Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi (NEÜHFD)
Journal of Necmettin Erbakan University Faculty of Law
DOI: 10.51120/NEUHFD.2021.7

Cilt: 4 Sayı: 1 Yıl: 2021 | Araştırma Makalesi / Research Article | E-ISSN: 2667-4076

The EU's Proceedings Against Gazprom And Their Repercussions On EU Competition Law

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Article Info

Article History
Received: 09.11.2020
Accepted: 02.03.2021
Published: 06.05.2021

Keywords:
Competition Law, Antitrust Law, Gazprom, EU Law, Russian Federation Abuse of Dominance

ABSTRACT

The European Union (EU) is concerned with the Russian Federation's (RF) policy of using natural gas resources as an instrument of expanding its influence over the EU Member States through the state-owned giant Gazprom, a super dominant energy company, operating in the EU with assets in upstream, midstream and downstream energy markets. On 4 September, 2012, the European Commission announced that it has initiated proceedings against Gazprom on the grounds that the Russian giant abused its dominant position in several EU energy markets through practices such as oil price indexation, take-or-pay clauses, refusing third party access rights, etc. In response, the RF enacted blocking legislations to prevent Gazprom and its subsidiaries in the EU from complying with the enforcement decisions that would be taken by the Commission. The Commission's proceedings constituted an extraterritorial application of EU Competition Law to certain practices perpetrated by Gazprom in its domicile, St. Petersburg, Russia. Blocking legislations indicated that the RF sought to provide to Gazprom, a legal basis, the principle of non-interference, the company would rely on in dismissing the enforcement decisions taken by the Commission. On 24 May, 2018, the Commission imposed binding obligations on Gazprom to ensure, inter alia, that natural gas provided by the Russian giant was priced at competitive levels through employing indices established in the EU. Even though the Commission's decision was not challenged by Gazprom before the EU courts, the arguments raised by the parties prior to the decision had serious legal implications as to the extraterritorial application of EU competition law to market practices that were part of a political agenda.

AB'nin Gazprom'a Karşı Soruşturmaları Ve Bunların AB Rekabet Hukuku Açısından Yansımaları

Makale Bilgileri

Makale Geçmişi
Geliş: 09.11.2020
Kabul: 02.03.2021
Yayın: 06.05.2021

Anahtar Kelimeler:
Rekabet Hukuku, Gazprom, Avrupa Birliği Hukuku, Rusya, Hakim Durumun Kötüye Kullanımı

ÖZ

Avrupa Birliği (AB), Rusya Federasyonu'nun (RF) sahibi olduğu ve üye devletler nezdindeki pek çok enerji piyasasında aktif olan enerji devi Gazprom şirketini siyasi dış politikasının bir parçası olarak kullanmasından dolayı rahatsızlık duymaktadır. AB Komisyonu 4 Eylül 2012'de Gazprom'a karşı, şirketin pek çok enerji piyasasındaki hakim durumunu, petrol fiyatı endekslemesi, al-yada-öde kaydı ve altyapılara üçüncü kişilerin ulaşım hakkının engellenmesi gibi eylemler yoluyla kötüye kullandığı gerekçesiyle inceleme başlatmıştır. RF buna karşı olarak kısıtlayıcı düzenlemeler yoluyla, Gazprom'un ve bağlı şirketlerinin, Komisyon kararı doğrultusunda hareket etmelerini engellemeye çalışmaktadır. Komisyonun başlattığı inceleme AB rekabet hukuku kurallarının, merkezi AB sınırları dışında olan (St. Petersburg) Gazprom şirketinin yine AB sınırları dışındaki eylemlerine karşı uygulanmasını öngörmekte olup, bu çerçevede AB hukukunun sınır-aşırı uygulanmasını gerektirmektedir. Rusya'nın kısıtlayıcı düzenlemeleri ise karışmazlık ilkesinin savunma aşamasında Gazprom tarafından ileri sürülmesinin planlandığını göstermektedir. Komisyon, 24 Mayıs, 2018'dede Gazprom'a yönelik bazı yükümlüler getirdiğini açıklamasına rağmen, Gazprom tarafından bu karar aleyhine AB Adalet Divanı'nda herhangi bir iptal davası açılmamıştır. Fakat, tarafların karar öncesine kadar yaptıkları tartışmalar, AB rekabet hukukunun devlet politikası niteliğindeki şirket eylemlerine karşı sınır-aşırı uygulanması hakkında ortaya çıkan önemli hukuki çıkarımlar açısından çok önemlidir.

Atıf/Citation: Çorlu, HÇ. (2021). The EU's Proceedings Against Gazprom And Their Repercussions on EU Competition Law, *Necmettin Erbakan Üniversitesi Hukuk Fakültesi Dergisi*, *4*(1), 28-46.

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INTRODUCTION

The fact that Russia uses its energy resources as political leverage to expand its influence over the Eastern European countries has not been welcomed by the European Union. There has also been growing tension in diplomatic relations as a result of a series of conflicts between Russia and Ukraine with respect to natural gas disputes that first started in the middle of 2000s, having repeated continuously with a 2-3 years of period without developing a long-lasting solution to the issue. In 2009, cut offs in natural gas supplies going through Ukrainian territory led to humanitarian concerns leaving certain regions in the Eastern Europe without energy in the middle of winter. Driven also by its Single European Energy Market agenda, the EU is extremely concerned with the Russian policy of exploiting natural gas resources as a political arm stretching over the cross-border energy trade across its Member States.

