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КОНТРОЛЬ ИНОСТРАННЫХ ИНВЕСТИЦИЙ В РОССИИ и финляндии

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В статье проводится исследование юридических и административных мер по улучшению инвестиционного климата в России и Финляндии. Отмечается, что правовой режим, регулирующий иностранные инвестиции в этих странах, продолжает развиваться. Проводится краткий анализ инвестиций в экономику России за последнее десятилетие. Подчеркивается привлекательность нашей страны для иностранных инвестиций. Представлен обзор развития российского законодательства в области инвестиций и его анализ, отмечаются наиболее значимые интеграционные объединения, созданные по инициативе Российской Федерации. Выделяются две группы законодательства, регулирующие иностранные инвестиции в обеих странах - в России и Финляндии, исследуется динамика появления компаний с участием иностранного капитала, выявляется уровень потока инвестиций в этих странах. Проведен анализ последствий санкционной политики западных стран для инвестиций в российскую экономику и национальное хозяйство Финляндии. Подчеркивается, что вопреки санкционному давлению, Россия и Финляндия по-прежнему остаются важными торговыми партнерами. Делается вывод о том, что действующее российское законодательство и нормативные правовые акты Финляндии формируют правовую основу для осуществления взаимных иностранных инвестиций и повышения конкурентоспособности национальных экономик.

Ключевые слова: инвестиции, контроль, иностранные инвестиции, торговые партнеры, законолательство.

FOREIGN INVESTMENT CONTROL IN RUSSIA AND FINLAND

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The article researches the legislative and administrative measures taken to improve the investment climate in Russia and Finland, and it is noted that the legal framework regulating foreign investment in these countries keeps developing. A brief analysis of investment in Russian economy for the last decade is carried out, and an accent to the investment potential of our country is given. The background of the Russian legislation on investment and its analysis is given, the major integration associations created on the Russian initiative are outlined. Two main legislation groups regulating foreign investment in both countries, Russia and Finland, are

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distinguished, the dynamics of arising of businesses with foreign participation is examined. The legislative regulation of foreign investment in Russia and the investment flow levels in both Russia and Finland are compared, the volume of foreign investment flow to these countries is revealed. The analysis of the impact of the Western countries sanctions policy impact on investment in the Russian economy and national economy of Finland are carried out. It is stressed that despite sanctions pressure, Russia and Finland remain important trading partners. The conclusion is drawn on that Russian legislation in power and statutes and regulations of Finland create the legal base for back-to-back investment for these countries, enhancing the competitiveness of national economies.

Keywords: investment, control, foreign investment, trading partner, legislation.

For the Russian provide guarantees and protection to foreign companies that do business in Russia. This trends remains effective and is supported by the Government in Russia is promoted and supported despite all political estrangement between Russia and European countries.

After the economic crisis of 2008 that depressed foreign investment to USD 81 billion, by 2012 it nearly doubled to USD 154 billion. 2013 statistics showed rapid growth of foreign investment, to USD 170 billion. After a period of moderate growth, the Russian economy slowed down again in 2014 due to economic sanctions imposed on Russia and a fall of oil prices, which affected its investment climate considerably, while the general macroeconomic situation remained favourable. Starting from the second half of 2015 and 2016 foreign investment was growing steadily. So, despite the sanctions imposed and other politically motivated issues, Russia remains one of the most attractive areas for investment and will continue working to attract foreign investment into the Russian market [1]. In 2018, European Union member countries including The Netherlands, France, Austria and Switzerland, remain the main investors in the Russian economy and industry. Other major investors active in the Russian market include the United Kingdom, the British Virgin Islands, Bahamas and Bermuda. The investment flow from Asian countries such as Singapore, Republic of Korea and Japan, increases year after year as well, and Russia now considers Asian countries as promising business partners in the field of mutual investment.

The development of the Russian foreign investment legislation began in 1991 when the first law on foreign investment was passed. That was replaced in 1999 with the Federal Law 'On Foreign Investment in the Russian Federation' (Foreign Investment Law)¹ that is currently in force. The Foreign Investment Law defines a foreign investor's status, legal regimes for foreign investment, and guarantees and benefits for foreign investors operating in Russia. It contains provisions that regulate the establishment and activities of companies with foreign investment and branches of foreign companies.

