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Martyniszyn, M. (2014). Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order. *World Competition*, 37(1), 103-119.
<http://www.kluwerlawonline.com/abstract.php?area=Journals&id=WOCO2014006>

Published in:
World Competition

Document Version:
Peer reviewed version

Queen's University Belfast - Research Portal:
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LEGISLATION BLOCKING ANTITRUST INVESTIGATIONS AND THE SEPTEMBER 2012 RUSSIAN EXECUTIVE ORDER

Marek Martyniszyn¹

ABSTRACT

This article offers a typology of so-called blocking legislation and analyses its development, functions and legality under international law. It also presents and discusses the new Russian blocking Order, issued in September 2012, focusing on its possible effects on the European Commission's investigation of Gazprom's business practices (in light of EU competition law) as well as, more broadly, on foreign operations of Russian strategic enterprises.

Disclaimer: This is a pre-edited manuscript. The final, edited version was published in Issue 37(1) of World Competition. It is available online at <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=WOCO2014006>

I. INTRODUCTION

In September 2012 the President of the Russian Federation issued an Executive Order on Measures to Protect Russian Federation Interests in Russian Legal Entities (the blocking Order).² The Order hinders foreign investigations and enforcement of foreign decisions and judgments against Russian strategic enterprises. In particular, it subjects the compliance with any foreign requests for information or discovery requests and with potential foreign decisions and judgments (especially behavioural and structural remedies) to prior authorization by a respective federal executive body authorized by the Russian government. The consent shall not be granted if the sought actions are considered harmful to Russia's economic interests.

Blocking legislation is not a new invention. It has been used in the past—most often in antitrust to shorten the long arm of US jurisdiction. It developed over time from a narrowly crafted measure focusing on particular sectors of economy and usually blocking foreign discovery, to measures of more general application, affecting foreign enforcement efforts also beyond the investigation stage. The new Russian Order serves similar functions, but it also has features unseen in the blocking legislation of other States.

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² 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 [Указ Президента РФ от 11 сентября 2012 г. N 1285 "О мерах по защите интересов Российской Федерации при осуществлении российскими юридическими лицами внешнеэкономической деятельности"], (2012), <http://text.document.kremlin.ru/document?id=70125938&byPara=1> (accessed 11 Nov. 2013). For a short press release in English see Executive Order on Measures Protecting Russian Interests in Russian Legal Entities' Foreign Economic Activities, (11 Sept. 2012), <http://eng.news.kremlin.ru/news/4401> (accessed 11 Nov. 2013). For original Russian text and an unofficial English translation see Annex I (p 12).

The blocking Order seems to be an early Russian official response to the European Commission's investigation of Gazprom's business practices.³ The Commission has concerns that Gazprom may be abusing its dominant market position in upstream gas supply markets in Central and Eastern European Member States, in breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU).⁴ The blocking Order was signed by the Russian President a week after the European Commission announced the opening of the formal proceedings and it was not anticipated.⁵

This article makes a twofold original contribution to the existing literature. First, it offers a typology of blocking legislation and analyses its development, functions and legality under international law. Second, it presents and discusses the new Russian blocking Order, focusing on its possible effects on the European Commission's investigation of Gazprom's business practices as well as, more broadly, on foreign operations of Russian strategic enterprises.

II. TYPOLOGY

The phrase 'blocking legislation' (or 'blocking statutes') describes domestic laws and provisions which result in hindrance, or obstruction of foreign enforcement measures. Five main types of such legislation can be distinguished: (1) 'pure' blocking legislation, (2) privacy protection legislation, (3) professional secrecy laws, (4) bank secrecy laws, (5) laws on classified information (State secrets). 'Pure' blocking legislation (blocking legislation in the narrow sense) denotes legislation which directly and principally negatively affects or obstructs foreign enforcement measures. From a foreign perspective it seems that this is the *raison d'être* of such measures, although from the perspective of the forum they are typically enacted to protect sovereignty and a State's important interests. Four other identified types of legislation serve primarily other functions, while having an ancillary capacity of negatively impacting on foreign enforcement measures.

By looking at different types of affected foreign enforcement measures (a distinction based on the stage of foreign enforcement being affected), one can differentiate between blocking legislation: (1) hindering foreign investigatory or adjudicatory processes, and (2) frustrating or obviating