Gazprom, Russia's state-owned giant, with assets in upstream, midstream and downstream energy markets has been a prominent actor in energy supply across the EU. The EU Commission considers Gazprom's economic power in the EU's energy sector as a threat to the EU's single energy market objective involving the introduction of competition into the energy markets and ensuring third party access rights to the existing energy infrastructures including grids, pipelines and storage facilities[1] The EU on the other hand has always concerned with undertakings having (super) dominance over multiple relevant markets and able to act independently to an appreciable extent from the customers in the relevant markets[2]. Recently, Gazprom purchased shares of Germany's Wingas, the interconnector between the UK and Belgium allowing the company to establish its own network capacity in the European market. In downstream markets, Gazprom entered into some agreements elevating its storage capacity in the EU from 1.4 to 4.1 billion cubic meter (bcm) natural gas between 2006 and 2013[3]. Gazprom is also the major exporter of the natural gas to the EU as 113 bcm of natural gas exported to the EU by Gazprom representing 34% of the total EU's total gas exports. According to the European "Commission Staff Working Document"[4], published in 2009, dependence on Russian gas reaches 100% in Estonia, Finland, Latvia and Lithuania. These countries are followed by Slovakia with 98%, Bulgaria with 92%, Czech

[1] In order to ensure that the Third Party Access rights are not distorted, the EU adopted several directives and regulations. The latest set of regulations and directives are called the "Third Energy Package". See further Third Energy Package involves Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, Regulation (EC) 2009/715 on conditions for access to natural gas transmission networks, Regulation (EC) 2009/714 on conditions for access to the network for cross-border exchanges in electricity.

[2] In its guidance paper on application of Article 102 of Treaty on Functioning of European Union (TFEU), the European Commission identifies the dominant position of the undertakings as having power over in setting the prices, noting that *"(...) an undertaking which is capable of profitably increasing prices above competition level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant."* Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] O.J. C45/7 para. 10.

[3] Gazprom, Annual Report 2013, p. 12. http://www.gazprom.com/f/posts/60/660385/gazprom-annual-report-2013-en.pdf. (*last accessed on* 02.09.2020).

[4] "Commission staff working document–Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC. Assessment report of directive 2004/67/EC on security of gas supply {COM(2009) 363}" (PDF). European Commission. 16 July 2009. pp. 33; 56; 63–76.

Republic 78%, Greece with 76% and Hungary with 60%. Nearly half of the Member States are dependent on Russian gas over 50% of their total consumption.

The Commission, applying its single European energy market agenda through "Commitment Decisions"[5] against several undertakings incorporated in the EU, on September 4, 2012, announced that it has initiated proceedings against Gazprom on the grounds that Gazprom abused its dominance in the European Energy Market in violation of Article 102 by committing certain activities such as applying excessive pricing, dividing the internal market and distorting the EU's diversification of supply purposes.[6] As a Russian legal entity incorporated in Moscow, the legal actions and proceedings initiated against Gazprom give rise to concerns with respect to the concept of 'extraterritoriality' which has been always subject to political and legal discussions in public international law. The EU has had experience of applying its antitrust law to foreign conducts on the grounds of several doctrines, which brought about several legal and political discussions between the EU and its trading partners. Providing a detailed analysis of case law, this paper discusses to what extend the EU antitrust law can be applied to the Gazprom and how the case affects the relations between the EU and Russia.

This paper first provides a brief introduction to the EU's practice of applying its Competition Law to conducts in foreign jurisdictions. In the second section, the paper provides the antitrust proceedings initiated against Gazprom and legal discussions between Gazprom and the Commission. This section explores Gazprom's conduct that the Commission regards as anti-competition and its importance with respect to extraterritoriality analysis. The third section provides an extensive legal analysis as to the implications of extraterritoriality in the Gazprom case. In the last section, the paper finally concludes.

I. EXTRATERRITORIAL APPLICATION OF EU COMPETITION LAW

The extraterritorial application of EU Competition Law has been a subject of a strife between the EU Commission (the Commission hereinafter), the primary EU institution tasked with powers to ensure the adherence of EU law across the jurisdictions of member states and the judicial authorities of the EU, the General Court (GC) and the Court of Justice of European Union (CJEU). While the Commission has adopted a more aggressive approach to the application of EU competition law, the GC and the CJEU preferred a more conservative stance on the basis of certain principles stemming from Public International Law[7].

The concept of 'the extraterritorial application of national laws' is apparently at odds with the concept of 'sovereignty', the primary principle, which defines and determines the very nature of public international law. Accordingly, states are free to act unless their actions are prohibited by customary international law or international treaties, of which they are parties[8]. *Argumentum*

[5] The Commission has carried out its energy liberalisation agenda via Commitment Decisions on the basis of Article 9 of Regulation (EC) No 1/2003 (Regulation 1/2003) as well as Article 8 of Regulation (EC) No 139/2004 (Merger Regulation). See, for example; EDP/ENI/GDP (Case COMP/M.3440) Commission Decision 2005/801/EC, [2005] OJ L302/69; *E.ON/MOL* (Case COMP/M.3696) Commission Decision 2006/622/EC OJ L253/20; *RWE/Essent* (Case COMP/M.5467) Commission Decision 23/06/2009 OJ C222/1.

[6] European Commission Press Release, *'*Antitrust: Commission opens proceedings against Gazprom*',* (4 September 2012) http://europa.eu/rapid/press-release_IP-12-937_en.htm. (*last accessed on* 02.09.2020).

[7] Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials,* (7th ed. 2019), p 1197

[8] S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para. 60

in contrario of this principle dictates that states cannot apply their jurisdictions to practices as long as they are considered to be within the sovereignty of other states[9]. Any attempt contrary to this principle would be deemed in breach of sovereignty rights of other states and thus in violation of their obligations under public international law.

Nevertheless, the line that demarcates the scope of the principle of sovereignty is not always easy to draw. Early case law of Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice (ICJ), reveals that certain instances may result in concurrent applications of multiple jurisdictions each of which may establish their authority under the principle of sovereignty. In fact, this phenomenon has been the main reason that underlies the advent of legal principles that deal with conflicts of laws and private international law. Despite significant developments on the harmonization of national approaches to international conduct[10], jurisdictional disputes between states are still far from being scarce.

Extraterritorial application of national competition rules constitutes a major component of disputes between states and is becoming a more contentious topic due to the expansion of international trade and the increase of globalization. Historically, the application of competition rules were understood within the confines of territoriality principle, stipulating that national jurisdictions could be exerted to practices that occurred only within the territory of relevant states. Practices perpetrated within territories of other states had been left outside the scope of national jurisdictions. Nevertheless, the economic developments in the 20th century, especially after the adoption of the General Agreement on Trade and Tariffs[11] and subsequent reduction of national tariffs[12], changed states' perspective of regulating corporate activity. Activities of multinational undertakings in one jurisdiction may have substantial consequences occurring in other jurisdictions. This is particularly evident in mergers and acquisitions that may result in global monopolization in certain sectors[13]. These developments led national authorities to the adoption of a more aggressive approach to dealing with adverse economic effects experienced in national sectors.