As foreign investment in Russia increased it became clear that the process of investment into strategic industries required stricter control by public authorities. In this connection, the Federal Law 'On the Procedure for Foreign Investment in Companies of Strategic Significance for National Security and Defence' (Strategic Investment law) was adopted and a special Government Commission for Foreign Investment Control (Government Commission) was established, headed by the Prime Minister of Russia².

Statutory regulations adopted by the Russian Government also constitute a major part of Russian foreign investment legislation and usually contain guidelines on the application of foreign investment control rules. The legal regime that governs foreign investment is still developing. For example, important provisions were approved and entered into force on 1 July 2017. Those amendments aimed to implement a de-offshorisation policy in the Russian economy and to considerably restrict the circle of subjects entitled to establish control over strategic companies. For example, deals that instituted control over strategic companies not only by foreign State and international organisations and their controlled entities but also by offshore companies and their controlled companies were prohibited. A second set of amendments was adopted soon afterwards and entered into force on 30 July 2017. That second set of amendments not only extended the list of transactions that required a strategic investment permit but also made some significant changes in the Government Commission's powers.

The de-offshorisation drive continued into 2018, and the latest set of amendments to the Strategic Investment Law took effect on 12 July 2018. However, unlike the preceding provisions, these generally aim to liberalise foreign investment in strategic sectors of the Russian economy and to streamline the strategic authorisation process.

That law superseded the special regulation of offshore companies introduced in 2017 and provided for a new concept of 'companies that instead do not disclose information about their beneficiaries, beneficiary owners and controlling persons' (undisclosed companies). According to the amendments, undisclosed companies' legal status is similar to that of public investors (foreign States and international organisations) that are subject to stricter

¹ Federal Law No. 160-FZ 'On Foreign Investment in the Russian Federation' of 9 July 1999. – URL: http://www.consultant.ru/document/cons_doc_LAW_16283/ (accessed 22.12.2019).

² Federal Law No. 57-FZ 'On the Procedure for Making Foreign Investment in Companies of Strategic Significance for National Security and Defence' of 29 April 2008. – URL: http://www.consultant.ru/document/cons_doc_LAW_76660/ (accessed 22.12.2019).

regulation under the Strategic Investment law, with lower thresholds than those established for private investors. So this concept seems more favourable for private investors than the 2017 concept of offshore companies, for now they can avoid the application of the stricter regime by providing the required information about the company's:

 beneficiaries: the persons in whose interests the company operates, particularly in transacting under an agency agreement, mandate agreement, commission agreement, or trust agreement;

– beneficiary owners: physical entities who ultimately own more than 25% of shares in the company directly or indirectly (via third persons) or are able to control the company's activities, and controlling persons: those who/that control other, controlled persons (i.e. those entitled to directly or indirectly dispose more than 50% interest in them and to determine the decisions taken by the controlled person, as set out in the Strategic Investment law) of a foreign investor (including those registered in offshore jurisdictions).

To refine the information disclosure procedure, in December 2018 the Russian Government issued a resolution that specifies the information to be provided and the procedure for the provision and registration of such information. Additionally, those amendments expressly entitle the Federal Anti-monopoly Service (FAS) of Russia to issue additional clarifications as to the nature and application of the Strategic Investment Law that may facilitate jurisprudence. The development of co-operation with foreign partners and the integration of Russia into the global economy have always been one of Russia's development priorities.

Foreign investment legislation continues its developing in 2019. Thus, the FAS is now drafting a new law on amending the Strategic Investment Law. The new bill accommodates the possibility of individual foreign private investors establishing aggregate control over a strategic company and prescribes a special procedure for obtaining strategic investment licenses.

A major change in Russia's position in the international arena resulted from the creation of the Eurasian Economic Union (EAEU). The Treaty establishing the EAEU was signed by the leaders of Belarus, Kazakhstan and Russia on 29 May 2014 and entered into force on 1 January 2015. The treaties on the accession of Armenia and Kyrgyzstan to the EAEU were signed on 10 October 2014 and 23 December 2014, respectively. Armenia's accession treaty took effect on 2 January 2015¹. Kyrgyzstan's accession treaty entered into force on 12 August 2015; however, Kyrgyzstan had participated in the EAEU's activities from its inception as an acceding State.

According to official statistics, the EAEU is a political and economic union based on the Customs Union of Belarus, Russia and Kazakhstan, with a

¹ Results of the Activities of the Government Commission for Foreign Investment Control in the Russian Federation in 2015–2017. Presentation by the FAS of Russia. – URL: https://fas.gov.ru/documents/627024 (accessed 22.10.2018).

common market, a population of more than 184 million and more than USD 1.9 trillion GDP. The EAEU is considered a major player in the world energy sector, weapons industry and agriculture [2].

