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Martyniszyn, M. (2015). On Extraterritoriality and the Gazprom case. *European Competition Law Review*, 36(7), 291-294.

Published in:
European Competition Law Review

Document Version:
Peer reviewed version

Queen's University Belfast - Research Portal:
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On Extraterritoriality and the Gazprom case

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Disclaimer: The final, edited version of this manuscript has been published in 37(6) European Competition Law Review 291-294 (2015). Please, refer to the final version.

In September 2012 the European Commission opened a formal investigation of Gazprom's business practices in the EU.¹ The Gazprom investigation raises a number of questions. One of them is the issue of jurisdiction—whether EU competition law applies to Gazprom, a foreign company. A day after the opening of the proceeding, in a press note and alongside other issues, Gazprom raised the question of jurisdiction, noting that it complies with laws of the countries in which it operates and that it is 'registered outside the jurisdiction of the EU'.² This statement, possibly, prompted some commentators to consider the applicability of EU law in this case.

In a piece in the ECLR, entitled 'Iron Curtain at the border: Gazprom and the Russian blocking order to prevent the extraterritoriality of EU competition law', Sean Morris offered his views on some of the aspects of the Gazprom case, including the issue of jurisdiction.³ Morris discussed also the blocking Order issued by the Russian President⁴ in response to the European Commission's investigation, and its possible effects in the Gazprom case.

This article seeks to add a few important and relevant issues of law relating to extraterritoriality and the reach of EU law generally and in particular— in the context of the Gazprom investigation and in the light of the Morris article. This piece also sheds some light on the considerations which might have informed Russia's hastily enactment of the blocking Order.

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¹ Three types of alleged anticompetitive practices are under investigation: usage of 'no resale' clauses in supply contracts; prevention of diversification of gas supplies; and imposition of unfair pricing by linking oil and gas prices in long-term contracts. European Commission, IP/12/937, Antitrust: Commission Opens Proceedings Against Gazprom (4 September 2012), available at http://europa.eu/rapid/press-release_IP-12-937_en.htm.

² Gazprom, Gazprom Statement on Formal Stage of European Commission Antitrust Investigation (5 September 2012), available at <http://www.gazprom.com/press/news/2012/september/article143314/>.

³ P Sean Morris, 'Iron Curtain at the border: Gazprom and the Russian blocking order to prevent the extraterritoriality of EU competition law', 35(12) European Competition Law Review 601 (2014).

⁴ 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), available at <http://text.document.kremlin.ru/document?id=70125938&byPara=1>. For analysis and the English translation see Marek Martyniszyn, 'Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order', 37(1) World Competition 103 (2014).

Extraterritoriality and the Effects Doctrine

The discussion of extraterritoriality needs to start with the principle of territoriality, which is the most often invoked by states to assert jurisdiction. A state exercises jurisdiction upon its soil, its territory. It does not matter whether the entities involved are domestic or foreign.

The terms 'extraterritoriality' or 'extraterritorial jurisdiction' are used interchangeably to describe a 'competence of a State to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory'.⁵ Yet, there is no universally accepted definition of extraterritoriality. The term is often used to express different phenomena. In the competition law area, commentators often use it only in the context of cases involving reliance on the effects doctrine (discussed below), without being explicit about it. This can be confusing since other jurisdictional principles, such as objective territoriality, also allow asserting jurisdiction over persons and conduct outside state's territory.⁶ In many transnational cases jurisdiction can be asserted over foreign entities without recourse to the effects doctrine.

Extraterritoriality requires a link, a sufficient connection between the state and the person, conduct, or property outside its territory. In many cases this link is *territorial*. The objective territoriality principle, formulated by the Permanent Court of International Justice in *Lotus*, a case decided in 1927, allows a state to assert jurisdiction where only part of the offence—one of its constituent elements—have been committed within its territory.⁷ In the context of a competition law case against foreign entities this means that if some of the challenged anticompetitive conduct took place in the territory of a state, that state can assert jurisdiction over the conduct and entities involved, even if they are foreign. Moreover, by piercing the corporate veil, the harmed jurisdiction may reach for a foreign parent company by contributing to its conduct of its local subsidiaries.