In the EU, this recalibration of legal perspective with respect to the extraterritorial application of competition rules has been reflected at administrative level, while judicial bodies were generally reluctant to discard conservative territoriality principle. Even though, the Commission consistently sought to extend its authority under EU Competition Law through citing so called "the effects doctrine" meaning that it has powers to apply EU Competition Law to any international conduct once its anti-competitive effects on EU markets are established, the GC and the CJEU refrained from approving such an overarching authority. Instead, the judicial bodies

[9] Case Concerning Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) ICJ. 1970, p. 105

[10] Harmonization of private international law has been a hot topic since 1893 Hague Conference on Private International Law. Several international organizations such as the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Convention on International Trade law have been instrumental in the harmonization of private international law at global level.

[11] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194

[12] While in mid-1980s the average applied tariff rate across the world accounted for 25 per cent, it was near 10 per cent in 2007. See: Andrew T. Guzman & Joost H.B. Pauwleyn, *International Trade Law* (Aspen Pub., 2009) p.3.

[13] See for example General Electric & Honeywell merger which caused a clash between US and EU authorities. Donna E. Patterson and Carl Shapiro, 'Transatlantic Divergence in *GE/Honeywell*: Causes and Lessons', *Antitrust*, 16, (2001), pp. 18-26.

utilized several other doctrines that address the extent of extraterritoriality with respect to the implementation of EU Competition Law rules.

Prior to *Intel,* the CJEU evaluated the extraterritorial dimension of EU Competition Law under "Single Economic Unit" and "Implementation" doctrines which allowed the court to address foreign conduct without overriding its adherence to the territoriality principle. Nevertheless, in *Intel,* it finally acknowledged the Commission's stance on extraterritoriality, through promulgating that the Commission may exert its authority under EU competition law to foreign conduct on the basis of effects doctrine. The CJEU would not consider this authority as absolute, as it evaluates any international conduct in relation with "the principle of non-interference", that is, EU law cannot be applied to a conduct perpetrated as a result of a legal obligation arising from a foreign jurisdiction[14]. The EU institutions are obliged to refrain from exerting their authority over foreign practices if such practices stem from a legal obligation set forth by an other sovereign. Whether or not such practices have adverse effects on EU markets is irrelevant.

In *Gazprom,* the alleged conduct that the Commission sought to punish was loyalty rebates which were deemed anticompetitive once perpetrators of the conduct was established to hold market power and use that power as an abuse of dominance in violation of Article 102 of the Treaty on the Functioning of the European Union (TFEU). As to be seen below, the majority of allegations raised in relation to Gazprom's practices in EU energy markets were related to the prohibition on abuse of dominance stipulated under Article 102. In order to establish its *prima facie* case, the Commission would seek to convince the GC and the CJEU that it has authority to impose sanctions on Gazprom on the basis of its activities in Russia. Despite acknowledging effects doctrine, the GC and the CJEU would engage in an extensive legal analysis including not only effects doctrine but also Single Economic Unit and Implementation doctrines as the principle of non-interference constitutes a major defense Gazprom would rely on in challenging the Commission's extraterritorial jurisdiction on the basis of effects doctrine.

II. ANTITRUST PROCEEDINGS AGAINST GAZPROM

On September 4, 2012, the Commission announced that it has opened antitrust proceedings against Gazprom on the grounds that the latter abused its dominant position in upstream energy markets of Baltic and Eastern European countries.[15] The announcement was of great importance in the context of EU's single energy market policy since it considered the operations of the Gazprom that have been inherent in the very structure of the European energy market itself, as anti-competitive. The conduct addressed as detrimental to competition in the European energy market was common in almost all energy contracts between energy companies operating across the EU. Furthermore, the fact that the proceedings were initiated against Gazprom, a foreign undertaking incorporated in Russia and one of the most important market players in the EU,

[14] Case T-102/96, *Gencor Ltd v Commission* [1999] ECR II-753, paras. 102-108
[15] See; *supra* 7.

rendered the Commission's proceedings more critical in the EU's energy sector liberalization policy. Thus the Commission's allegations against Gazprom were addressed on three grounds[16].

A.*Destination Clause:* The Commission first asserted that Gazprom was dividing European gas markets by preventing the free flow of natural gas across Member States through resale restrictions in upstream natural gas supply contracts. Territorial restriction clauses that prevent buyers of natural gas from reselling it further in other markets has long constituted a major component of Gazprom's gas supply contracts with its counterparts[17]. Such clauses have allowed the company to reduce potential competition from suppliers inside the EU in EU downstream natural gas markets, as well as to discriminate its customers through determining gas prices separately across the different gas markets across the EU. Destination clauses have been subject to Commission's several commitment decisions with a number of energy supply undertakings such as *ENI*[18] and *OMV*[19]. The final settlement in these cases included the exclusion of these clauses from energy supply contracts and allowing the reselling of natural gas across the European energy market without territorial restrictions. Having found that the contractual relationships that Gazprom entered into with its European counterparts included destination clauses, the Commission sought their removal from the agreements and contractual practice.

B. *Oil Price Indexation:* According to the Commission Gazprom imposed unfair pricing practices against it customers in the EU by linking gas prices to oil prices in its relevant gas supply contracts[20]. These practices allowed the company to discriminate among its EU customers and resulted in price differentials for natural gas across the EU. While the price for a thousand cubic meters (tcm) of Russian natural gas in Germany was $376 in 2013, this was $500 in Lithuania and $526 in Poland[21] and it was between $75 and $97 for per tcm in the Russian domestic market[22].

