

## THE EUROPEAN COMMISSION V. GAZPROM

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### I. INTRODUCTION

The European Union (EU) recently announced that it would be launching an antitrust investigation into the Russian natural gas monopoly, Gazprom.<sup>1</sup> Penalties for antitrust violations can be up to 10% of a company's global revenue.<sup>2</sup> The government of Russia owns the majority of Gazprom, meaning that any penalty against Gazprom is, in essence, a penalty levied by the EU against Russia.

In order to interpret how the EU has acted in an antitrust setting, this paper will look to the EU's previous antitrust actions, namely, the case against Microsoft. In 2004, the EU found that Microsoft had violated Article 82 of the EC Treaty because it had acted to severely limit competition in the software market. Much like Microsoft, Gazprom has been accused of using its dominant market position to eliminate competition. Some Eastern European countries have tried to develop

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<sup>1</sup> Press Release, European Commission, Antitrust: Commission opens proceedings against Gazprom (Sept. 4, 2012), *available at* [http://europa.eu/rapid/press-release\\_IP-12-937\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-12-937_en.htm?locale=en).

<sup>2</sup> Matthew Bryza, *Europe Takes on Gazprom at Last, Now Must Hang Tough*, BLOOMBERG (Sept. 18, 2012), <http://www.bloomberg.com/news/2012-09-18/europe-takes-on-gazprom-at-last-now-must-hang-tough.html>.

their own natural gas infrastructure, only to have Gazprom manipulate the gas prices so as to make further market development unsustainable. With Gazprom providing a quarter of all European natural gas, this conflict represents a dramatic moment in the EU's attempts to protect its single market ideal.

The end result could be similar to the battle between Microsoft Corp. and the European Commission. However, after a decade of struggling against the Commission's inquiry and subsequent fine, Microsoft has found little success in its policy of resistance. Gazprom should note the expense that Microsoft has incurred in order to fight a losing battle. Resistance to European Commission inquiries would result in years of costly and resource-consuming legal battle that has little chance of success. Instead, Gazprom should look to how Microsoft has shifted its policy to cooperate with the Commission to avoid further penalty. President Putin's attempts to shield Gazprom from any fines from the Commission stands to only worsen the situation Russia and its strategic company find themselves in. Gazprom's most successful option appears to be cooperating with the European Commission's inquiry. Russia appears to be starting the process of cooperating by unbundling Gazprom's distribution and transport networks and dividing them into separate subsidiaries, but this is not enough to address the concerns of the European Commission that Gazprom has manipulated the market through unfair pricing. Unbundling is a start, but in order to avoid a heavy penalty, Russia and Gazprom must cooperate with the EC and reach a settlement.

## II. THE INVESTIGATION INTO GAZPROM

The investigation into Gazprom's activities stems from Europe's own economic goals. In pursuit of these goals, the European Commission has recently taken actions towards establishing a single market within the European Union. Through Single Market I and II, the European Commission has made its stance clear that it intends to protect its member states from foreign monopolies. Gazprom represents a major influence on the European gas market and can be regarded as a hindrance to the European dream of internal markets. The gas monopoly has been accused of severe anti-competitive practices in Lithuania<sup>3</sup> and the

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<sup>3</sup> *Gazprom sued for \$2bn by Lithuania over high gas prices*, BBC NEWS (Oct. 3, 2012), <http://www.bbc.com/news/business-19819487>.

Commission has previously acted to protect its member states in Germany and Poland.<sup>4</sup> The Russian Federation and its strategic company must understand its role as a foreign company in the European Commission's drive to realize its ideals.

#### A. THE CURRENT STATE OF THE EUROPEAN GAS MARKET

On September 4, 2012, the European Commission published a press release announcing that it had opened a formal investigation into Gazprom.<sup>5</sup> The Commission stated that there were three major concerns that had caused the investigation into Gazprom's business practices regarding its dealings with Eastern European countries. First, Gazprom may have deliberately separated gas markets by hindering gas flow between EU member-states.<sup>6</sup> Second, Gazprom may have prevented the diversification of gas supplies.<sup>7</sup> Third, Gazprom may have manipulated market prices by linking the price of gas to oil prices.<sup>8</sup> If the Commission finds evidence of these practices, then the Commission may find Gazprom guilty of violating Article 102 of the Treaty on the Functioning of the European Union.<sup>9</sup> Article 102 forbids a company who holds a dominant position within an internal market from engaging in any abuse of that dominant position.<sup>10</sup>

The investigation by the European Commission represents an attempt to stand up to the Russian company's practices. Gazprom's pipelines give it the only route from East Asia to Europe, allowing it to buy gas cheaply from East Asian suppliers only to sell it at a higher rate upon reaching Europe.<sup>11</sup> The sell prices have been found to be as much as two or three times the purchase price. In order to prevent European resistance to their practices, Gazprom offered special deals to different countries. For example, as of the time of the announced investigation,

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<sup>4</sup> Press Communique, Antitrust: Commission Confirms Unannounced Inspections in the Natural Gas Sector, European Commission (Sept. 27, 2011), *available at* [http://europa.eu/rapid/press-release\\_MEMO-11-641\\_en.htm?locale=fr](http://europa.eu/rapid/press-release_MEMO-11-641_en.htm?locale=fr) [EC Natural Gas Inspections].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Sept. 5, 2008, 2008 O.J. (C 115) 89.

<sup>10</sup> *Id.*

<sup>11</sup> Matthew Bryza, *Europe Takes on Gazprom at Last, Now Must Hang Tough*, BLOOMBERG (Sept. 18, 2012), <http://www.bloomberg.com/news/2012-09-18/europe-takes-on-gazprom-at-last-now-must-hang-tough.html>.

