflow ratio varies quite wildly and, on the whole, correlates with the data presented in the Doing Business 2017 ratings, according to which Kazakhstan is the 35<sup>th</sup> most attractive country for doing business with, followed by Belarus (37<sup>th</sup>), Armenia (38<sup>th</sup>) and Russia (40<sup>th</sup>).<sup>36</sup>

It is interesting to compare this data with the structure of direct foreign investments in the EAEU member states (Table 5).

A comparison of the country data presented above, as well as of that provided in tables 4 and

5, demonstrates that the EAEU member states invest insignificant amounts into other EAEU countries (with the exception of Belarus and the Kyrgyz Republic).

Economic research, however, suggests that a key factor in the development of investment cooperation within the EAEU will be the continued work on the formation of a common production factor market in the EAEU and the *harmonization of national legislation in the regulation of investment activity*.<sup>37</sup>

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*That is, according to a number of Russian economists, the growth of mutual investments does not lead to regulatory competition, but rather to the harmonization of investment activity regulation.*

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It should be noted that different ratings of the competitiveness of states, which, in essence, should reflect the attractiveness of these countries’ jurisdictions for doing business, contain widely differing assessments.

For example, Russia is ranked 43<sup>rd</sup> in the Global Competitiveness Report 2016–2017 (up from 45<sup>th</sup> in 2015–2016), with Kazakhstan taking 53<sup>rd</sup> place (down from 42<sup>nd</sup> in 2015–2016), Armenia in 79<sup>th</sup> place (after ranking 82<sup>nd</sup> in 2015–2016) and the Kyrgyz Republic slipping to 111<sup>th</sup> (from 102<sup>nd</sup> in 2015–2016).<sup>38</sup>

According to the IMD World Competitiveness Ranking, Kazakhstan placed 32<sup>nd</sup> in 2017 (up from 47<sup>th</sup> in the previous ranking), while Russia took 46<sup>th</sup> place (down from 44<sup>th</sup>).<sup>39</sup>

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*These differences in ranking the competitiveness of states demonstrate that an assessment of the level of regulatory competitiveness should entail either a complex multi-factor analysis, or else be carried out for different areas of regulation.*

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<sup>34</sup> World Investment Report 2016. Investor Nationality: Policy Challenges. Overall Trends and Summary. UNCTAD, 2016.

<sup>35</sup> World Investment Report 2017 // UNCTAD. URL: [http://www.unctad.org/en/PublicationsLibrary/wir2017\\_en.pdf](http://www.unctad.org/en/PublicationsLibrary/wir2017_en.pdf)

<sup>36</sup> Doing Business 2017. URL: <http://www.doingbusiness.org/reports/global-reports/doing-business-2017>

<sup>37</sup> Abramov V.L., Alekseev P.V. Investment Cooperation among EAEU Member States as a Key Factor in their Sustainable Development // Finance Journal, 2016, no. 4. p. 34.

<sup>38</sup> The Global Competitiveness Report 2016–2017 // World Economic Forum. URL: <https://www.weforum.org/reports/the-global-competitiveness-report-2016-2017-1>

<sup>39</sup> IMD World Competitiveness Ranking 2017. URL: <https://www.imd.org/globalassets/wcc/docs/release-2017/wcy-2017-vs-2016---final.pdf>

TABLE 5. THE STRUCTURE OF MUTUAL DIRECT INVESTMENTS IN EAEU MEMBER STATES (NET FLOWS FOR 2016, MILLION USD)<sup>40</sup>

Investors	Investment Recipients					Total
	Republic of Armenia	Republic of Belarus	Republic of Kazakhstan	Kyrgyz Republic	Russian Federation	
Republic of Armenia		0.4	0.3	–	32.6	33.3
Republic of Belarus	–		7.1	-17.6	46.0	35.6
Republic of Kazakhstan	-1.6	11.1		16.3	351.0	376.8
Kyrgyz Republic	–	–	-1.2		-15.4	-16.5
Russian Federation	-89.4	475.0	184.6	230.7		800.9
Total	-90.1	486.6	190.8	229.4	414.3	1230.2

Source: Eurasian Economic Commission.