The practice of oil price indexation has been inherent in Gazprom's long-term natural gas supply agreements with its European counterparts, originating from the principle that oil and natural gas have been alike since they were geographically inter-related and were able to substitute each other in the demand side to a certain extent[23]. The new European initiative considered that this was no longer true for EU natural gas markets as the liquidity of natural gas in the Europe was growing as a result of new supplies introduced from unconventional natural gas resources. Thus natural gas prices should be determined on the basıs of demand and supply forces rather than

[16] See; "Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets", http://europa.eu/rapid/press-release_IP-15-4828_en.htm (*last accessed on* 27/09/2020).
[17] Alan Riley, "Commission v. Gazprom: The Antitrust Clash of the Decade", in *CEPS Policy Briefs*, No. 285 (31 October 2012), p. 8.
[18] *ENI* (Case COMP/39.315) Commission Decision 29/12/2010.
[19] *OMV* (Case COMP/37.811) [2003] Commission Press Release IP/03/1345.
[20] See*; supra* 17.
[21] See; Politico, 'No easy answer in Commission-Gazprom fight' (22 April 2015) http://www.politico.eu/article/no-easy-answer-in-commission-gazprom-fight/ (*last accessed on* 27/09/2020).
[22] See; Euractiv, 'Russia's Natural Gas Dilemma' (11 April 2012), http://www.euractiv.com/energy/russias-natural-gas-dilemma-analysis-512092 (*last accessed on* 27/09/2020).
[23] Alan Riley, p. 9.

through indexation to oil prices[24]. As recent developments in oil and gas markets in the global energy market resulted in separate treatment of these two products, oil price indexation practices in natural gas supply contracts were no longer deemed to be market-based and thus considered as anti-competitive by the Commission[25].

C. *Energy Supply Diversification:* The last allegation that the Commission raised against to Gazprom's practices in the EU's energy market involved that the company engaged into certain market practices that sought to eliminate the EU's policy of "Diversification of Energy Supplies"[26]. Accordingly the Commission asserted that Gazprom has eliminated the EU's diversification policy through:

take-or-pay clauses, which obliged the buyers of energy to pay a certain price, even if the amount of energy that corresponded to the paid price was not used;

refusal to the third party access rights to the existing infrastructures and;

inter-corporal practices between Gazprom and its European contractual partners such as reducing the liquidity, excluding the potential competitors from the energy market[27].

Gazprom was accused of abusing its dominance by requiring its customers to support specific infrastructure projects. Accordingly, in order to receive gas supplies from Gazprom, buyers in Bulgaria and Poland have been required to provide investments in Gazprom's South Stream project and Yamal-Europe pipeline[28]. The Commission's proceedings, in this part, directly focus on Gazprom's vertical integration and its business practice in the EU without limitations of its contractual relations. Therefore, the result of the investigations not only extensively affects the corporal structure of Gazprom, but also has implications in the Russian energy policy in general which makes the proceedings even more critical.

The Commission can fine Gazprom a 10 per cent of its annual turnover,[29] which corresponds to an amount more than € 10 billion[30]. This is 10 times higher than the biggest fine ever levied by the Commission on an undertaking[31] and constitutes a huge financial burden on Russia that also suffers great financial losses due to recent drastic falls in oil prices caused by decrease in China's economic growth and hence its oil demand as well as introduction of new supplies through newly developed unconventional exploration and extraction techniques such as horizontal fracking in the US and new LNG facilities in Australia and Papua New Guinea. Russia's

[24] Recent developments on horizontal fracking and new technologies introduced as to the liquification of natural gas rendered the EU's diversification agenda more plausible and feasible. For further detail, see; *BP Energy Outlook 2030*, London, (January 2012).
[25] See*; supra* 17.
[26] Ibid.
[27] Ibid.
[28] Jonathan Stern & Katya Yafimava, The EU Competition Investigation of Gazprom's Sales in Central and Eastern Europe: A Detailed Analysis of the Commitments and the Way Forward, (OIES 2017), p. 3.
[29] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) para. 32.
[30] In 2013, the revenues that Gazprom acquired through its energy trade business exceeded €120 billion. See: "Gazprom Annual Report 2013", pg. 48.
[31] European Commission press release, 'Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices' (13 May 2009) http://europa.eu/rapid/press-release_IP-09-745_en.htm, (*last accessed on* 27/09/2020).

initiative to diversify its customers through entering into deals with China and Turkey cannot constitute a prompt remedy for losses it suffers due its weakening position in the European market[32]. Norway is currently replacing the Russia's position as the main supplier of natural gas to the European energy market with its 46 per cent of market share while Gazprom's supplies dwindled down to 29 per cent[33]. Therefore the threat that the Commission's antitrust proceedings expose on Gazprom's activities in the European energy market is a serious concern on the Russian side.

Questioning the timing of the Commission's investigation, as it came at a time in which the company was requested for the recalibration of its supply contracts and lower prices in line with the spot prices in the alternative energy supplies, Sergei Kupriyanov, the spokesman for Gazprom said that the Commission's move against the company is a political attempt to pressure Gazprom and influence the negotiations that the company is currently having with its contractual partners.[34] A further response against the Commission came from the Russian Presidency. A week after the Commission's announcement of the proceedings, Vladimir Putin issued an executive order[35] to block the foreign investigations and enforcement of foreign judgments[36]. Accordingly, open joint stock companies on the list of strategic enterprises and their subsidiaries are required to obtain a prior consent from the relevant Russian government authority assigned to them before releasing any information to foreign authorities or agencies or complying with any enforcement decisions taken by foreign regulatory bodies or courts.

The questions of whether the executive order is capable to obstruct Commission's initiative to further the proceedings and investigations and to what extent Commission's dawn raids against Gazprom's European offices were successful to obtain necessary information are discussed by several commentators. They suggested that these blocking statutes may have come too little and too late. These are the questions that this paper does not seek to answer. It must be borne in mind that the importance of the blocking order does not lie on its effects on the Commission's ability to pursue its proceedings. Once the case is brought before to the GC, and at the end the CJEU, the blocking order will have serious implications with respect to the enforcement of the remedies issued by the European Courts. Nevertheless, the blocking order is not limited to a specific sector;

[32] Construction of new supply routes that Russia developed with China and Turkey to reduce its dependence on European downstream gas markets will also cost billions of dollars to Russian economy. Therefore these projects can be toxic for Gazprom. See; 'How Russian energy giant Gazprom lost $300bn' (7 August 2015) http://www.theguardian.com/world/2015/aug/07/gazprom-oil-company-share-price-collapse, (*last accessed on* 27/09/2020).