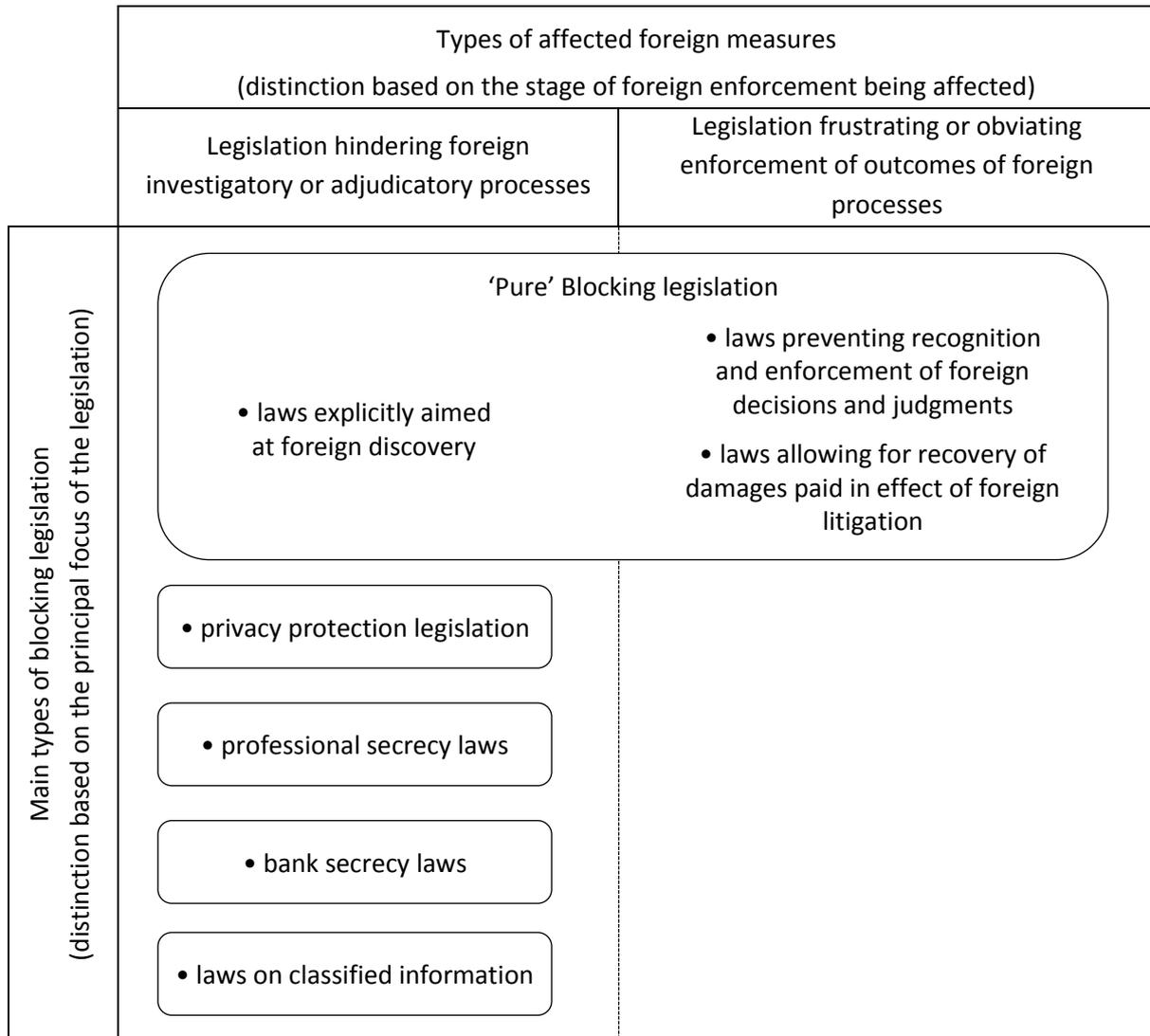
³ European Commission, IP/12/937, Antitrust: Commission Opens Proceedings Against Gazprom (4 Sept. 2012), http://europa.eu/rapid/press-release_IP-12-937_en.htm (accessed 11 Nov. 2013). The investigation has been initiated following a formal complaint about Gazprom practices lodged with the Commission by Lithuania. Milda Seputyte, 'Lithuania Seeks EU Probe Into Possible Gazprom Abuse', *Bloomberg*, 25 Jan. 2011, <http://www.bloomberg.com/news/2011-01-25/lithuania-asks-eu-to-look-into-possible-market-abuse-by-gazprom.html> (accessed 11 Nov. 2013).

⁴ Three types of possible anticompetitive practices of Gazprom are under investigation: (1) usage of 'no resale' clauses in supply contracts—hindering a free flow of gas across the EU and effectively splitting up the single market; (2) prevention of diversification of gas supplies, which may be considered in breach of the special responsibility doctrine under Art. 102 TFEU (as articulated by the European Court of Justice in Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461, para 57); and (3) imposition of unfair (excessive, exploitative) pricing by linking oil and gas prices in long-term contacts. For more about the European Commission's investigation and its broader context see Alan Riley, 'Commission v. Gazprom: The Antitrust Clash of the Decade?' (CEPS Policy Brief No. 285, 2012), <http://www.ceps.eu/ceps/dld/7433/pdf> (accessed 11 Nov. 2013); Nicolò Sartori, 'The European Commission vs. Gazprom: An Issue of Fair Competition or a Foreign Policy Quarrel?' (IAI Working Papers No. 13-03, 2013), <http://www.iai.it/pdf/DocIAI/iaiw1303.pdf> (accessed 11 Nov. 2013).