The principle of objective territoriality helps to pursue many transnational violations, yet it does not allow to address all of them. In particular, it is of no help in cases involving only foreign anticompetitive conduct of foreign entities, even if the consequences of that conduct (that is, the competitive harm) affect the domestic market. In this context, the United States was the first jurisdiction which went further and departed from what were then the well-recognized jurisdictional principles. Already in 1945, in *Alcoa*,⁸ a US federal court, hearing an appeal in lieu of the Supreme Court, formulated a new jurisdictional principle—the effects

⁵ Menno T. Kamminga, 'Extraterritoriality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, online ed. (OUP, 2010).

⁶ The principle of objective territoriality is particularly useful in competition law. Other principles allowing for extraterritoriality include the principles of nationality, passive personality, security and universality. In this vein, for example, Robert Y. Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws', 33 *British Yearbook of International Law* 146 (1957), at 153.

⁷ 'Offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there' *France v. Turkey*, Ser. A., No. 10, 23 (PCIJ 1927).

⁸ *United States v. Aluminium Company of America (Alcoa)*, 148 F.2d 416 (2nd Cir. 1945).

doctrine. In essence, this principle provides that a state may apply its competition law to foreign persons in relation to their foreign conduct, if that conduct has harmful effects within the state's borders. Hence, under the effects doctrine the suffered harm serves as a jurisdictional link. It provides for a potentially far-reaching extraterritorial jurisdiction.

From Protest to Recognition

The effects doctrine was heavily criticized and contested in the first decades following its formulation in *Alcoa*. Yet, it was embraced and regularly relied upon by US courts to find jurisdiction in cases challenging foreign anticompetitive agreements affecting the US market. In response, a number of states (such as Australia, Canada, France, Japan, South Africa, and its the most vocal opponent—the UK) attempted to oppose it by means of formal protests, expressed in diplomatic notes and, later, submitted directly to US courts in the form of amicus curiae briefs. Some states introduced also blocking legislation, aimed at curbing the long-reach of US competition law, which although hardly ever used in practise, sent a strong message.⁹

Last instance in which an extraterritorial assertion of jurisdiction based on the effects doctrine by US courts—*in itself*— was protested against dates back to 1992 and the UK's amicus curiae brief in *Hartford Fire*.¹⁰ This issue is relevant from the international law perspective. A protest to be effective, and, in turn, able to prevent recognition of a new customary norm must be maintained and actively manifested.¹¹ Since 1992, foreign states' protests in transnational competition cases in the US touching upon the issue of jurisdiction did not challenge the effects doctrine as such, but only questioned the permissible limits of jurisdictional assertions on that basis.

Moreover, since its first formulation in *Alcoa*, many states recognised some form of the effects doctrine, that is grounding extraterritorial jurisdiction on domestic harm caused by foreign conduct of foreign entities. Some have done so by interpreting the existing provisions in a way similar to US courts. That was the case, for example, in the EU¹² and seemingly also in Japan.¹³ Other jurisdictions introduced statutory provisions allowing for extraterritoriality in such instances. That is the case, for example, in Australia,¹⁴ Brazil,¹⁵ Canada,¹⁶ China,¹⁷

⁹ For discussion and analysis of blocking legislation, including its history, see Martyniszyn, n 4.

¹⁰ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). This conclusion draws from the author's on-going research on foreign states' amicus curiae briefs submitted in antitrust cases in the US.

¹¹ Krzysztof Skubiszewski, 'Unilateral Acts of States' in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff, 1991) 227.

¹² *Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Ahlström Osakeyhtiö and others v. Commission (Wood Pulp)*, [1988] ECR 5193; *Case T-102/96, Gencor Ltd v. Commission*, [1999] ECR II-753; *Case T-286/09, Intel Corp v. Commission*. See further notes 32-38 and accompanying text.

¹³ Rio Tinto/ BHP Billiton joint venture (2010); Marine Hose cartel (2008); Cathode Ray Tube (CRT) cartel (2009 and ongoing).