[33] European Commission, 'Quarterly Report on European Gas Markets', 8/1, [2015], pg. 3, https://ec.europa.eu/energy/sites/ener/files/documents/quarterly_report_on_european_gas_markets_q1_2015.pdf, (*last accessed on* 27/09/2020).

[34] Catherine Belton, Alex Barker and Joshua Chaffin, "Kremlin Shield from EU Probe", The Financial Times, (11 September 2012). https://www.ft.com/content/fcdbe0e4-fc31-11e1-ac0f-00144feabdc0, (*last accessed on* 27/09/2020).

[35]Executive order of the President of the Russian Federation No 1285 of 11 September 2012 on Measures to Protect Russian Federation Interests in Russian Legal Entities' Foreign Economic Activities, *see* http://eng.news.kremlin.ru/news/4401. (*last accessed on* 27/09/2020).

[36]Blocking legislations has been used continuously by States as a defence against the United States' practice of extraterritorial application of antitrust laws. For further information *see* Marek Martyniszyn, 'Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order', *Journal of World Competition*, 37/1, (2014), pp. 103-120.

its timing and context clearly indicate that the main purpose of the order is to hinder the Commission's further investigations and proceedings against Gazprom and its subsidiaries operating across the EU.

Enacting the blocking legislation, Russia also asserts that the Commission lack of jurisdiction in prosecuting Gazprom having the status of strategic state-controlled entity and hence is subject to the EU State Aid rules that cannot be applied to a company incorporated in a non-member state[37]. Nevertheless the Commission points out that Gazprom is an undertaking active in the EU and thus has to follow the EU antitrust rules[38]. This is where the concept of extraterritoriality in EU law plays an important role for the establishment of jurisdiction.

III. ANALYSIS OF EXTRATERRITORIALITY IN GAZPROM CASE

It is reasonable to anticipate that the first objection that Gazprom would raise against the Commission' proceeding would be that the Commission lacks the jurisdiction to investigate Gazprom, since the company is incorporated outside the EU. Gazprom will try to convince the Court that it cannot be held liable for the actions of its subsidiaries in the EU, because they are separate legal entities and there is no enough structural evidence indicating that the subsidiaries have acted in accordance with the instructions given to them by their parent company. Claiming that it has not acted in violation of Articles 102 and its conducts outside the EU has no immediate, substantial and reasonably foreseeable effects on the trade in internal market. Gazprom would assert that the Commission is in breach of public international law, violating the jurisdiction of another sovereign state, the RF.

Jurisdictions are divided into two categories; Prescriptive Jurisdiction and Enforcement Jurisdiction.[39] While the former refers to the jurisdiction of courts, the latter focuses on the enforcement of the judicial or governmental decisions reviving the sovereignty issues between conflicting parties. Even though, prescriptive jurisdiction has been historically exercised on the grounds of territoriality and nationality principles, effects doctrine has also been regarded as a legitimate reason for courts to exercise their judicial authority. The Commission has been the main proponent of the effects doctrine in the analysis of extraterritorial application of EU antitrust laws since *Dyestuffs* case and the concept was also acknowledged by the GC in *Gencor*[40] as a principle of jurisdictions, consonant to the public international law. It must be borne in mind that the Commission accuses Gazprom on the ground that the company abuses its dominant position in

[37]See; Gazprom, 'Statement of OAO "Gazprom" with respect to the adoption of "statement of objections" by the European Commission under the antitrust investigation' (22 April 2015), http://www.gazprom.com/press/news/2015/april/article224444/, (*last accessed on* 27/09/2020).

[38]See; European Commission press release, 'Statement by Commissioner Vestager on sending a Statement of Objections to Gazprom', (22 April 2015), http://europa.eu/rapid/press-release_STATEMENT-15-4834_en.htm, (*last accessed on* 27/09/2020).

[39] Cedric Ryngaert, '*Jurisdiction in International Law',* (Oxford University Press, 2008). For further detain on jurisdiction under public international law versus adherence to competition policies, see; Chie Sato, Extraterritorial Application of EU Competition Law –Is It Possible for Japanese Companies to Steer Clear of EU Competition Law?, *Journal of Political Science and Sociology,* No. 11, (2010), 23-47.

[40] "Application of the (Merger) Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community." T-102/ 96 *Gencor Ltd v. Commission* [1999] ECR II-753, para 90.

upstream markets in certain regions of EU[41]. The culprit according to the Commission was not the Gazprom's subsidiaries, branches, or agencies in the EU but Gazprom itself, which, as claimed by the Commission, abuses its dominance by distorting flow of energy through territorial jurisdictions, unfair pricing and hindering the diversification of supply[42]. The Commission, main proponent of effects doctrine in the EU antitrust law, would assert that Gazprom's practices have immediate, substantial and reasonably foreseeable impact on internal market and therefore, it has legislative jurisdiction over Gazprom's practices outside the EU.

A. Single Economic Unit Doctrine

It is hard to predict which doctrine that the CJEU would follow with respect to the Gazprom Case. Single economic unit doctrine is certainly the most efficient, releasing the CJEU from the burdens of proving its extraterritorial jurisdiction, and issuing the enforcement measures. This doctrine is based on the nationality of the undertakings. The fact that the subsidiaries of Gazprom are generally located in the EU and incorporated within the Member States allows the CJEU to impute the liability on Gazprom without addressing the problems of extraterritorial jurisdiction. The doctrine also enables CJEU to acknowledge the fines imposed by the Commission on the subsidiaries, branches or agencies due to the actions of parent companies. In order to apply the doctrine, the Commission must establish that the subsidiaries, branches, or agencies are not able to decide independently upon their own conducts on the market but follows orders and instructions given to them by Gazprom[43]. Yet the Commission's focus is on Gazprom's upstream activities in Central and Eastern European gas supply markets.

As discussed above, there are three anticompetitive practices allegedly committed in by Gazprom:

dividing gas markets through destination clause hindering the free flow of gas across Member States;

preventing the diversification of supply of gas,

imposing unfair prices on its customers by linking the price of gas to oil prices[44].

Accordingly, the Commission seeks the termination of certain clauses and articles in Gazprom's long-term energy supply and capacity contracts as well as the dismantlement of the undertaking's vertical integration, by obliging the company with the divestiture of its assets in the midstream and downstream energy markets. Since the European subsidiaries of Gazprom are not the parties to the contracts that the Commission means to revise, single economic unit doctrine is not feasible way for the purposes of the case.