The following criteria could form the basis for such an analysis:

- the existence of a “proposal” for regulatory competition – that is, the stated goal of ensuring regulatory competition, increasing the jurisdiction’s attractiveness, and implementing the legal and regulatory framework, as defined in the strategic planning documents of the EAEU member states;
- the existence of “demand” for ensuring regulatory competition on the part of business – that is, legal processes in Court of the Eurasian Economic Union (similar to the *Centros Ltd. vs Erhvervs-og Selskabsstyrelsen* case in the European Union);
- quantitative criteria and indicators of tax competition (which are mostly estimated at the present time);
- the existence of an assessment (analysis) of regulating (regulatory, regulative) influence in other spheres of regulation (currently implemented in Russia, Kazakhstan and the Kyrgyz Republic only, and planned for Belarus; certain elements are already present in Armenia);
- the presence of a unified methodology for assessing all business costs – in this case, using the “standard cost model” introduced by the European Commission, several EU countries and currently being implemented by Russia looks promising.

In addition, sectoral studies similar to the EU studies mentioned above need to be conducted in order to assess the actual level of cross-country capital flows (investments) in various sectors of the economy, as well as the regulatory factors that affect these crossflows (the specific features of legal regulation and law enforcement in individual spheres in all EAEU member countries).

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*It is important to note that, based on European experience, a real assessment of regulatory competition can only be carried out after the barriers to the free movement of goods, services, human resources and capital are lifted.<sup>41</sup> This is why the topic became relevant only in the late 1990s. Thus, regulatory competition is an effect that arises as a result of “primary” integration (harmonization), a qualitative and objective assessment of which can only be carried out in the future.*

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### 3. Regulatory Competition: An Obstacle to, or an Incentive for Deeper Integration?

Assessments of regulatory competition differ greatly depending on the scientific “angle” from which it is approached. In Russian legal science, particularly as it relates to the jurisdiction of international courts, regulatory competition is

<sup>40</sup> Foreign Companies Operating in Kazakhstan: Market Review // CA Portal. Central Asian Portal. May 18, 2017. URL: <http://www.ca-portal.ru/article:35032>

<sup>41</sup> Kerber W. Interjurisdictional Competition within the European Union // Fordham International Law Journal. 1999. Vol. 23, no. 6, pp. 219

seen as a negative phenomenon. For example, some studies indicate that the positive effect of multiplying the number (or proliferation) of international courts is that it ensures the geographical and sectoral specializations of the courts, while the negative effects include the fragmentation of international law, regulatory competition, competition of court judgements, etc.<sup>42</sup> This circumstance is down to the narrow formal understanding of regulatory competition in the legal sense, as noted above. In this regard, lawyers pay greater attention to eliminating regulatory competition among states, primarily by concluding international agreements that delimit it.<sup>43</sup>

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### *Economic and political assessments of regulatory competition differ a lot.*

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According to Eurasian Economic Commission estimates, the efforts of the Eurasian Economic Commission and EAEU countries to form a common market, remove barriers and restrictions, and develop effective legislation increase the international competitiveness of EAEU member states. As Tatyana Valovaya, Member of the Collegium (Minister) for Integration and Macroeconomics of the Eurasian Economic Commission, notes, "The EAEU states are starting to improve their national legislation within the framework of the regulatory competition that exists in the Union in order to be more competitive in our common economic space. This leads us to improving our positions on the international stage. We are talking here about the qualitative recognition of our economic integration."<sup>44</sup>

According to Eurasian Development Bank estimates, a higher level of mobility of companies and capital would increase the overall effectiveness of integration associations for the EAEU and stimulate countries to compete to attract businesses and thus improve the investment climate.<sup>45</sup>

It should be noted that reducing regulatory requirements (the so-called "race down") is not always justified. A number of foreign studies have shown that strict regulation in various sectors does not bring about regulatory competition. For example, the stringent requirements governing financial reporting standards help the financial markets to develop, and further improvement of regulation leads to the harmonization of national standards.<sup>46</sup> This is also typical for e-commerce.<sup>47</sup>

In terms of environmental protection, governments also minimize the potential consequences of regulatory competition by way of the international harmonization of requirements, in order to avoid the so-called "race down." Thus, regulatory competition serves as an incentive for international competition in environmental protection.<sup>48</sup>

Containing this competition cannot be the task of integration associations such as the European Union, since their main task is still to ensure "cooperation for competition" because, as we have already noted, regulatory competition and the coordination (harmonization) of legal regulation are mutually complimentary.<sup>49</sup>

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*At the same time, mechanisms of regulatory competition such as the European Union and other integration associations depend on the social structure, political problems, public perception and legal discourse (that is, the differences in approaches to legal regulation in various spheres of social relations).*

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## **4. Incentives and Obstacles to the Further Development of Regulatory Competition in the EAEU**

According to Eurasian Development Bank estimates, the main obstacle to regulatory com-

<sup>42</sup> Vlasenko N.A. Crisis of Law: Problems and Approaches to Resolving Them // Journal of Russian Law. 2013, no. 8, p. 146; Tolstykh, V.L. The Proliferation of International Courts and the Consequences thereof // Rossiyskoe Pravosudie, 2010, no. 10, pp. 55–56.