¹⁴ Sec. 5 of the Competition and Consumer Act 2010.

¹⁵ Art. 2 of the Law Nº 12.529.

¹⁶ Sec. 46(1) of the Competition Act.

¹⁷ Art. 2 of the Anti-Monopoly Law.

Germany,¹⁸ Korea,¹⁹ India,²⁰ Russia,²¹ Singapore,²² South Africa,²³ and Turkey.²⁴ The very broad recognition of the effects doctrine together with the lack of protest against it, at the very least, disprove any arguments as to its still controversial nature or contestability under public international law. They strongly support the claim that the effects doctrine has already emerged as an additional jurisdiction base, alongside the principles of nationality and territoriality.

Extraterritoriality and the Gazprom case

Morris presupposes the necessity of basing the EU's jurisdictional assertion over Gazprom on the effects of its practices in the EU. He submits that the Gazprom case requires the European Commission to rely on the effects doctrine. Moreover, in his view 'this new vigour [of the European Commission] to focus on Gazprom is *a brazen step to export EU competition laws to Russia* or in other words, the application of EU competition laws extraterritorially, in particular to companies ... outside the European Union [emphasis added].'²⁵ Morris further adds that in the Gazprom case 'the European Union is seeking to extend its competition rules beyond the EU borders well into the jurisdiction of another sovereign state'²⁶ and that 'attempts by external forces to reign in companies outside its jurisdiction such as Gazprom question how far the EU competition rules can go',²⁷ implying that EU may not have a legitimate jurisdictional claim in this case. The initial presupposition regarding extraterritoriality is an over-simplification, partly contradicted in the article (since Morris acknowledges that 'Gazprom has significant operations in a number of European countries'²⁸). The suggestion that the European Commission is attempting to interfere with sovereign rights of the Russian Federation is putting the cart before the horse.

The question whether, and if so—to what extent the Gazprom case necessitates reliance on extraterritoriality is fact-specific. Should Gazprom be found present or conducting business in the EU, the location of its seat or its registration outside the EU will carry little significance from jurisdictional perspective.²⁹ If Gazprom itself is not present or conducting business in the EU, it may be possible to assert jurisdiction over it through its EU's subsidiaries. If they were involved in the investigated practices and if they were controlled by Gazprom (in the sense of following its instructions in all material respects), the corporate veil may be pierced and

¹⁸ Art. 130(2) of the Act against Restraints of Competition.

¹⁹ Art. 2(2) of the Monopoly Regulation and Fair Trade Act.

²⁰ Art. 32 of the Competition Act.

²¹ Art. 3(2) of the Federal Law №135-FZ on Protection of Competition.

²² Art. 33(1) of the Competition Act.

²³ Art. 3(1) of the Competition Act.

²⁴ Art. 2 of the Act on the Protection of Competition.

²⁵ Morris, n 3, at 605.

²⁶ Ibid, at 609.

²⁷ Ibid, at 603.

²⁸ Ibid, at 608.

²⁹ See, for example, *Case 6/72, Europemballage Corp and Continental Can Co. Inc. v. Commission*, [1973] ECR 0215, 16: 'The circumstance that [the firm] does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the application of Community law.'

Gazprom would fall under the preview of EU law based on the single economic unit doctrine.³⁰ In such scenarios EU law would apply on the basis of the principles of territoriality or objective territoriality.³¹

If neither of the above was applicable, it may be possible to assert jurisdiction over Gazprom based on the effects which the alleged anticompetitive practices caused in the EU. As mentioned above, the EU is one of regimes which recognized such a jurisdictional base. In a recent judgment in *Intel* the General Court clarified that two alternative approaches are available in such cases.³² First, laid down in *Wood Pulp*,³³ jurisdiction over foreign entities in relation to their foreign conduct can be asserted if that conduct was implemented in the EU (*the implementation test*). In *Wood Pulp* the agreement at stake was implemented in the EU by means of direct sales. In *Intel* the Court emphasized that a direct sale is only one means of implementing a practice. In the case at bar it found that certain restrictions were implemented in the EU by a dominant foreign firm by means of incentivising its customers to refrain from selling certain products worldwide, including in the EU. The fact that a foreign firm does not sell directly to entities in the EU does not remove it from the jurisdictional reach of EU law.³⁴ While the General Court sees the implementation approach as based on the principle of territoriality, it has been widely considered a form of the effects doctrine.³⁵ Second, as established in *Gencor*,³⁶ jurisdiction over foreign entities can be asserted on the basis of the qualified effects of the investigated conduct in the EU (*the effects test*). If such conduct has immediate, substantial and foreseeable effect—actual or potential—in the EU, the test is satisfied.³⁷ In the General Court's view both approaches are justified under public international law.³⁸