The EAEU is a new stage of integration that supports free movement of goods, capital, services and people and provides for a common transport, agricultural and energy policy with a prospect of a common currency and greater integration. The Union operates via supranational and intergovernmental institutions. The Union's superior authority is the Supreme Eurasian Economic Council that comprises the heads of its member States. Its other supranational institutions are the Eurasian Commission (executive authority), Eurasian Intergovernmental Council (comprising the prime ministers of its member States) and the EAEU Court (judicial authority).

Another initiative that the FAS head Igor Artemyev put forward last year aims to establish dialogue and co-operation among all countries' competition protection departments: the Expert Centre for co-operation among competition authorities of BRICS countries was established, based at the Higher School of Economics Russian National Research University. The Expert Centre will monitor major M&A deals and develop common approaches to their assessment. Besides, the Expert Centre is to support information exchange among the anti-monopoly authorities as they consider transnational deals. The Expert Centre will give special attention to IT market transactions. The BRICS countries' anti-monopoly authorities will decide on their own whether they will participate in the project and assess deals together.

The proposal to establish the Expert Centre was not the first attempt to expand competition policy co-operation among the BRICS countries. There already exist a BRICS competition policy co-ordination committee and a number of working groups that cater to various markets such as IT, automotive, pharmaceutical, food and agro-industrial markets. However, unlike the previous forms of co-operation, the Expert Council will become a permanent mechanism. The first results of the Expert Council's work will become a topic for discussion at the BRICS International Competition Conference to be held in Moscow in 2019. Delegates from BRICS countries will review the experience gained by the Expert Council and decide on its continued existence. The establishment of the Expert Centre reflects the BRICS countries' readiness to harmonise their approaches and expand their analytical capacity. As BRICS accounts for some 46% of the global market, hardly any transaction might evade notification in at least one BRICS jurisdiction [5]. In this connection, the approaches to be developed and used by the Expert Centre may have a considerable effect not only on national competition regulation but also on global merger control and foreign investment environment.

Besides, to continue facilitating investment attraction conducive to the development of goods markets and the Russian economy in general (and,

consequently, the implementation of the Decree No. 618 of the President of the Russian Federation 'On the State Competition Policy Guidelines' dated 21 December 2017) a Foreign Investment Expert Centre was established as a FAS unit in June 2018.

Experts and members of the business community are expected to become members of the Foreign Investment Expert Centre and contribute to the attainment of its main goal: to generate feedback for the Government that reflects the real needs of business and investors.

Besides, the head of FAS has approved the priority guidelines regarding business analytics and the removal of the legal and administrative barriers faced by investors¹ to be followed by the Foreign Investment Control Department.

The legislation that governs foreign investment can be divided into two groups. The first one includes general rules applicable to both Russian and foreign investments. These are contained in the Civil Code of the Russian Federation (CC RF), Federal Law 'On Limited Liability Companies', Federal Law 'On Joint Stock Companies', Federal Law 'On State Registration of Legal Entities and Individual Entrepreneurs', Federal Law 'On the Securities Market', and others. Those Federal Laws regulate, in particular, the general procedures for the establishment of legal entities, acquisition of shares/interests in legal entities' authorised capital, corporate governance matters and State registration of legal entities. The first group also includes anti-monopoly rules contained in the Federal Law 'On the Protection of Competition' (Competition Law).

The second set of rules regulates foreign investment exclusively. The main laws in these groups are the Foreign Investment Law and the Strategic Investment Law.

The Foreign Investment Law defines the public guarantees of the investor's right to invest and derive income and profit, and defines the conditions for foreign investors' activities in Russian territory. This law does not apply to foreign capital investment in banks and other credit companies, insurance companies and non-profit organisations. Those areas are to be regulated under the Federal Law 'On Banks and Banking Activities' (Banking Activities Law), Law of the Russian Federation 'On the Organisation of Insurance Activities in the Russian Federation' and the Federal Law 'On Out-of-Exchange Activities'.