<sup>43</sup> Chernichenko O.S. International Legal Aspects of a State's Jurisdiction: Dissertation Abstract for a Ph.D. in Law. Moscow, 2003, pp. 12–13.

<sup>44</sup> Agricultural Production Grows Almost 4% in 2016 // Eurasian Economic Commission. January 19, 2017. URL: <http://www.eurasiancommission.org/ru/nae/news/pages/valovaya-selhoz1.aspx>

<sup>45</sup> Vinokurov E. Why has Regulatory Competition in the Eurasian Economic Union been Ineffective? // Ведомости. May 22, 2017. URL: <https://www.vedomosti.ru/economics/blogs/2017/05/22/690856-konkurenciya-yurisdiksi-evraziiskom-neeftivnoi>

<sup>46</sup> Sunder S. Regulatory Competition among Accounting Standards within and Across International Boundaries // Journal of Accounting and Public Policy. 2002. Vol. 21. P. 232.

<sup>47</sup> Ibid.

<sup>48</sup> Holzinger K., Knill C., Sommerer T. Environmental Policy Convergence: The impact of International Harmonization, Transnational Communication and Regulatory Competition // International Organization. 2008. Vol. 62, pp. 553–587.

<sup>49</sup> Radaelli C.M. The Puzzle of Regulatory Competition // Journal of Public Policy. 2004. Vol. 24, no. 1, pp. 1–23.

petition is the high level of involvement of the government in the economy. The Russian government's share in the country's economy was 70% in 2015. In Belarus, it was 70–75%, and in Kazakhstan, it was around 60% (note that the average around the world is 30–40%).<sup>50</sup>

What is more, regulatory competition is hampered by non-tariff barriers, of which there are currently 450 on the EAEU market. Around 80% of these belong to the category of non-tariff barriers allowed by the Treaty on the Eurasian Economic Union (the so-called exemptions and restrictions).<sup>51</sup>

Another consequence of the large-scale presence of the state in a country's economy is the orientation of businesses towards working with the government and state-owned corporations. The "huge" volume of public procurement in EAEU countries equals \$270 billion. In the United States, it is about the same size as total exports (\$300 billion). There is a common market for public procurement in the European Union, but it is not widely accessible for foreign companies, particularly small and medium-sized businesses.<sup>52</sup> We should also mention the restrictions associated with implementing import substitution programmes and plans in various sectors in the Russian Federation, primarily in information technology.

Studies published in other countries comparing regulatory competition in the European Union and the Eurasian Economic Union indicate that the tendency towards the centralization of the EAEU is *hampering the development of regulatory competition in the EAEU space*.<sup>53</sup> *At the same time, we should not forget that it is decentralization that lies at the heart of the concept of regulatory competition. It cannot work if regulators do not implement the authority invested in them to develop rules in individual countries, because a centralized or*

*"monopoly" regulator would behave exactly the same as any other monopoly.*<sup>54</sup>

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*Thus, it is not efforts to harmonize regulation of the EAEU's bodies that have the greater significance for the development of regulatory competition within the framework of the EAEU, but rather the improvement of the quality of regulatory policy at the national (and domestic) level. At the same time, the Eurasian Economic Commission can be a driver for such improvements.*

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The fact that the first regulatory act on the evaluation of the regulatory impact in the Republic of Belarus was adopted precisely because this institution for regulatory policy originated in the Eurasian Economic Commission is illustrative of this.<sup>55</sup>

It is interesting how the EAEU member states plan to develop the regulatory competition themselves. The data on these plans can be found in the speeches of top officials, as well as in the strategic planning documents of EAEU member states.

First Deputy Minister of Economy of the Republic of Belarus A. Zaborovsky noted at a round table meeting of the Ministry in November 2016 that a system for assessing the regulatory impact on business will be implemented in order to ensure the attractiveness of Belarus' jurisdiction. In addition, administrative procedures will be made wholly electronic, and new conditions for supporting and stimulating business by the Belarusian Foundation for the Financial Support of Entrepreneurship will be introduced.<sup>56</sup>

In the Republic of Kazakhstan, the tasks relating to the development of regulatory competition were set out in the President of the Republic of

<sup>50</sup> On Regulatory Competition in the EAEU // Eurasian Development Bank. May 19, 2017. URL: <https://www.eabr.org/press/publications/o-konkurentsii-yurisdiktsiy-v-eaes>

<sup>51</sup> Ibid.