⁵ As one commentator pointed out, the Order 'was written with lightning speed and took all the companies ... completely by surprise'. Konstantin von Eggert, 'Due West: Putin's Intervention in Gazprom Probe Set to Backfire', *RIA Novosti*, 14 Sept. 2012, <http://en.rian.ru/columnists/20120914/175955751.html> (accessed 11 Nov. 2013).

enforcement of outcomes of such processes. In fact, most types of blocking legislation fall into the first category. Such measures actually or potentially limit the collection of and access to information and evidence located in the forum for use in foreign proceedings. The second category encompasses only some types of the ‘pure’ blocking legislation. These are laws (1) preventing recognition and enforcement of foreign decisions and judgments, (2) allowing domestic companies to recover—via domestic processes—the damages paid by them in effect of foreign litigation (so-called claw-back provisions).

Exhibit 1 Foreign Blocking Legislation: Typology



III. HISTORICAL PERSPECTIVE ON THE ‘PURE’ BLOCKING LEGISLATION

Blocking legislation was originally introduced in reaction to the US reliance on extraterritoriality in antitrust, as a mean of shortening the long arm of US jurisdiction. Probably the first such legislation—the Business Records Protection Act⁶—was introduced in the Canadian province of

⁶ Business Records Protection Act, R.S.O. 1990, c. B.19.

Ontario in 1947. It prohibited, subject to quasi-criminal sanctions,⁷ complying with foreign discovery orders. It was enacted in response to US discovery orders addressed to Canadian companies regarding production of documents for use in the US grand jury cartel investigation in the paper industry.⁸ Later blocking legislation was enacted—always reactively—in numerous jurisdictions, including: Australia, Belgium, Denmark, Finland, France, Germany, Italy, New Zealand, Norway, Philippines, South Africa, Sweden, and the UK.⁹ Moreover, in the antitrust context, blocking legislation was introduced only in reaction to the long reach of US jurisdiction.

Initially most of the blocking statutes were very narrowly drafted. Some took the form of orders addressed to particular companies in their home jurisdictions prohibiting them from complying with US requests for documents,¹⁰ in some cases without clear legal basis.¹¹ Sometimes such legislation applied only to a particular sector of the economy.¹² The major wave of blocking legislation was enacted in response to the Uranium litigation in the US.¹³ The case was extremely politically charged. It concerned an international uranium cartel created by non-US uranium producers under the patronage and out of initiative of their respective governments in response to an official US prohibition on purchasing uranium from non-US producers.¹⁴ It led to the introduction and further development of blocking legislation internationally—in terms of the scope of application and gravity of its effect. In particular, the newly enacted legislation not only frustrated foreign investigations by hindering¹⁵ or barring¹⁶ access to business records. It also contained provisions either empowering

⁷ These were quasi-criminal sanctions as under Section 91(27) of the Canadian Constitution Act of 1867 the federal Parliament has the exclusive legislative jurisdiction to introduce criminal sanctions. See, generally, Patrick Malcolmson and Richard Myers, *The Canadian Regime* (University of Toronto Press, 2012) 137-38.

⁸ *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Co.*, 72 F.Supp. 1013 (S.D.N.Y. 1947).

⁹ Many of the statutes have been reprinted in Alan Vaughan Lowe, *Extraterritorial Jurisdiction: an Annotated Collection of Legal Materials* (Cambridge: Grotius Publications, 1983). See also extracts from diplomatic notes filed in and speeches relating to some of the earlier controversial cases in George Winthrop Haight, 'Extracts from some Published Material on Official Protests, Directives, Prohibitions, Comments, etc.', 51 International Law Association Reports of Conferences 565 (1964), at 129, 31.

¹⁰ That was the case in France, Italy, the Netherlands, and in the UK (see extracts reprinted in Haight, above n 9, at 569-70, 72.) in reaction to US investigation of an alleged international petroleum cartel in early 1950s. *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining & Distribution of Petroleum (Oil Cartel)*, 13 F.R.D. 280 (D.D.C. 1952).

¹¹ As was the case in the UK. See Frederick Alexander Mann, 'Anglo-American Conflict of International Jurisdiction', 13(4) ICLQ 1460 (1964), at 1461-62.

¹² One such example is blocking legislation introduced in Belgium, Denmark, Finland, Germany, Norway, and Sweden in response to US Federal Maritime Commission's investigation, in the early 1960's, of alleged breaches of US antitrust in maritime transport.

¹³ *In re Uranium Antitrust Litigation*, 473 F.Supp. 382 (N.D. Ill. 1979).

¹⁴ See generally Spencer Weber Waller, *Antitrust and American Business Abroad*, 3rd ed. (St. Paul Minn.: West Group, 1997-2010) § 6:14. See further Earle Gray, *The Great Uranium Cartel* (Toronto: McClelland and Stewart, 1982).