Should jurisdiction over Gazprom be asserted on the basis of the effects of its conduct in the EU, Russia—at least theoretically— could challenge its legality under international law. This question goes back to the issue of recognition of the effects doctrine as a jurisdictional base. As discussed above, the international community has— by and large— recognised and embraced it. Even Russian competition law provides for extraterritorial assertions on such a basis.³⁹ Therefore, it is unlikely that the Russian government would challenge any similarly-grounded extraterritorial assertion of the EU, in itself.

³⁰ *Case 48/69, Imperial Chemical Industries Ltd. v. Commission (Dyestuffs)*, [1972] ECR 619, 133.

³¹ See also Alan Riley, 'Commission v. Gazprom: The Antitrust Clash of the Decade?' (CEPS Policy Brief No. 285, 2012), 11, available at <http://www.ceps.eu/ceps/dld/7433/pdf>.

³² *Intel*, n 12, at paras 231-36.

³³ *Wood Pulp*, n 12.

³⁴ *Intel*, n 12, at paras 302-07.

³⁵ See, for example, Walter van Gerven, 'EC Jurisdiction in Antitrust Matters: The Wood Pulp Judgment', *Fordham Corporate Law Institute* 451 (1989), at 470-71.

³⁶ *Gencor*, n 12.

³⁷ *Intel*, n 12, at paras, 240-43, 51-52.

³⁸ *Ibid*, at 236.

³⁹ See n 21.

In effect, although the European Commission's investigation of Gazprom practices raises various important issues of law and policy, the question of jurisdiction—unlike suggested by Morris—is unlikely to become contentious.

On considerations behind the Russian blocking Order

In response to the European Commission's investigation Russian President Putin issued a blocking Order aimed at hindering foreign investigations of Russian strategic enterprises.⁴⁰ In particular, the Order requires the investigated firms to seek Russian government's consent prior to (1) providing foreign authorities information in relation to their business operations, (2) implementing certain requested remedies, such as introducing changes to pre-existing contracts or disposing of certain assets.⁴¹

In his article Morris observed that 'in reality, the Blocking Order prevents foreign competition authorities from investigating Russian companies on the list of strategic companies, and in particular Gazprom',⁴² that the Order 'exclude[s] Gazprom and other strategic companies from external investigations (...)'.⁴³ These comments conflate different aspects of enforcement that need to be teased out. Whatever legislation the Russian Federation adopted, it has little bearing on the capacity of foreign authorities to investigate practices of entities within their jurisdiction. One regime cannot enact any sort of immunity or exception into laws of another. Hence, foreign investigations are not 'prevented' and the firms not 'excluded' from the potential scrutiny. That said, in a particular case—when the investigated entities do not obtain a Russian government's consent, the Order may hinder an investigation and negatively affect the possibility of the investigated entities to comply with some of the ordered remedies, following a possible decision finding violation.

Given that the Order was issued long after the European Commission dawn-raided (that is, conducted unannounced inspections) a number of companies active on the natural gas market in the EU, including some of Gazprom's subsidiaries, it seems that preventing access to information might not have been the principal aim of this measure, at least not in relation to this particular investigation. The blocking Order is rather aimed at preventing the consequences of the application of the substantive provisions of EU law. It particularly targets the implementation of some of the possible remedies.

Was Gazprom to be found in violation of EU competition law, the Commission could impose on it a fine in the amount of up to 10 per cent of its worldwide turnover.⁴⁴ This could be a

⁴⁰ 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"].