[41] See; *supra* 7.
[42] Consumer welfare has been considered as a major objective in US antitrust litigation. For a detailed analysis on the divergence in *GE/Honeywell* between the US and the EU, see; *supra* 14.
[43] Case 48/69, *ICI v. Commission* (Dyestuffs) [1972] ECR 619 para. 133.
[44] Briony Hale, GE-Honeywell: Hope Lives on, (22 June, 2001) *BBC News Online*, http://news.bbc.co.uk/1/hi/business/1402399.stm, (*last accessed in* 02.09.2020).

B. Implementation Doctrine

In *Wood Pulp* case, establishing the jurisdiction, the CJEU put emphasis on where the conduct was implemented[45]. The CJEU certainly has jurisdiction over conducts that are implemented within the EU due to the principle of territoriality. The question with respect to the Gazprom case is the whether the company has committed an anticompetitive behaviour that is implemented in the EU. According to the Commission's press release on the antitrust proceedings on Gazprom[46], the Russian company is suspected to be in violation of Article 102 because of, inter alia, the context of its contracts including destination clauses and oil price indexation. In paragraph 17 of its judgment in the *Wood Pulp* case, the CJEU held that it is immaterial whether or not the undertakings resort to their subsidiaries, branches or agencies for the implementation of their agreements[47]. The mere sale is sufficient for the CJEU to consider that it has the legislative jurisdiction to apply the EU antitrust laws and the Gazprom can be held liable for its sales to the EU under the contracts with destination clauses and oil price indexation.

However, the implementation doctrine is silent with respect to the structural remedies that the Commission seeks to incur to Gazprom. As requiring Gazprom to abide by the rules laid out in the "Third Energy Package"[48], the Commission considers the Gazprom's vertical integration as a detriment to the internal energy market[49] and seeks Gazprom to sell its assets on the transmission networks and storage facilities. The CJEU in this case has to consider to what extend the vertical integration of Gazprom can be regarded as a conduct that is implemented in the EU. As Advocate General Darmon puts it in its opinion[50] in the *Wood Pulp* case, the enforcement of specific measures such as structural remedies and recovery of fines may require "Enforcement Jurisdiction", which is closely connected to the principle of State sovereignty. According to AG Darmon, public international law prevents a state from enforcing its jurisdiction in another state's territory. The reason behind the prohibition dates back the ruling in *Lotus* where a state was allowed to enforce its jurisdiction in international waters[51]. The Court ruled that states are allowed to enforce their jurisdiction unless they violate another's sovereignty. The vertical integration is outside the EU as Gazprom is a Russian undertaking incorporated in Moscow and any structural remedy on the side of the company requires CJEU to enforce its decision in Russia. This can be possible, if not certain, by both the EU and Russia entering into a bilateral agreement regarding the application of their competition rules in each other's soil and including obligatory positive

[45] Cases 89, 104, 114, 116, 117, and 125-129/85, *A. Ahlström Oy v. Commission* [1988] ECR 5193 para. 16.
[46] See; *supra* 7.
[47] Cases 89, 104, 114, 116, 117, and 125-129/85, *A. Ahlström Oy v. Commission* [1988] ECR 5193 para. 17.
[48] See; *supra* 3.
[49] The Commission's position against the vertical integration dates back the EU's agenda of liberalisation in the energy markets. The Third Energy Package, adopted in 2009 provides that all the vertically integrated companies in the energy sector have to be unbundled for the purposes of securing Third Party Access rights to the transmission networks. For further detail see; Christopher Jones (ed), '*The Internal Energy Market: The Third Liberalisation Package',* (Claeys & Casteels, 3rd ed., 2014).
[50] See Opinion of Advocate-General Darmon in the 'Wood pulp' cases, delivered on 25 May 1998 in Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Ahlström Osakeyhtiö and others v Commission of the European Communities ("Woodpulp") [1988] ECR II-5193, at para. 28 ff.
[51] Ibid para. 29 ff. For Lotus Case, see; S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

comity provisions requiring the parties to enforce their antitrust decisions[52]. Otherwise, dismantlement of Gazprom's vertical integration would be only possible on the negotiation table, rather than via the Court's decision.

C. Effects Doctrine

Prior to *Intel*[53] decided in 2017, the CJEU had consistently avoided referring to the "effects doctrine", when applying the EU law to foreign conducts extraterritorially. The reason why the Court preferred this course of precedence stems from the understanding of ordoliberal thinking[54], stipulating that the maintenance of competition within the relevant markets can only be ensured with the protection of potential competitors, which serve the purposes of economic welfare and European integration. During the last decade the general understanding of the EU's competition policy has started to change with the Regulation 1/2003[55] transforming from a formal and structuralist approach to a more effects-based and functionalist economic approach.

The Commission has been putting forward the 'the effects doctrine' since the *Dyestuffs* case mostly due to its review of US experience[56]. The Commission's insistence on the effects doctrine finally gave its fruit on the judicial level in *Intel* in which the CJEU confirmed the GC's ruling stating that the court can exercise its jurisdiction "when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union"[57]. The CJEU further stated that availability of probable effects of conduct on competition would suffice for the determination of foreseeability under the effects doctrine[58]. This statement implied an overarching authority enjoyed by the Commission in anti-competition proceedings at least under Article 102 which was criticized by the Advocate General of the case Nils Wahl giving notice that such a ruling "would risk encroaching upon the sovereign interests of other States and be legally and practically difficult enforce (…) also considerably increase overlapping in the jurisdictions of different States or policies and thereby create uncertainty for undertakings and increased risks of conflicting rules (or judgements) applying to the same conduct"[59]. ,

Given the recalibration of EU competition policy, the Commission's investigation in *Gazprom* reflects the new effects based and functionalist approach focusing on directly the effects

[52]For the bilateral agreement between EU and Russia see; Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States and the Russian Federation 30 October 1997, 97/800/EC,ECSC, Euratom. Involving a memorandum of understanding subject to the parties' discretion, the agreement lacks binding provisions on the cooperation in the antitrust investigations.