¹⁵ For example, under Section 2 of the UK's Protection of Trading Interests Act 1980, c. 11, <http://www.legislation.gov.uk/ukpga/1980/11> (accessed 11 Nov. 2013) the Secretary of State has discretion to prohibit compliance with foreign discovery requests. Under Section 1 of the 1978 South African Protection of Business Act, Act 99, as amended, compliance with foreign discovery orders is prohibited, except when permitted by the Minister of Economic Affairs. The French blocking legislation—Law No. 80-538 of 16 July 1980—prohibits compliance with any foreign discovery orders, apart from these made in line with international agreements. It makes it also unlawful to request any materials for use in foreign administrative or judicial proceedings, but for these made under international agreements. For an unofficial translation of the French blocking provisions and their analysis see Bate C. Toms III, 'The French Response to the Extraterritorial

authorities to block recognition and enforcement of foreign antitrust judgements,¹⁷ or blocking such recognition and enforcement by default.¹⁸ Moreover, some statutes contain claw-back provisions targeted at foreign (essentially US) multiple damages awards. When damages are paid by a company in a foreign jurisdiction, claw-back provisions provide a cause of action in the home jurisdiction against the plaintiff in the original action in the foreign jurisdiction (the recipient of the damages) to recover usually the non-compensatory part of the award. The UK was the first to enact such legislation.¹⁹ Australian claw-back provisions went even further. They allow for recovery of the full amount of the paid damages, as well as for the recovery of reasonable costs and expenses incurred in the underlying foreign antitrust proceedings.²⁰ In 1990 the UK and Australia concluded an agreement on reciprocal recognition and enforcement of judgments,²¹ covering also claw-back judgments—hence increasing the chances for their successful enforcement. The blocking statutes introduced in the wake of the Uranium litigation, in the mid-1980s, are the most recent examples—except for the 2012 Russian blocking Order—of such measures adopted in reaction to extraterritorial enforcement of domestic competition laws.

While the invocation of blocking legislation, in the narrow sense, has been relatively rare,²² in most cases it remains on the books and may be used in future. Although the history of blocking statutes is intertwined with US extraterritoriality in antitrust, similar laws were also enacted in other areas of law.²³

Application of United States Antitrust Laws,' 15 Int'l Law. 585 (1981). Compare Pierre Grosdidier, 'The French Blocking Statute, the Hague Evidence Convention, and the Case Law: Lessons for French Parties Responding to American Discovery' (2011), http://www.haynesboone.com/french_blocking_statute/ (accessed 11 Nov. 2013).

¹⁶ For example, Section 2 of the Quebec's Business Concerns Records Act, R.S.Q., c. D-12, bars removal of any business records in response to any foreign—or even Canadian, but not from Quebec—discovery orders.

¹⁷ For example, under Section 8 of the Canadian Foreign Extraterritorial Measures Act, R.S.C., 1985, c. F-29, <http://laws-lois.justice.gc.ca/eng/acts/F-29/> (accessed 11 Nov. 2013), the Attorney General of Canada may declare a foreign antitrust judgment non-recognizable or non-enforceable in any manner in Canada, if (s)he is of the opinion that the judgment adversely affects or is likely to adversely affect significant Canadian interests, or if it is likely to infringe Canadian sovereignty. See further William C. Graham, 'The Foreign Extraterritorial Measures Act', 11 Can. Bus. L. J. 410 (1985).

¹⁸ For example, under Section 1 of the South African blocking statute (see above note 15).

¹⁹ Section 6 of the UK's Protection of Trading Interests Act 1980 (see above note 15).

²⁰ Sections 10 and 11 of the Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3, as amended. The current as well as previous versions of the Act are available at <http://www.comlaw.gov.au/Series/C2004A02867> (accessed 11 Nov. 2013).

²¹ Agreement between the Government of Australia and the Government of the United Kingdom and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters [1994] ATS 27.

²² In this vein Jonathan M. Jacobson and ABA Section of Antitrust Law, *Antitrust Law Developments*, 6th ed. (ABA Section of Antitrust Law, 2007) 1256.

²³ For example, recently both the EU and Japan introduced legislation providing for non-recognition and claw-back of awards based on the US Antidumping Act of 1916. The Act was found inconsistent with the US obligations within the WTO framework and while the US Congress repealed it, it was done on a prospective basis. Waller, above n 14, at § 3:11. Japan and the EU enacted legislation allowing for recovery of paid damages, fees and costs. *Ibid*, at § 4:17. See further Mitsuo Matsushita and Aya Iino, 'The Blocking Legislation as a Countermeasure to the US Anti-Dumping Act of 1916: A Comparative Analysis of the EC and Japanese Damage Recovery', 40(4) J. World Trade (2006).

IV. FUNCTIONS AND LEGALITY UNDER INTERNATIONAL LAW

Blocking legislation serves two principal functions. First, from the enacting State's perspective it serves as a sword. It cuts through foreign enforcement measures, disallowing their effectuation in the forum. Hence, from the forum's standpoint blocking legislation protects its territorial integrity and sovereignty. In this context it must be underlined that while States may in certain circumstances assume extraterritorial prescriptive (subject-matter) jurisdiction over foreign persons and foreign conduct, enforcement jurisdiction remains territorial. No State can exercise enforcement jurisdiction in the territory of another State without its consent (and that consent normally cannot be substituted by a private party consent).²⁴ The notion of enforcement jurisdiction encompasses enforcement through both physical use of force and peaceable performance of acts of an authority. The latter category includes collection of evidence as well as the conduct of an investigation.