<sup>52</sup> On Regulatory Competition in the EAEU // Eurasian Development Bank. May 19, 2017. URL: <https://www.eabr.org/press/publications/o-konkurentsii-yurisdiktsiy-v-eaes>.

<sup>53</sup> Klofat A. Regulatory Competition within the Eurasian Economic Union and the European Union: A Comparative Legal Analysis // Legal Issues of Economic Integration. 2017. Vol. 44, no. 2, pp. 173–196. URL: <https://www.ssrn.com/abstract=2737369>

<sup>54</sup> Barnard C., Deakin S. Market Access and Regulatory Competition // Jean Monnet Working Paper. 2001, no. 9/01, p. 5.

<sup>55</sup> Resolution of the Council of Ministers of the Republic of Belarus No. 380 "On the Procedures for Interaction among the Republican Bodies of State Governance and Other State Organizations Subordinate to the Government of the Republic of Belarus, Other Organizations and State Bodies in the Preparation and Review of Draft Decisions of the Eurasian Economic Commission, the Implementation of Procedures for Overturning or Altering Decisions Adopted by the College of the Eurasian Economic Commission and the Preparation of Initiative Proposals" dates May 16, 2013.

<sup>56</sup> The Ball Has Been Set in Motion. Taking 37th Place in the Doing Business Rankings in Just the Beginning. Experts on How We Can Reach New Heights // National Legal Internet Portal of the Republic of Belarus. November 3, 2016. URL: [http://www.pravo.by/novosti/obshchestvenno-politicheskie-i-v-oblasti-prava/2016/november/21858/?sphrase\\_id=228108](http://www.pravo.by/novosti/obshchestvenno-politicheskie-i-v-oblasti-prava/2016/november/21858/?sphrase_id=228108)

Kazakhstan Nursultan Nazarbayev's State of the Nation Address on January 31, 2017, entitled "Third Modernization of Kazakhstan: Global Competitiveness."<sup>57</sup> The document proposes such measures as:

- preserving the country's leading position in terms of attracting foreign investments, including the effective implementation of the joint investment programme with China on the establishment of production in Kazakhstan;
- ensuring the free transit of goods, building and modernizing transport corridors, managing the transport infrastructure, improving the level of services provided and removing administrative barriers;
- introducing systemic measures to deregulate business, including developing detailed plans to improve the conditions of doing business in the regions on the basis of the World Bank's ratings, and implementing an ease of doing business index for of the country's regions and cities;
- reducing the government's share in the economy to 15% of the country's GDP, to the same level as countries in the Organisation for Economic Cooperation and Development (OECD), including speeding up and completing the process of privatizing the 800 firms previously slated for privatization by 2020 to the end of 2018;
- ensuring continued work on the implementation of OECD best practices and recommendations, including reforms aimed at protecting private property, the rule of law and ensuring

equality of all under the law, auditing all legislation in order to strengthen the protection of property rights, humanizing administrative and criminal legislation, reducing sanctions for business violations, decriminalizing economic entities that do not pose a significant danger to the public, and increasing public confidence in the judicial system.

In Russian Federation, no attention is paid at the level of strategic planning documents to direct regulatory competition, both globally and within the framework of the EAEU. The term is not even used. For example, the Russian Federation National Economic Security Strategy until 2030 contains provisions relating exclusively to the economic competitiveness of export industries.<sup>58</sup> At the same time, the expansion of partner interaction and integration ties within the EAEU is mentioned *alongside the CIS, BRICS, the Shanghai Cooperation Organisation (SCO) and other interstate organizations*.

In the Republic of Armenia, published strategic planning similarly do not mention the term "regulatory competition" and measures for its development. A similar situation can be observed in the Kyrgyz Republic.

Thus, as a whole, the EAEU member states on the whole strive to develop their own competitiveness using both traditional monetary and fiscal means as well as advanced regulatory policy instruments. Belarus and Kazakhstan pay greater attention to the development of regulatory competition.