The second fundamental law is the Strategic Investment Law that defines the procedure for making foreign investment in Russia's strategic sectors. Under the Strategic Investment Law, a strategic permit is required if the target company is incorporated in Russia and active in one of the areas listed in the Law (e.g. activities related to nuclear and radioactive materials, devices and

¹ Press Release of the Government Commission on the Situation as of 17 June 2019. – URL: http://government.ru/news/37047/ (accessed 29.02.2020).

wastes; aerospace industry; natural resources sector; prospecting and extraction of mineral resources in subsoil sections of federal significance; use of subsoil sections of federal significance (oil and gas sector); encryption and cryptography equipment; mass media and telecommunications; and use of infectious agents (except foodstuff production companies), or licensed to engage in such activities (a strategic company). The possession of a license is not mandatory for the company to be considered a strategic one. It is now sufficient that it has 'other permit documents' that enable the company to engage in any of the said activities.

The list of activities contained in the Strategic Investment Law is generally exhaustive, so a foreign investor can check whether their prospective target may be considered a strategic company. However, the President of the Government Commission is vested with a discretionary power to bring foreign investors' deals with virtually any Russian business, not only a strategic one, before his Commission.

Firstly, transactions that may be of interest for the Prime Minister and be considered by the Government Commission include transactions in respect of Russian companies that engage in no strategic activities but do engage in activities that may be directly related to 47 activities of strategic significance¹.

Secondly, the authorities' potential interest area includes major crossborder deals involving the transfer of assets or subsidiaries located in Russia on which Russia's economic security may depend (e. g. food and pharmaceutical industries and the defence sector).

And, finally, a third category of transactions that can potentially arouse the Prime Minister's special interest and be reviewed by the Government Commission comprises transactions with public investors usually working in multiple cultural and legal settings.

In accordance with the Resolution of the Government of the Russian Federation 'On the Government Commission that Exercises Foreign Investment Control in the Russian Federation', the FAS of Russia is the public authority responsible for monitoring the foreign investment sector. The Government Commission considers the transaction notifications submitted and decides whether the deals jeopardise national security and defence [3].

In the banking sector, the purchase of ten or more per cent of shares in a Russian credit organisation requires prior approval by the Central Bank of Russian, and the purchase of more than 1% but less than 10% is a notified transaction.

In the insurance sector, a Russian insurance organisation must obtain prior authorization to increase its authorised capital with foreign funds and transfer equity to the foreign investor. Its shareholders must obtain prior authorization to transfer their shares to the foreign investors.

¹ Joint Press Conference with Sauli Niinistö, President of Finland. Events. President of Russia. – URL: http://www.kremlin.ru/events/president/news/58347 (accessed 21.01.2020).

In the mass media sector, foreign investors may not own more than 20% of shares/interests in Russian mass media. Furthermore, foreign investors or legal entities, Russian dual nationals or stateless persons may not be founders of mass media.

In the natural monopoly sector, the purchase of more than 10% of the fixed assets of a legal entity operating in the natural monopoly sector requires permission from the FAS of Russia.

After the Law No. 57-FZ was adopted, between April 2008 and April 2018 the Government Commission considered more than 229 deals with foreign investors and denied prior authorization to 13 deals only, less than 5% of their total number. Also in the same period 516 applications were filed with FAS, of which 206 were returned to the applicants as the deals in question required no prior authorisation [9].

According to the Bank of Russia, between 2015 and 2017 the total volume of foreign direct investment in the Russian economy was more than USD 64.73 billion, including USD 6.853 billion in 2015, 32.539 billion in 2016, and 25.338 billion in 2017.

And the total volume of foreign investment in Russia's strategic companies under deals authorised by the Government Commission and made in the said period amounted to USD 28.235, (including 3.57 billion in 2015, 17.87 billion in 2016, and 6.794 billion in 2017), or 43,6% of all foreign direct investment¹.

In 2015, Finland accounted for 7% of all foreign investment in Russia's strategic companies under deals authorised by the Government Commission and made in the said period, or USD 249.9 million.

Notable among the most significant deals made by Finnish investors in the Russian economy in 2017–2018 is the purchase of 46,65% shares in Fortum, a German energy company, that the Fortum public company of Finland made last June [8].

The said transaction's specifics was as follows. Not only did the deal affect the interests of the two foreign parent companies (Fortum of Finland and Uniper of Germany) and their Russian subsidiaries (Fortum PAO with 94.99% of shares owned by the Finnish concern and Unipro PAO with 83,73% owned by the German company); it also required approval by the regulatory authorities of a number of States (Russia, Finland, and Germany) and the European Union.