Second, from the perspective of a party facing litigation or investigation abroad, domestic blocking legislation can be a shield. In particular, a defendant could argue before foreign courts or authorities that under domestic laws it cannot comply with, for example, foreign discovery orders. Hence, blocking legislation allows the defendant to rely on foreign State compulsion as a defence. Commentators identified this function of blocking statutes early on and argued that it was its key purpose.²⁵ The shielding function is somewhat problematic, especially when a particular statute blocks foreign enforcement measures by default. While it may potentially shield some companies from foreign litigation, it also hinders other domestic companies' capacity to properly engage in legal processes abroad. For example, such legislation makes it cumbersome for domestic companies willing to defend their case in a foreign forum. It also hinders their ability to sue in foreign forums, since they may also not be able to comply with discovery ordered in relation to actions which they have themselves initiated.

Given that enforcement jurisdiction is considered strictly territorial, domestic measures prohibiting the compliance by natural and legal persons with foreign orders do not violate international law. Similarly, taking into consideration that there is no general obligation under international law to recognize and enforce foreign judgments²⁶ or decisions,²⁷ blocking legislation explicitly hindering or ruling out such recognition and enforcement violates no international norm or custom.²⁸ At the same time, while not violating international law, blocking legislation can be seen as incompatible

²⁴ Frederick Alexander Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours* 1 (1964), at 138-41.

²⁵ In this vein, for example, Mann, above n 11, at 1463. At the same time, as Waller points out, blocking legislation constitutes a form of negative compulsion. It is 'usually not geared to advancing any affirmative policy' of a foreign state. Spencer Weber Waller, 'Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond', 14 *Law & Pol'y Int'l Bus.* 747 (1982), at 780. In the US it is recognized that while the compelled defendant is entitled to be completely freed from liability, when blocking legislation is involved 'a variety of adverse inferences are permissible' and the statutes 'need not be given the same deference ... as differences in substantive rules of law.' American Law Institute, *Restatement of the Law (Third): Foreign Relations Law of the United States* (St. Paul, Minn.: American Law Institute Publishers, 1987) § 442, n 5.

²⁶ Ralf Michaels, 'Recognition and Enforcement of Foreign Judgments' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, online ed. (OUP, 2009) para 11.

²⁷ Matthias Ruffert, 'Recognition of Foreign Legislative and Administrative Acts' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, online ed. (OUP, 2007) para 6.

²⁸ On the other hand, some constructions of claw-back provisions may be seen in certain circumstances as problematic.

with the spirit of international cooperation. In most instances the invocation of such laws has led only to more international friction. In fact, an enactment of blocking legislation itself—in reaction to foreign litigation or investigation—suggests, at the very least, significant mistrust of the enacting State in the legal processes and / or norms of the foreign jurisdiction.

V. NEW RUSSIAN BLOCKING ORDER AND THE 2011 RUSSIA/EU ANTITRUST MEMORANDUM OF UNDERSTANDING

A week after the European Commission announced that it had opened formal proceedings to investigate practices of Gazprom in light of EU competition law, the President of the Russian Federation, Vladimir Putin, signed a blocking Order.²⁹ The Order applies to all joint stock companies that enjoy the status of Russian strategic enterprises. The list of such companies was originally composed in 2004.³⁰ It includes numerous State-owned companies, among them Gazprom, Rosneft, etc. but also Russian Railways, Aeroflot, the main Russian TV channel, the international airports. Effectively, operations of a few dozen companies fall under the regime of the blocking Order.

The Order stipulates that its addressees require prior Russian government's consent to:

- 1) provide information concerning their business operations to foreign authorities;³¹
- 2) amend:³²
 - a. contracts concluded with foreign counterparts,
 - b. other documents relating to their commercial policy (including pricing) abroad; or
- 3) dispose of:³³
 - a. shares in foreign companies,
 - b. rights to carry out business in foreign countries,
 - c. immovable property located abroad.

In other words, the Order fits within the notion of 'pure' blocking legislation.³⁴ It has the potential of affecting foreign enforcement both: (1) at the stage of investigation or adjudication—by hindering or blocking access to evidence, and (2) at the stage of implementation of the outcomes of such processes—by frustrating compliance with potential injunctions or required behavioural and structural remedies.

²⁹ 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, above n 2.

³⁰ Executive Order of the President of the Russian Federation No 1009 of 4 August 2004 Approving the List of Strategic Enterprises and Strategic Joint Stock Companies [Указ Президента РФ от 4 августа 2004 г. N 1009 "Об утверждении перечня стратегических предприятий и стратегических акционерных обществ"], (4 Aug. 2004), as amended, <http://text.document.kremlin.ru/document?id=3900734&byPara=1> (accessed 11 Nov. 2013).

³¹ Section 1(a) of the Order No 1285, above n 2. Note that the prior consent is not required with regard to information subject to publication and disclosure requirement under Russian legislation and information required in connection with issuance, circulation and acquisition of securities.

³² Section 1(b) of the Order No 1285, above n 2.

³³ Section 1(c) of the Order No 1285, above n 2.

³⁴ See above Part II of this article.

Compliance with foreign requests mentioned in the Order requires the consent of a relevant federal executive body authorised by the Russian government.³⁵ In October 2012 the Russian government entrusted eleven bodies with such competence and assigned particular companies to each of them.³⁶ Effectively, each nominated body has an exclusive mandate to review requests for compliance from companies in a particular sector of the economy. For example, the Ministry of Energy is responsible for Gazprom, Rosneft, and Transneft; the Ministry of Transport is responsible for Aeroflot and Russian Railways and so on.