[53] Case C-413/14 P, *Intel Corp. v European Comm'n*, ECLI:EU:C:2017:632.

[54] The idea of Ordoliberalism was also referred as Freiburg School holding that the competition among many competitors is substantial for economic welfare. See further D. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the 'New Europe', *American Journal of Comparative Law* 42, (1994), pp. 25-84.

[55] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 04.01.2003.

[56] Advocate General Mayras in *Dyestuffs* reviewing national laws of Member States and US laws justified the adoption of effects doctrine not just by reference to the principle but also grounds of pragmatism. See; Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials*, (5th ed. 2014), p 1272.

[57] Case C-413/14 P, *Intel Corp. v European Comm'n*, ECLI:EU:C:2017:632 para. 49.

[58] I*bid.*, para. 51.

[59] The Opinion of Advocate General Wahl delivered on 20 October 2016 in Case C-413/14 P. *Intel Corp. v. European Comm'n*, ECLI:EU:C:2016:788, para. 303.

of conducts on consumer welfare and the internal market. The approach taken by the Court in the Gazprom case will have important implications with respect to the understanding of EU competition law. The test that the CJEU may use in the Gazprom case would certainly address effects of the relevant conduct in the internal market, irrespective of whether or not the CJEU directly refers to the effect doctrine. The court may apply the three-fold test as applied by the General Court in *Intel* and *Gencor* case or interpret the implementation doctrine in a way that it applies to Gazprom's vertical integration as a conduct implemented in the EU. The Case will shed light upon the extraterritorial application of EU competition law after the Regulation 1/2003 and clarify how it would be interpreted in a highly concentrated and newly liberalized market. After establishing that the Gazprom's practices have immediate, substantial and reasonable foreseeable effects on the internal market or the Gazprom's vertical integrations has been implemented in the EU with its long-term supply contracts with European buyers, the CJEU will turn on the issue of international comity as conceptualised in the EU case law, 'principle of non-interference'.

D. Principle Non-Interference

Since the extraterritorial application of national laws constitute interference in another state's sovereignty, principle of non-interference is fundamental for the legality of jurisdiction in public international law. Initially addressed in the US, in 1976, *Timberlane,* the US Supreme Court acknowledging the need for the limitations to the ruling of *Alcoa,* adopted a balancing mechanism, through which the US courts should act in a way to avoid interference with the jurisdiction of other states and the national jurisdiction should not be exercised, if interests of foreign state at stake outweigh the interests of the US[60]. *Hartford Fire Insurance*[61], reformed the balancing mechanism and established that the states should refrain from applying their jurisdiction where a "True Conflict"[62] between the national laws exists. The case also identified what constitutes a true conflict. Accordingly, if the undertaking is able to comply with both of the national laws, it is regarded that there is no true conflict between the relevant jurisdictions and the State can apply its antitrust law extraterritorially.

In *Gencor,* the Court held that

"*the South African competition authorities simply concluded that the concentration agreement did not give rise to any competition policy concerns, without requiring that such an agreement be entered into"*[63]. [Italics added].

The Court further noted that

[60] *Timberlane Lumber Co v. Bank of America,* 549 F.2d 597 (9th Cir. 1976).
[61] *Hartford Fire Insurance Co. v. California,* 509 US 764, 113 S. Ct 2891 (1993).
[62] In *Hartford Fire Insurance* case, the Supreme Court divided 5 to 4. The Court did not engage in comity balancing. Instead the question was if a true and direct conflict existed between US and UK law. The Court declared that no conflict exists where a person can comply with the laws of both nations at the same time. Justice Scalia dissented saying that national legislatures limit the reach of the laws they write out of respect for other nations' rights to govern the structure and regulation of activity on their territory. This legislative restraint, according to Scalia was mandated by US's self-regarding respect for the relevant interests of foreign nations in the regulation of their commerce as part of the legitimate concern of the international community. For further details see; Eleanor M. Fox, 'National Law Global Markets and Hartford: Eyes Wide Shut' (2000), *Antitrust Law Journal* 68/1, 73-86.
[63] T-102/ 96 *Gencor Ltd v. Commission* [1999] ECR II-753, para. 103.

"*neither the applicant nor, indeed, the South African Government (…) have shown, beyond making mere statements of principle, in what way the proposed concentration would affect the vital economic and/or commercial interests of the Republic of South Africa"*[64]. [Italics added]

The EU followed an approach very similar to that of the US examining whether the foreign undertaking is compelled to conclude a certain action by its national authorities, or it is only allowed to pursue the course of action. If the former is present, then the court should dismiss the case based on the principles of Foreign Sovereign Compulsion, the Act of State[65].

In *Gazprom*, the CJEU has to decide whether the anticompetitive practices committed by Gazprom are required by the Russian Government or the role of the government is only limited to an official approval provided for related conducts. It must be pointed out that the connection between Gazprom' operations and the incentives of Russian foreign interests is murky. Russian political elite having a great influence on the Russian foreign policy are also stakeholders in the company. Gazprom, acting as a political arm of the RF, played an important role in the gas crises[66] experienced in last decade. For example, political collision between the Russian and Ukrainian officials was followed with the Gazprom's interruption of energy supply, asserting that the flows were cut due to the debts owned by Ukrainian state-owned entity Naftogaz. It has been stated by the officials that Gazprom cannot supply natural gas to Ukraine for free. However, why Gazprom allowed Ukrainian debt to reach up to even the $1.6bn which, as confirmed by Naftogaz was due, let alone to the $2.2 bn Gazprom demands to be paid by the end of the year is an open question[67].

It is important to see the correlations between the RF's interests and Gazprom. As the RF uses the company to expand its influence over certain regions, Gazprom also plays an important role in RF's determination of its foreign policy. Enjoying an exclusive right to transport and export the natural gas originated in Russia or bought from Central Asian states such as Kazakhstan, Turkmenistan and Uzbekistan to sell into the EU, Gazprom opposed numerous proposals for energy market liberalization in Russia and was the main barrier before the introduction of competition in the Russian market[68]. None of these proposals has been adopted. The company is also responsible for the failure of the Energy Charter Treaty (ECT), adopted to regulate energy trade between EU and Russia. The main opposition against the ratification of the ECT came from lobbying activities of Gazprom[69]. The company argues that the Treaty provisions contain a threat

[64] *Ibid*, para. 104.