<sup>57</sup> The President of Kazakhstan Nursultan Nazarbayev's Address to the Nation of Kazakhstan. January 31, 2017 "Third Modernization of Kazakhstan: Global Competitiveness" // Official Site of the President of the Republic of Kazakhstan. URL: [http://www.akorda.kz/ru/addresses/addresses\\_of\\_president/poslanie-prezidenta-respubliki-kazakhstan-nazarbaeva-narodu-kazahstana-31-yanvarya-2017-g](http://www.akorda.kz/ru/addresses/addresses_of_president/poslanie-prezidenta-respubliki-kazakhstan-nazarbaeva-narodu-kazahstana-31-yanvarya-2017-g)

<sup>58</sup> Russian Federation National Economic Security Strategy until 2030 approved by Executive Order No. 208 of the President of the Russian Federation on May 13, 2017.

## RECOMMENDATIONS

The development of regulatory competition in conjunction with a reduction in inter-state barriers in international associations (so-called “negative” integration) is an important basis for harmonizing legal regulation (“positive” integration).

Moreover, judging from the numerous studies carried out overseas into the various aspects of economic relations, the fact that *a real assessment of the attractiveness of a particular jurisdiction and its competition can only be based on a multifactor analysis that includes an evaluation of both a wide range of legally established requirements and a large number of economic and social factors should be taken into account.*

Given the general understanding that monetary and fiscal policy (as well as regulatory competition in these areas) have their limitations in terms of promoting economic growth, a fact that has been well known in OECD countries since the 1990s, greater attention is being paid to regulatory policy,<sup>59</sup> as well as regulatory reform.<sup>60</sup>

*Developing regulatory competition in the tax sphere is not enough; regulatory policy must be developed as well. The first step in this direction would be introducing a Regulatory Impact Assessment (RIA, also known as a Regulatory Impact Analysis) in all EAEU member states.*

A promising area in the development of regulatory competition in the sphere of regulatory policy (in addition to the full implementation of RIAs in all EAEU member states) would be *ensuring the possibility of listeners from other EAEU member states participating in public consultations as part of RIAs at the domestic (national) level.*

*In addition, it would be prudent to get businesses involved in public discussions of draft decisions taken by the Eurasian Economic Commission. Today, there is a noticeable lack of participation in public discussions on the part of business representatives EAEU countries. According to the Eurasian Economic Commission’s Annual Report on Monitoring the Regulatory Impact Assessment of Draft Decisions by the Eurasian Economic Commission in 2015, a total of 2586 comments and proposals were offered by the participants in public discussions regarding 94 Draft Decisions taken by the Eurasian Economic Commission and put up for public discussion as part of RIA procedures, an average of 27.5 comments and proposals per draft decision.<sup>61</sup> Throughout the course of the public discussion on the draft decisions of the Eurasian Economic Commission as part of the RIA procedures, a total of 317 participants – representatives of business associations, economic entities, experts (private persons), representatives of the scientific community and members of the authorized executive bodies of the EAEU member states – made comments or offered proposals. In 2016, a similar Annual Report stated that 34 Draft Decisions taken by the Eurasian Economic Commission and put up for public discussion as part of RIA procedures in 2016 received a total of 268 comments and proposals, or an average of 8 comments and proposals per Draft Decision.<sup>62</sup> In 2016, throughout the course of the public discussion on the draft decisions of the Eurasian Economic Commission as part of the RIA procedures, a total of 317 participants – representatives of business associations, economic entities, experts (private persons), representatives of the scientific community and members of the authorized executive bodies of the EAEU member states and third countries – made comments or offered proposals.*

<sup>59</sup> Regulatory Policy // OECD. URL: <http://www.oecd.org/regreform/regulatory-policy>

<sup>60</sup> Regulatory Reform // OECD. URL: <http://www.oecd.org/regreform>

<sup>61</sup> Disposition No. 9 of the Eurasian Intergovernmental Council “On the Annual Report on Monitoring the Regulatory Impact Assessment of Draft Decisions by the Eurasian Economic Commission in 2015” // Legal Portal of the Eurasian Economic Union. URL: [https://www.docs.eaeunion.org/docs/ru-ru/01410268/ico\\_23052016\\_9](https://www.docs.eaeunion.org/docs/ru-ru/01410268/ico_23052016_9) dated May 20, 2016.