The blocking Order states that consent shall not be granted if the sought actions could harm the economic interests of the Russian Federation.³⁷ It does not clarify any further what these are, what time perspective (short v. long-term) should be used in an assessment, or what criteria shall govern determination of a possible impact of the sought foreign measures on the Russian economic interests. No test has been laid down. Moreover, adding another layer of difficulty, procedures safeguarding obtaining consent are not uniform—each of the nominated federal executive bodies was to adopt its own rules. These are likely to matter in practice. Effectively, under the blocking Order the federal executive bodies have a far-reaching discretion on the matter.

The rapid and unanticipated issuance of the Order within a matter of days after the European Commission's official opening of the proceedings, looking into Gazprom's practices in light of EU competition rules, suggests that the Order was issued to hinder this particular investigation and, possibly, to prevent similar foreign investigations or legal actions in future. The fact that compliance with foreign requests—even for the purposes of investigatory and adjudicatory purposes—is subject to the consent of the Russian government, attempts to move the underlying controversy from the sphere of rule-of-law to the realm of politics. The issuance of the blocking Order itself may be seen as 'an admission that Gazprom has something to hide'.³⁸ This is particularly so given that the Order's default rule is a prohibition (of compliance) which may or may not be lifted by the Russian authorities' consent. The alternative was to introduce a notifying requirement and to allow for compliance by default, but for an explicit prohibition by the authorities.³⁹ While the same outcome can be achieved in terms of protecting State's important interests, the latter model would be more favourably perceived internationally. A default rule of prohibition sends a strong message.

The Russian Federation has a right—as do all sovereign States—to protect its interests as it sees fit within the limits set by international law. As earlier discussed, blocking legislation is not a new invention⁴⁰ and in general it does not violate international law.⁴¹ The novel aspect of the Russian blocking Order is that it also subjects compliance with possible foreign remedies to Russian government's consent. In past, the blocking legislation in antitrust, apart from discovery, focused

³⁵ Section 2 of the Order No 1285, above n 2.

³⁶ Resolution of the Russian Government No 1017 of 5 October 2012 on Measures Aimed at Implementation of an Order of the President of the Russian Federation No 1285 of 11 September 2012 [Постановление Правительства Российской Федерации от 5 октября 2012 г. N 1017 г. о мерах по реализации Указа Президента Российской Федерации от 11 сентября 2012 г. N 1285], (2012), <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=136293> (accessed 11 Nov. 2013).

³⁷ Section 2 of the Order No 1285, above n 2.

³⁸ von Eggert, above n 5.

³⁹ This type of blocking legislation operates, for example, in Canada. See Foreign Extraterritorial Measures Act 1985, R.S.C., 1985, c. F-29, s. 1.

⁴⁰ See above notes 6-9 and accompanying text.

⁴¹ See above Part IV of this article.

predominantly on partial non-recognition of multiple damages awards. This was underpinned by cultural and systemic differences. In the past, the US was—and still is—one of very few jurisdictions allowing for treble damages in private antitrust actions.⁴² This was—and still is—seen as a punitive solution and it is not widely recognised in the sphere of private enforcement outside the US. The Russian blocking Order produces very different effects. It says nothing about fines or damages, but it effectively requires Russian government's consent for introducing changes in important aspects of firm's foreign-oriented business operations. This is striking. In the EU-Russia context, it is exclusively for the EU and its Member States to lay down rules governing the EU marketplace (including competition law and policy). It is an unacceptable proposition that EU's jurisdiction over Russian companies operating in the EU should be subjected, in any regard, to Russia's consent.

Regardless of its status under international law, the Russian blocking Order is an unfriendly measure, which goes against the spirit of international cooperation. This is particularly so in the Russia-EU context in light of the Memorandum of Understanding concluded in 2011 between the Russian Federal Antimonopoly Service and the EU's DG Competition.⁴³ Although not a hard law instrument, the Memorandum recognizes the obstacles posed by anticompetitive conduct and the importance of cooperation in competition law enforcement.

From the perspective of the European Commission's investigation of Gazprom practices, it is unlikely that the Order will have any important hindering effects at the investigation stage. In September 2011—a year before opening of the formal investigation—the Commission conducted dawn raids in various EU Member States.⁴⁴ It had an opportunity to collect information regarding the practices under scrutiny. Given the value of commerce involved and, hence, the economic significance of this case, it is doubtful that the Commission would have moved ahead and opened the formal proceedings without having collected materials strongly indicating that EU competition rules were violated. In other words, the Commission may not now need more information from Gazprom to thoroughly investigate its business practices. If that is so, then the blocking Order will have limited impact on the investigation at this stage.

