

# REGULATORY COMPETITION IN THE DIGITAL ECONOMY OF THE EURASIAN ECONOMIC UNION

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**Abstract.** Digital transformation is becoming a mainstream of world economic development both at the national and international levels. The development of Eurasian economic integration makes it relevant to analyse both digital integration and regulatory competition of digital economies of the EAEU countries and the factors that affect these phenomena. It also prompts a deeper discussion on whether or not regulatory competition is necessary for international (and regional) integration, including in the digital sphere.

The analysis demonstrates that 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. 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, telecommunication law, law on information technologies and cyberspace). But it is not enough 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 on digital economy at the international and national level. At the same time, the Eurasian Economic Commission can be a driver for such improvements.

Based on the analysis, the new general algorithm of the consistent (cyclical) development of integration (harmonization) regulation and regulatory competition in digital economy of the EAEU is proposed. Implementation of these recommendations would help improve business environment in the EAEU and enhance their regulatory competitiveness in the area of digital economy.

**Points for Practitioners.** The new general algorithm of the consistent (cyclical) development of integration (harmonization) regulation and regulatory competition in digital economy of the EAEU is proposed. Implementation of these recommendations would help improve business environment in the EAEU and enhance their regulatory competitiveness in the area of digital economy.

**Keywords:** digital economy, digital transformation, information and communication technology, factors, regional economic integration, regulatory competition, regulatory policy.

## 1 Introduction

Digital transformation is becoming one of the critical factors driving economic development both in the advanced economies and in the developing world. However, unleashing the potential of digital economy calls for creating the regulatory environment supporting rather than restricting digital dividends [35]. As many countries are

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striving to promote digitalizations and reap digital benefits, their efforts create the basis both for furthering economic integration on the basis of digital economy (for instance, through developing the Digital Single Market in the European Union [8], issues for Digital Transformation in the G20 [24] - as well as the adoption of the Guidelines for the Digital Agenda of the Eurasian Economic Union [10]) but also for increasing regulatory competition for the digital dividends (for instance, in the area of crypto-mining).

The development of Eurasian integration makes it relevant to analyse both integration and competition and the factors that affect these phenomena. It also prompts a deeper discussion on whether or not regulatory competition is necessary for international (and regional) integration, including in the digital sphere.

## **2 Paper Objective, Methodology and Literature**

The objective of this paper is to identify the prospects for developing regulatory competition in the Eurasian Union and the opportunities provided by regulatory integration for digital economy.

The research methodology is based on institutional analysis, comparative legal analysis and modeling of the international legal institutionalization of the developed recommendations.

Regulatory competition refers to the situation when jurisdictions design their legislation and administrative procedures in the way so as to attract investments and best talent. It is the subject of research in various scientific fields, including jurisprudence, political science and economics. As noted by E.Kamar, regulatory competition “stems from firms’ inability to incorporate outside the jurisdiction in which they operate, and is designed to attract capital and direct investments in local businesses, rather than incorporations by foreign businesses” [15]. In new institutional economics, the term “interjurisdictional competition” is used, while “regulatory competition” is used in works on jurisprudence. In economic research, this term is used alongside such categories as convergence and divergence [1], regulatory conversion and dispersion, and “race-to-the-top” or “race-to-the bottom” [4].

Regulatory competition as a phenomenon is linked to the processes of globalization and regional economic integration. 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) [19] and “positive integration” (the harmonization of institutions, including legal regulation and the creation of national [and international] organizations and their attendant regulatory bodies) [32]. 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 investments.

Generally, jurisdictions compete for financial 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 economic literature has been focusing on the specific models of the jurisdictional competition, comprising both tax regulation [14] and also regulation of other spheres of regulation (for example, financial reporting standards [33], deposit insurance [12], and issuing corporate bonds [11]) and separate branches and sectors of the economy, such as innovation [27].

The Internet provides in general plenty of new opportunities for regulatory arbitrage and makes it much easier to relocate business activity because to move a server or to change on which server a certain content is made accessible is much easier than to move a factory [22].

Russian economic science has also proffered economic analyses of the phenomenon of regulatory competition [17, 19, 20]. 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 [18]. 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 bodies within the same state; interjurisdictional, or competition between regulatory bodies 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 [25].

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 [21, 31]. 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 [5]. Only Kazakh scholars demonstrate a significant degree of interest in the legal aspects of state competitiveness [30].

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 [23]:

- 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).