[65] Marek Martyniszyn, 'Export Cartels: Is it Legal to Target your Neighbour? Analysis in Light of Recent Case Law', *Journal of International Economic Law*, 15/1,(2012), pp. 181-222, p. 210.

[66] In 2004, 2006, and 2009, the Russia cut off the energy flow going to the Ukraine. Especially the gas crisis in 2009 that lasted two weeks caused humanitarian concerns that the households, hospitals could not be heated in the middle of winter and disrupted the functioning of local industries in countries where the dependence on Russian gas is high. Simon Pirani, Jonathan Stern, & Katya Yafimava,'The Russo-Ukrainian gas dispute of January 2009: a comprehensive assessment', *Oxford Institute for Energy Studies* Oxford (2009), pp. 14-19.

[67] Nicolò Sartori, 'The European Commission vs. Gazprom: An Issue of Fair Competition or a Foreign Policy Quarrel?', *IAI Working Papers* 13/03, (2013), p. 2.

[68] Andrey A Konoplyanik, "Gas Transit in Eurasia: Transit Issues between Russia and the European Union and the Role of the Energy Charter," *Journal of Energy & Natural Resources Law*, 27/3, (2009), pp. 445-486, p. 464. See also: Thomas W. Walde & Andreas J. Gunst, "International energy trade and access to energy networks," *Journal of World Trade*, 36/2, (2002), pp. 191-218.

[69] Reiner Liesen, "Transit under the 1994 Energy Charter Treaty," *J. Energy & Nat. Resources L.*, 17/1, (1999), pp. 56-73, p. 62.

of future obligations of the third party access which will apparently reduce Russia's influence over the regions, in particular in Central Asia, introducing competition between Russian gas and the energy resources from other resource endowed countries. The close integration of Gazprom and the Russian government is, in fact, the result of the idea of neo-nationalisation put into practice by President Vladimir Putin[70], which renders the practices of Gazprom in the energy sector more controversial.

The Commission is well aware of political implications of the case. As a policy of liberalization, the Commission has been exerting political and economic pressure over the Member States. This resulted in the cancellation of the South Stream Pipeline project in September 2014[71], by pressuring Bulgaria to withdraw from the project that had been proposed by Russia to bring the Russian gas through the Black Sea basin, bypassing the Ukraine reducing Russia's dependence on supply routes located in Ukraine. The Commission has sought to prevent Russia from using the pipeline as a way to enable Gazprom to maintain its tight grip on the internal energy markets. Accordingly, the only way that the Gazprom could build the pipelines is allowing access to the pipelines from third party suppliers. Gazprom rejected this since the Energy Charter Treaty negotiations. As implied from its previous proceedings, the Commission is determined to attack foreign conducts because it regarded as anticompetitive despite strong political opposition.

In order to establish its jurisdiction over the issue, the CJEU has to provide an analysis as to whether Gazprom is compelled to pursue the course of actions regarded as anticompetitive by the Commission. There are strong physical connections between Gazprom and the Russian Government and the CJEU has to understand to what extend Gazprom was able perform on its own discretion. This may be a difficult task for the Court to accomplish due to the lack of transparency in the decision-making process in the corporate and governmental level. However, brushing aside the comity by claiming an overriding interest in enforcement may further lead to unsatisfactory outcomes. The single European energy market is a long-sought interest pursued of the EU, but the Gazprom's position in the energy policy stems from the decades long Russian foreign policy. Gazprom's business activities and relations in the EU represent the most vital economic and commercial interests of the RF. This certainly amounts to a collision between hardcore interests of two important actors in the energy market. It is important to note that the Russian government already issued a blocking legislation to hinder the ongoing proceedings and if the European Courts held in favour of the Commission to stop the enforcement of the decision. Under strict orders from the relevant government agency, Gazprom can deny any course of action dictated by the Commission, which will further increase the tension between the EU and Russia.

[70] In its doctoral dissertation, Vladimir Putin proposed that the RF should use its natural resources and fixed infrastructure as a means to promote its political influence on Eastern Europe, Circassia, and Central Asia. See futher; Martha Brill Olcott, "Vladimir Putin and the Geopolitics of Oil" *The Energy Dimension in Russian Global Strategy*, (Houston: The James A. Baker III Institute for Public Policy of Rice University, 2004).

[71] Euractive, 'Cancellation of South Stream makes economic sense', (12 December, 2014) http://www.euractiv.com/sections/energy/cancellation-south-stream-project-makes-economic-sense-310788 (*last accessed in* 02.09.2020).

CONCLUSION

Gazprom is of great importance in the application of the EU law in the energy sector. It is named by some commentators as the "*antitrust clash of the decade"*[72] due to its legal, economic and political implications. The case may shed light upon the concept of 'abuse of dominance' in the energy sector, since the all of the legal disputes in the sector were resolved through the commitment decisions. The issue of what kind of actions may constitute the abuse of dominance in the context of Article 102 has not been identified in the case law so far. Here the paper focused on how the case may clarify the extraterritorial application of EU competition law after the 1/2003 Reform Regulation and to what extend the legal experience so far can provide an answer for the CJEU's jurisdiction over the case.

It must be borne in mind that the case is just a small portion of overall picture between the tension between the RF and the EU. It is unreasonable to expect from the CJEU to provide an overall solution to the all the disputes that the parties are having with respect to the energy sector. However, the Commission should not employ its competences under EU competition law as a political tool to exert a pressure over Russia. Gazprom is an important player in the energy sector with its presence in several downstream and midstream markets, owning assets of transmission networks, storage facilities, and LNG terminals across the Europe. Russia, on the other hand, is the major supplier and partner of the EU in the energy sector. The Commission has serious concerns with respect to the economic strength and market power of Gazprom in the EU. However the Commission should be aware that the evolution in the understanding of Russia regarding to its energy policy cannot be overcome by a single case brought before the CJEU. Drastic changes in third countries' domestic policies, especially in those of the RF, should not be enforced through utilization of extraterritorial application of EU antitrust. This may alienate the Russia from the EU and even result in cessation in diplomatic relations which would definitely be a catastrophe for both parties.

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[72] Supra 17.

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