The situation is bound to get more complex should there be a finding of a violation of EU competition law. The blocking Order provides that Gazprom requires Russian government's consent to, for example, change its contracts with foreign counterparts. Given the nature of the business practices under investigation,⁴⁵ changes in contractual relationships may be one of the ordered remedies. Without Russia's consent Gazprom will not be able to comply. This potentially brings the State action doctrine into play—a defence possibly protecting Gazprom from sanctions for non-

⁴² Treble damages are also available in private antitrust actions, for example, in Taiwan (under Art. 32 of the Fair Trade Act) and in Panama (under Art. 30 of the Law 45/2007 on the Protection and Defense of Competition).

⁴³ Memorandum of Understanding on Competition between the Federal Antimonopoly Service of the Russian Federation and DG Competition of the European Commission, (10 Mar. 2011), http://en.fas.gov.ru/international-cooperation/bilateral-and-multilateral-documents/bilateral-and-multilateral-documents_50730.html (accessed 11 Nov. 2013).

⁴⁴ See European Commission, MEMO/11/641, Antitrust: Commission Confirms Unannounced Inspections in the Natural Gas Sector (27 Sept. 2011), http://europa.eu/rapid/press-release_MEMO-11-641_en.htm (accessed 11 Nov. 2013). See also Alessandro Torello, 'EU Raids Natural-Gas Companies in Probe', *Wall Street Journal*, 27 Sept. 2011, <http://online.wsj.com/article/SB10001424052970204831304576596993538359656.html> (accessed 11 Nov. 2013).

⁴⁵ See above note 4.

compliance, if it proves it was compelled not to comply.⁴⁶ To make a long story short: the lack of Russian government's consent for Gazprom compliance with possible remedies will unavoidably lead to a significant political conflict with potentially far-reaching and long-lasting consequences in the EU-Russia political and trade relations. It will boil down to the fundamental issue of who has jurisdiction over entities operating within the EU.

The blocking Order will also have consequences reaching beyond the Gazprom investigation. Firstly and most fundamentally, its rapid and unexpected enactment shows that there is a great deal of unpredictability and perhaps also additional risk when engaging in business with Russian State-owned companies. The rules of the game may change suddenly.⁴⁷ Secondly, the everyday life of Russian companies, falling under the scope of application of the blocking Order, will be more difficult.⁴⁸ Many operate abroad or have foreign subsidiaries. They need to comply with foreign rules, often imposing various reporting or disclosure requirements. The blocking Order stipulates that each time they need a Russian government's consent to comply with their obligations in those jurisdictions in which they operate. This poses practical difficulties and it is unlikely to meet with the understanding of foreign partners. Thirdly, if the European Commission finds that Gazprom violated EU competition rules and if Gazprom will be unable to comply with the ordered remedies, the emerging conflict will inevitably negatively affect Russia's image and its relations, especially with other open and free-market economies.

VI. CONCLUSIONS

The recent enactment of a blocking Order in Russia brings the issue of blocking legislation back into the limelight. This paper provided a typology of such measures and presented their development, functions, and discussed their legality under international law, in the quest for further clarification of law governing transnational commerce. It also presented and analysed the new Russian measure both in the context of the on-going antitrust investigation of Gazprom's practices by the European Commission as well as more generally as affecting all Russian strategic firms operating internationally.

The newly introduced Russian blocking Order, at the very minimum, shows that Russia is very anxious about its strategic enterprises being subject to foreign regulatory regimes even when operating abroad. The introduced default rule is one of general prohibition of compliance with foreign measures. This carries a political message and should not be underestimated, especially since an alternative was available—Russian President could have allowed for compliance by default,

⁴⁶ For more on the State action doctrine see Marek Martyniszyn, 'A Comparative Look on Foreign State Compulsion as a Defence in Antitrust Litigation', 8(2) *Competition L. Rev.* 143 (2012), <http://ssrn.com/abstract=1986032> (accessed 11 Nov. 2013); Eric Blomme, 'State Action as a Defence Against 81 and 82 EC', 30(2) *World Competition* 243 (2007); Fernando Castillo de la Torre, 'State Action Defence in EC Competition Law', 28(4) *World Competition* 407 (2005).

⁴⁷ In a broader context, commenting on various recent pieces of legislation enacted in Russia, the EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, Catherine Ashton commented in the European Parliament that 'this trend raises serious questions as to the state of the rule of law in the country, in particular the use of legal and law enforcement structures and other instruments for political purposes rather than for protecting and safeguarding the rights and freedoms of the citizens of Russia.' Catherine Ashton, 'Statement on the Political Use of Justice in Russia' (European Parliament, 11 Sept. 2012), http://europa.eu/rapid/press-release_SPEECH-12-598_en.htm (accessed 11 Nov. 2013).

⁴⁸ Same point was raised by commentators. See, for example, von Eggert, above n 5.

but for an explicit prohibition in a particular case. He did not choose to follow that approach. The adopted measure is restrictive in nature and it goes against the spirit of international cooperation.

The Order is unlikely to play any important, practical role during the European Commission's antitrust investigation at this early stage. Assuming that Gazprom will be found in violation of EU competition law, then at the stage of enforcement of remedies depending on whether the necessary consent shall or shall not be granted by Russian authorities, the blocking Order may lead to a significant friction between the EU and the Russian Federation. The proverbial ball will be in the Russian court. If the Russian authorities do not allow Gazprom to comply with the outcome of the proceedings in the EU, the conflict is likely to escalate. In more general terms, the Order will make everyday business operations of Russian strategic enterprises more cumbersome. They will have to seek Russian's authorities consent when requested to comply with foreign reporting or disclosure requests, or when facing discovery requests abroad, even when they themselves brought the suit.