<sup>62</sup> Disposition No. 12 of the Eurasian Intergovernmental Council “On the Annual Report on Monitoring the Regulatory Impact Assessment of Draft Decisions by the Eurasian Economic Commission in 2016” // Legal Portal of the Eurasian Economic Union. URL: [https://www.docs.eaeunion.org/docs/ru-ru/01414059/ico\\_29052017\\_12](https://www.docs.eaeunion.org/docs/ru-ru/01414059/ico_29052017_12)

With regard to factors that negatively affect regulatory competition in the EAEU, such as the high level of participation of states in their respective economies, it is unlikely that it will be systemically reduced in the coming years (with the possible exception of the Republic of Kazakhstan, which has moved towards large-scale privatization). This is due to the lack of the appropriate guidelines in the strategic planning documents of other EAEU member states.

*It is more promising to develop regulatory competition in new industries, ensuring more comfortable legal regimes (including so-called regulatory “sandboxes” – regimes of legal experiment) for the digital economy, “the fourth industrial revolution” and the development of new technologies.*

*The Eurasian Economic Commission can focus on identifying “best practices” in this sphere and using them for further harmonization.*

These circumstances (the high level of the state’s participation in the economies of EAEU member states and the prospects for developing competition among legal regimes in order to develop new technologies and further the digital economy) *also make the development of competition among the legal regimes of public-private partnerships (PPP) in these areas so relevant.*<sup>63</sup> Provisions are directly made for the development of PPP in the field of digitization, for example, in the draft decision entitled Main Areas of Implementing the Digital Agenda of the Eurasian Economic Union until 2025 published on the Legal Portal of the Eurasian Economic Union in July 2017.<sup>64</sup> In this connection, the regulation of PPP projects in the field of IT penetration in the Republic of Kazakhstan, where the new laws “On IT Penetration” and “On Public-Private Partnerships” call for such projects, is particularly interesting. Current Russian law states that information systems cannot be the subject of PPP agreements. The corresponding draft federal law has only just been submitted to the State Duma.<sup>65</sup>

Thus, the study demonstrated the prospects, possibilities and likely areas for the development of regulatory competition within the framework of the EAEU, which will contribute to the economic development of the member states, as well as of integration associations as a whole.

### **A general algorithm of the consistent (cyclical) development of integration (harmonization) regulation and regulatory competition can be constructed as follows:**

- 1) The Eurasian Economic Commission promotes the elimination of barriers, exemptions and restrictions in the regulation of individual markets (spheres, industries) – “primary harmonization”;
- 2) National (domestic) regulatory bodies, using advanced regulatory policy tools, including developing regulatory impact assessment mechanisms and carrying out legal experiments in leading industries, help improve the quality of legislative regulation and law enforcement in the respective countries, thus stimulating the development of regulatory competition and the flow of capital and human resources (mobile resources);
- 3) The Eurasian Economic Commission monitors the state and development of regulatory competition based on a complex multifactor analysis (which would require the relevant methodology to be developed and institutionalized on a legislative basis), identifies “best practices” and promotes their dissemination (“soft” secondary harmonization);

<sup>63</sup> Public-Private Partnerships in Eurasian Economic Union Countries. A Practical Guide for Investors. Moscow: PPP Development Center, 2017. 80 p. URL: [http://www.pppcenter.ru/assets/files/Evrazes\\_Book-2017.pdf](http://www.pppcenter.ru/assets/files/Evrazes_Book-2017.pdf)

<sup>64</sup> On the Draft Decision of the Council of the Eurasian Economic Commission “On the Main Areas of Implementing the Digital Agenda of the Eurasian Economic Union until 2025” // Legal Portal of the Eurasian Economic Union. URL: [https://www.docs.eaeunion.org/pd/ru-ru/0101963/pd\\_28072017](https://www.docs.eaeunion.org/pd/ru-ru/0101963/pd_28072017)

<sup>65</sup> Automated Legislative Support System. URL: [http://www.asozd.duma.gov.ru/main.nsf/\(Spravka\)?OpenAgent&RN=157778-7](http://www.asozd.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=157778-7)

4) The decision is made within the framework of the EAEU to transfer new regulatory areas to the supranational level and, accordingly, unify them within the Eurasian Economic Commission. At the same time, in order to prevent bureaucratization within the Eurasian Economic Commission itself, it is necessary to carry out regulatory impact assessments of draft laws and existing legislation passed by the EAEU, as well as to encourage representatives of EAEU member countries to participate in public consultations (discussions) on these laws and regulations.



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Tel.: +7 (495) 225 6283  
Fax: +7 (495) 225 6284  
E-mail: [welcome@russiancouncil.ru](mailto:welcome@russiancouncil.ru)  
119180, Moscow, Bol. Yakimanka St., 1.

[www.russiancouncil.ru](http://www.russiancouncil.ru)