⁴¹ The Order has been analysed in detail in Martyniszyn, n 4.

⁴² Morris, n 3, at 605.

⁴³ Ibid, at 608.

⁴⁴ Art. 23(2) of the 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, 1-25 (2003).

gigantic fine. In 2013 Gazprom's worldwide turnover amounted to 5.25 trillion roubles,⁴⁵ about 85 billion euro. But the fine itself, however large, is probably not what is most dreaded in Russia. The Commission could also 'unbundle' Gazprom. Under the Third Energy Package legislation a firm cannot both supply energy (be it electricity or gas) and control the transmission infrastructure.⁴⁶ Should Gazprom be found violating EU rules, the Commission could impose structural remedies and order Gazprom to 'sell the pipe'. This would effectively dismantle Gazprom's business model. However unpalatable, the European Commission could order it as it has the necessary legal basis. This eventuality might have informed the issuance of the blocking Order. The Order potentially makes compliance with any Commission's decision problematic as it requires Gazprom to seek Russian government's consent prior to, for example, selling foreign assets. This is also why it can be seen as an attempt to move the Gazprom investigation 'from the sphere of rule-of-law to the realm of politics'.⁴⁷

Conclusions

The European Commission's investigation of Gazprom practices in the EU has been pending for more than two-and-a-half years. Recently, the EU's Competition Commissioner stated that the Commission 'can move the case forward in a hopefully relatively short time-span'.⁴⁸ Although the Gazprom investigation raises numerous important and often complex issues of law and policy, the question of jurisdiction—in itself—is not one of them. It is unlikely to become contested and feature prominently in any debates which may follow.

The question on the role the blocking Order may play in relation to Gazprom's possible compliance, should it be found violating EU rules, remains open. Was the firm unable to obtain the Russian government's consent, it might find itself in a peculiar situation. Legally, it is unlikely that the Order could effectively prevent enforcement of a Commission's decision since any possible remedies, including unbundling, concern acts and assets in the territory of the EU, not in Russia.

Addendum

After the above article was submitted to the ECRL, the European Commission, on 22 April 2015, send the Statement of Objections to Gazprom, formally formulating its concerns in relation to Gazprom's conduct in the EU.⁴⁹ In particular, the Commission alleges that Gazprom

⁴⁵ OAO Gazprom IFRS consolidated financial statements 31 December 2013, available at <http://www.gazprom.com/f/posts/07/271326/gazprom-ifrs-2013-12m-en.pdf>.

⁴⁶ Directive 09/73/EC of the European Parliament and of the Council concerning the Common Rules for the Internal Market in Natural Gas and Repealing Directive 03/55/EC, OJ 2009 L211/94.

⁴⁷ Martyniszyn, n 4, at 112.

⁴⁸ Tom Fairless and Stephen Fidler, 'EU Competition Chief Vestager Speaks on Gazprom, Google and Tax', *Wall Street Journal*, 18 February 2015, available at <http://blogs.wsj.com/brussels/2015/02/18/eu-competition-chief-vestager-speaks-on-gazprom-google-and-tax/>.

⁴⁹ European Commission, IP/15/4828, Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets (22 April 2015), available at http://europa.eu/rapid/press-release_IP-15-4828_en.pdf.

is: (1) hindering cross-border gas sales, (2) charging unfair prices, and (3) leveraging its dominance by making supplies conditional upon unrelated commitments from wholesalers. In the official communication the Commission pointed out that 'All companies that operate in the European market— no matter if they are European or not – have to play by our EU rules.'⁵⁰ This suggests that having analysed the facts the Commission has, indeed, found Gazprom operating in the EU, making this investigation—set in an important geopolitical context⁵¹— a jurisdictionally uncontroversial case.

⁵⁰ Ibid.

⁵¹ See further Marek Martyniszyn, 'The EU's case against Gazprom is about far more than business', *The Conversation*, 24 April 2015, available at <https://theconversation.com/the-eus-case-against-gazprom-is-about-far-more-than-business-40773>.