Annex I

The original text of the Order comes from the official website of the President of the Russian Federation.⁴⁹ The English translation has been created for the purposes of this article by its author.

**Указ Президента РФ
от 11 сентября 2012 г. N 1285
"О мерах по защите интересов Российской
Федерации при осуществлении российскими
юридическими лицами внешнеэкономической
деятельности"**

В целях защиты интересов Российской Федерации при осуществлении российскими юридическими лицами внешнеэкономической деятельности постановляю:

1. Установить, что открытые акционерные общества, включенные в перечень стратегических предприятий и стратегических акционерных обществ, утвержденный Указом Президента Российской Федерации от 4 августа 2004 г. N 1009 "Об утверждении перечня стратегических предприятий и стратегических акционерных обществ" (далее - акционерные общества), и их дочерние хозяйственные общества в случае предъявления к ним требований со стороны органов иностранных государств, международных организаций, союзных объединений иностранных государств, органов (институтов) этих организаций и объединений, включая органы регулирования и (или) контроля, вправе только с предварительного согласия федерального органа исполнительной власти, уполномоченного Правительством Российской Федерации:

а) предоставлять этим органам, организациям и объединениям информацию, касающуюся своей деятельности. Без предварительного согласия федерального органа исполнительной власти, уполномоченного Правительством Российской Федерации, акционерные общества и их дочерние хозяйственные общества вправе предоставлять таким органам, организациям и объединениям информацию, подлежащую опубликованию или раскрытию в соответствии с законодательством Российской Федерации, а также в соответствии с требованиями,

**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**

In order to protect the interests of the Russian Federation in Russian legal entities' foreign economic activities it is ordered that:

1. Open joint stock companies enjoying the status of strategic enterprises and strategic joint stock companies, as established by the Executive Order of the President of the Russian Federation No 1009 of 4 August 2004 Approving the List of Strategic Enterprises and Strategic Joint Stock Companies (henceforth referred to as joint stock companies), and their subsidiaries in an event of any request made by agencies of foreign governments, international organizations, associations and unions of foreign governments, agencies (authorities) of such organizations and associations, including their regulatory and (or) supervisory authorities may only subject to a prior consent of the federal executive body authorized by the Government of the Russian Federation:

а) provide such agencies, organizations and associations with information regarding their activities. Without the prior consent of the federal executive body authorized by the Government of the Russian Federation, joint stock companies and their subsidiaries may provide such agencies, organizations and associations with information which is subject to publishing or disclosure requirements under laws of the Russian Federation, as well as information required in connection with issuance, circulation and acquisition of securities;

⁴⁹ <http://text.document.kremlin.ru/document?id=70125938&byPara=1> (accessed 11 Nov. 2013).

предъявляемыми в связи с выпуском, обращением и приобретением ценных бумаг;

б) вносить изменения в договоры, заключенные акционерными обществами и их дочерними хозяйственными обществами с иностранными контрагентами, и в другие документы, касающиеся их коммерческой (ценовой) политики в иностранных государствах;

в) отчуждать принадлежащие акционерным обществам и их дочерним хозяйственным обществам доли участия в иностранных организациях, права на осуществление предпринимательской деятельности на территориях иностранных государств и недвижимое имущество, находящееся за рубежом.

2. Установить, что федеральный орган исполнительной власти, уполномоченный Правительством Российской Федерации, отказывает в согласии на осуществление действий, предусмотренных пунктом 1 настоящего Указа, если эти действия способны нанести ущерб экономическим интересам Российской Федерации.

3. Правительству Российской Федерации в месячный срок определить федеральные органы исполнительной власти, уполномоченные давать акционерным обществам и их дочерним хозяйственным обществам согласие на осуществление действий, предусмотренных пунктом 1 настоящего Указа.

4. Настоящий Указ вступает в силу со дня его официального опубликования.

Президент Российской Федерации
В. Путин

Москва, Кремль
11 сентября 2012 года
N 1285

b) amend agreements (contracts) concluded by the joint stock companies and their subsidiaries with foreign counterparts, and other documents relating to their commercial policy (including pricing) in foreign countries;

c) dispose of their shares in foreign companies, rights to carry out business activities on foreign soil, and titles to immovable property located abroad, belonging to such joint stock companies and their subsidiaries.

2. The federal executive body authorized by the Government of the Russian Federation shall refuse to grant consent to implementation of the actions mentioned in Section 1 of this Order, if such actions could harm the economic interests of the Russian Federation.

3. Government of the Russian Federation within one month shall nominate the federal executives bodies, authorized to grant joint stock companies and their subsidiaries consent for implementation of the actions mentioned in Section 1 of this Order.

4. This Order shall enter into force on the day of its official publication.

President of the Russian Federation
V. Putin

Moscow, Kremlin
September 11, 2012
No 1285