The paper first briefly reviews the EU experience in regulatory competition in digital economy and identifies possible criteria for evaluating regulation of digital economy in the EAEU countries. Then we analyze the role of regulatory competition in economic integration. The paper concludes with recommendations on harmonizing digital economy regulation in the EAEU countries so as to use the advantages of regulatory competition and regulatory integration.

### **3 Regulatory Competition in the Digital Economy in the EU**

Regulatory competition 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 [29].

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 dif-

fers it from the competitive federalism adopted in the United States [7]. 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) [6]. 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.

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.

As this has already been noted by M. Müller, despite the ease with which an E-Commerce business can be relocated, only some relevant legal areas provide opportunities for regulatory arbitrage. Regulatory arbitrage depends mainly on the possibility of exporting legal advantages provided by local law. In order to assess the opportunities for regulatory arbitrage one has to distinguish between the applicable law and its enforcement. Therefore, regulatory competition does not take place in all legal areas relevant for E-Commerce. Governments are, in some areas which are important for E-Commerce, able to regulate free from the pressure imposed by regulatory competition. Regulatory competition is limited in IP law [22].

The proposition that the DSM strategy will contribute to the creation of a Digital Single Market neglects how regulatory heterogeneity in traditional non-digital sectors [affects the competitiveness of European businesses] is draining both digital and non-digital businesses in Europe of competitive edge. European authorities implicitly assume that digital technologies and the digitalisation of non-digital business models will be released by the elimination of supply and demand constraints that result from insufficient e-communication infrastructure, fragmented copyrights systems, heterogeneous privacy laws, and simplified rules for e-commerce. It is true that legislation in these policies, if appropriately designed, can set a better context for digital economic activity. It is highly questionable, however, that such reforms will encourage online entrepreneurial discovery, innovation and creative destruction in non or semi-digital sectors [3].

According to the last joint Report on regulatory sandboxes and innovation hubs of the European Supervisory Authorities (ESAs) [13] regulatory sandboxes and innovation hubs become areas of regulatory competition.

#### **4 Criteria for Benchmarking of the Regulatory Competition in the Digital Economy of the Eurasian Economic Union**

To assess the development of the level of the regulatory competition of the digital economy of the Eurasian Economic Union, we proceed from the premise 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.

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

- the existence of a “supply” 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 on digital economy of the EAEU member states;
- the existence of “demand” for ensuring regulatory competition on the part of business – that is, free flow of capital and human resources, as well as ICT products within the EAEU countries, 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 on digital markets (which are mostly estimated now);
- the existence of an assessment (analysis) of regulating (regulatory, regulative) influence in spheres of regulation of digital economy (currently implemented in Russia, Kazakhstan and the Kyrgyz Republic only, and planned for Belarus; certain elements are already present in Armenia) or technology assessment;
- 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.

#### **5 Regulatory Competition: An Obstacle to or an Incentive for Deeper Digital 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 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 [34]. 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 [5].

Economic and political assessments of regulatory competition differ markedly. 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.

It should be noted that reducing regulatory requirements (the so-called “race down”) is not always justified. A number of international 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. This is also typical for e-commerce [33].

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 [16]. 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 [2].

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 international and national level. At the same time, the Eurasian Economic Commission can be a driver for such improvements.

The fact that the first regulatory act on the regulatory impact assessment in the Republic of Belarus was adopted precisely because this institution for regulatory policy originated in the Eurasian Economic Commission is illustrative of this trend [28].

Thus, regulatory competition should be seen more as an incentive for deeper economic integration and harmonization of standards, rules, and requirements, rather than an obstacle for developing common approaches to regulatory challenges the digital era poses.

## **6 Conclusions**

The analysis demonstrates applicability of common approaches to the development of regulatory competition for digital integration.

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.

Improving regulatory competitiveness in the digital economy calls for a range of actions, including both broad measures relevant to both digital and non-digital sectors and sectoral measures, which are of specific importance in the era of digitalization. Thus, 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 jurisdictional 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.

It is also promising to develop jurisdictional 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. The EAEU Agreement on Regulatory Sandboxes is currently under development.

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 [26].

A general algorithm of the consistent (cyclical) development of integration (harmonization) regulation and regulatory competition in digital economy of the EAEU can be constructed as follows:

1) The Eurasian Economic Commission promotes the elimination of barriers, exemptions and restrictions in the regulation of individual digital 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 digital 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);

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. Such regulatory impact assessment should, inter alia, help to identify barriers to developing digital economy and promoting digital society [9].

Implementation of these recommendations would help improve business environment in the EAEU and enhance their regulatory competitiveness in the area of digital economy.

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