FAS experts reviewed the materials submitted and found certain risks posed by the implementation of the said deal between the two foreign companies that owned major energy assets in the territory of the Russian Federation. Thus, it gave rise to a situation where their generating facilities'

¹ Results of the Activities of the Government Commission for Foreign Investment Control in the Russian Federation in 2015–2017. Presentation by the FAS of Russia. – URL: https://fas.gov.ru/documents/627024 (accessed 22.10.2018).

aggregate installed capacity would account for 58,3% of all the power plants' capacity and 58.8% of all electricity output in the Tyumen free power transfer zone, which would restrict competition in that wholesale electricity and power market (WEPM).

As for foreign direct investment in Finland, the year 2018 saw reorganisation of major multi-national businesses. At the end of 2018, foreign direct investment in Finland amounted to EUR 62.4 billion, a EUR 12.6 decrease from its 2017 level. At the end of 2018, Finland's foreign direct investment amounted to EUR 111.7 billion, an increase by EUR 9.4 year-on-year. In 2018, Finland's profit from the inflow of foreign direct investment was EUR 2.1 billion [8].

In 2018 foreign direct investment in Finland decreased as it received EUR -2.1 billion in FDI, including reinvested earnings. Finland's inward FDI had last been negative in 2013 (Figure 1). In country group breakdown, the EC countries accounted for most of the investment. In turn, Finland's outward foreign direct investment increased as EUR 9.3 billion net went abroad as foreign direct investment, including reinvested earnings. As regards groups of countries, most of the investment was made in the EU area and North America.

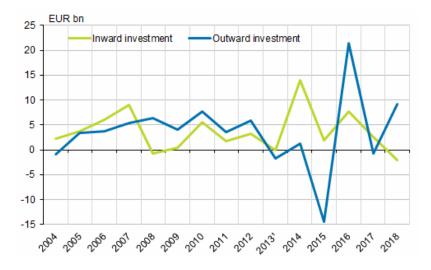


Figure 1. FDI Flows in 2004–2018 [10]

Starting from 2013, the figures are not fully comparable with 2004–2012 data due to changes in the international statistics standard.

In 2018, net direct investment in Finland amounted to EUR -2.1 billion, which was markedly less than in the previous two years. Investment in equities was EUR -4.0 in 2018, including reinvested earnings, and debt investment was EUR 1.9 billion. Negative equity investment partly resulted from negative reinvested earnings that reflect the difference between the earnings assessed and paid. The incomes paid to inward FDI owners in

Finland were EUR 1.4 billion higher than the incomes assessed in 2018. In addition to the negative reinvested earnings, businesses repatriated capital from their Finnish operations.

At the end of 2018, the volume of foreign direct investment was EUR 62.4, including EUR 56.7 billion in own capital and EUR 5.7 billion in borrowed capital. For the above companies, own capital value is recognised at market value, and for other businesses, at book value. In connection with corporate acquisitions, capital is valued on market value basis, with the deal's actual price used to determine market value [7].

The volume of foreign direct investment fell by EUR 12.6 billion over 2018. The volume of debt liabilities increased by EUR 1.8 billion, which is attributable to financial transactions. In turn, the investment pool based on debt instruments decreased by EUR 14.4 billion, mainly on account of changes in classification reflected in other changes of the assessment. The classification changes relate to changes in the value of financial asset and liability pools not resulting from international financial transactions or other changes. The classification changes include e.g. changes in the value of the financial asset and liability pool resulting from cross-border movement of the enterprise's domicile and changes caused by business restructuring as the enterprise's group of companies organises its internal ownership structure. Changes caused by changing investment type are also reflected under this item. For example, if ownership of a foreign investee falls below 10% of votes, the investment no longer meets the direct investment criteria and is classified in the balance of payment as a portfolio or other investment.

In country breakdown, direct investment in Finland was made particularly from Sweden (32% of all investment), Luxembourg (19%), The Netherlands (17%), Denmark (5%) and Germany (4%) (Figure 2).

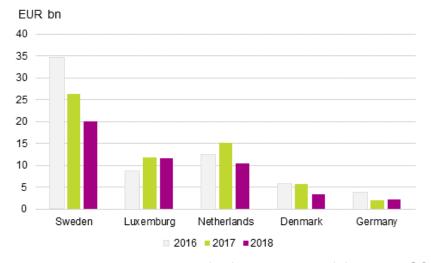


Figure 2. Direct Investment in Finland in Country Breakdown, 2018 [4]

In country group breakdown, investment mainly comes to Finland from EU countries that account for a total of 90% of its investment funds in 2018 [6]. Eurozone countries account for 50% of its investment portfolio. The equity presented here was calculated based on the direct investor's country. Investments are often actually managed via foreign branches, and in this case their ultimate controlling investor is located in some other country.

No statistics on Finland's outward FDI broken down by ultimate investor country can be collected from the data sources available. However we can study the ownership chains of its businesses that made foreign investments from Finland to figure out what share of Finland's outward FDI was made by businesses under Finnish control. Such a check is also of limited reach as it only covers corporate units' ownership chain. And, for example, a parent company incorporated in Luxembourg may actually be owned by Finnish nationals.

In 2018 the volume of FDI exported from Finland was EUR 111.7 billion, of which 90% belonged to businesses under Finnish control¹. The most significant ultimate investor countries outside Finland were the United States (4%) and Sweden (3%). If we consider investment from Finland in biggest controlling owner's country perspective, Finland cannot be considered an important direct investment transit country.

Despite the sanction regime still in place, Russia remains Finland's important trading partner that ranks third in goods turnover (with 9.6% in 2017), and fifth and third, respectively, in goods export to and import from Finland.

In turn, Finland ranks fifteenth among Russia's foreign trade partner countries. Besides, territorial proximity and membership in the European Union make Finland especially attractive for Russian countries as regards access to the EU countries' capacious goods and service markets.

Despite all sanction pressure, Russia is still of investment interest to Finnish corporations. Thus, e.g. in the 1st quarter of 2017, Finland's foreign direct investment in the Russian economy was USD 7 billion, and some EUR 12 billion if the assessment takes into account Finnish subsidiaries, including offshore ones.

Notwithstanding the policy of sanctions that is being pursued by the USA and its partners and forces Russia to respond, Russian investment business is linked to Finland, and vice versa.

Thus, cumulative Russian direct investment in Finland was USD 2,5 billion in the 1st quarter of 2016, while as of 1 January 2018 it was USD 3.1 billion, and 4.4 billion as of a 1 September 2018 [7].

¹ Briefing by Igor Artemyev, Head of FAS, after a Meeting of the Government Commission for Foreign Investment Control. – URL: http://en.fas.gov.ru/press-center/news/detail.html?id =52981 (accessed 23.12.2019).

Finnish companies remain interested in developing the Russian woodworking industry, as exemplified by the activities of such major wood processing companies as Stora Enso and UPM-Kymmene.

The sanctions imposed on Russia have led to no significant decrease of co-operation between Russian and Finnish businesses/corporations. Thus, the Federal Grid Company of the Unified Energy System Public Joint Stock Company (FGC UES PAO) and the System Operator of the Unified Energy System Joint Stock Company (SO UES JSC) continue their investment and technological co-operation with the Fingrid Oyj company of Finland whose main shareholders are the Finnish State and the National Logistics and Emergencies Agency. Fingrid Oyj, FGC UES PAO and SO UES JSC support inter-regional and inter-State transfers of electricity to enhance the efficiency of trade in electricity.

It should also be noted that in 2015 the Government of the Russian Federation decided to include FGC UES PAO and SO UES JSC in the list of system-forming enterprises – as legal entities in the jurisdiction of the Russian Federation that have a considerable influence on GDP generation, employment and social stability¹. So the sanction policy being pursued by the United States and other Western countries has failed to suppress continued co-operation between the Finnish public company and Russian energy companies.

The Western countries' current policy of sanctions aiming to weaken the economic and political influence of Russia and reduce her global competitiveness and participation in international division of labour has created a situation that is conducive to stronger Russo-Finnish economic ties, primarily in the investment area, and continued co-operation between Russian and Finnish businesses.

The investment co-operation between Russia and Finland encompasses not only small and medium enterprises but also the two States' vital interests in some industries and economic sectors (e. g. energy, defence and security).

The current Russian legislation and the normative legal acts of Finland constitute a legal framework for mutual foreign investment. They strictly regulate the public authorities' activities as they implement their powers in the said area, particularly in respect of investment in business of strategic significance for national defence and security (in Russia) and enterprises to be monitored (in Finland).

¹ Joint Press Conference with Sauli Niinistö, President of Finland. Events. President of Russia. – URL: http://www.kremlin.ru/events/president/news/58347 (accessed 21.01.2020).

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