Europe paid an average price for Russian gas of \$443 per 1000 cubic meters.<sup>12</sup> Other countries, however, paid noticeably less. On average, countries such as Germany, Slovakia, and Italy paid \$380, \$330, and \$320 per 1000 cubic meters, respectively.<sup>13</sup> Additionally, with the construction of the Nord Stream pipeline that bypasses Eastern European countries, Gazprom has been able to weaken the Eastern European countries' ability to bargain for prices.<sup>14</sup> Gazprom comprises a large portion—about a quarter—of the total European gas supply<sup>15</sup> and over half of Europe's imported gas.<sup>16</sup> The relationship between Gazprom and Europe has been described as an “umbilical” relationship.<sup>17</sup> This dependence on Russian gas is nothing new and neither is the EU's desire to wean itself from Gazprom's monopoly.

## B. THE RUSSIA-GAZPROM CONNECTION

There is no doubt that Gazprom is a massive company. From 2010 to 2012, Gazprom has reported steady growth with net sales reaching as high as RR 4,764 billion, or approximately \$133 billion.<sup>18</sup> The natural gas company is closely intermingled with the Russian government. By Russian law, Gazprom is the only natural gas company permitted to export natural gas.<sup>19</sup> In fact, the Russian government owns

<sup>12</sup> *European Commission Could Fine Gazprom 10 Billion Euro*, OIL & GAS EURASIA (Sept. 8, 2012), <http://www.oilandgaseurasia.com/articles/p/164/article/1897/>.

13 *Id.*

<sup>14</sup> See Bryza, *supra* note 11.

<sup>15</sup> James Kanter, *Gazprom Objects to European Antitrust Inquiry*, N.Y. TIMES (Sept. 5, 2012), <http://www.nytimes.com/2012/09/06/business/global/gazprom-objects-to-european-antitrust-inquiry.html?ref=europe&r=1&>.

<sup>16</sup> BORIS NEMTSOV & VLADIMIR MILOV, PUTIN AND GAZPROM: AN INDEPENDENT EXPERT REPORT (Dave Essel trans., 2008), *available at* [http://www.europeanenergyreview.eu/data/docs/Viewpoints/Putin%20and%20Gazprom\\_Nemtsov%20en%20Milov.pdf](http://www.europeanenergyreview.eu/data/docs/Viewpoints/Putin%20and%20Gazprom_Nemtsov%20en%20Milov.pdf).

<sup>17</sup> Ian Traynor, *The Struggle to Reduce Dependence on Gazprom*, *The Guardian* (Jan. 1, 2009), <http://www.guardian.co.uk/world/2009/jan/02/russia-ukraine-gazprom>.

<sup>18</sup> Over the past three years, Gazprom has reported net sales of approximately \$100.7 billion in 2010, \$129.8 billion in 2011, and \$133.4 billion in 2012. These figures are converted from estimates provided by Gazprom in Russian Rubles according to an exchange rate of 0.028 U.S. Dollar per Russian Ruble. Financial Fact Sheet, Gazprom, <http://www.gazprom.com/investors/info/> (last visited Apr. 9, 2014).

<sup>19</sup> Federal'nyi Zakon Law o 18 Iyul' 2006 [Federal Law of 18 July 2006], Rossiiskaia Gazeta [Ros. Gaz.] July 20, 2006, No. 4122.

the majority stake in the company.<sup>20</sup> The company accounts for 10 percent of Russia's yearly economic activity.<sup>21</sup> One EU official summed up the relationship best, saying that the problem with Gazprom was that it is "both a company and a political instrument of Russia."<sup>22</sup> In regards to the relationship between the state and the company, it has been observed that "Putin needs Gazprom as much as Gazprom needs Putin."<sup>23</sup> The response by the Russian government has reflected their substantial interest in Gazprom's success.

Russian public officials have reacted to news of the inquiry defensively. According to Russian First Deputy Prime Minister Igor Shuvalov, the investigation is merely a ploy to restore bargaining power to the EU and negotiate for lower gas prices.<sup>24</sup> In reaction to the news of an open investigation, Gazprom declared that it held the status of a "strategic organization" in Russia.<sup>25</sup> President Vladimir Putin issued an order in response to the investigation which forbids "strategically important companies" that do foreign business from cooperating with foreign regulators without the express permission of the Russian government.<sup>26</sup> This decree is an attempt by the Russian government to force the Commission to resolve their inquiry at a political level, above Gazprom. If the Commission were to find an antitrust violation, they can levy a fine of as much as 10% of the company's annual revenue.<sup>27</sup> In Gazprom's case, such a penalty could amount to \$12 billion.<sup>28</sup> Because of Russia's controlling stake in Gazprom, any fine levied by the European Commission would be a fine imposed on the Russian government, an unprecedented move.

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<sup>20</sup> Will Englund & Kathy Lally, *Cumbersome Gazprom Losing its Clout*, Washington Post (Sept. 23, 2012), [http://www.washingtonpost.com/world/europe/cumbersome-gazprom-losing-its-clout/2012/09/23/adf7ec08-fcf8-11e1-8adc-499661afe377\\_story\\_2.html](http://www.washingtonpost.com/world/europe/cumbersome-gazprom-losing-its-clout/2012/09/23/adf7ec08-fcf8-11e1-8adc-499661afe377_story_2.html).

<sup>21</sup> Andrew Kramer, *Putin Impedes European Inquiry of State Fuel Supplier*, N.Y. TIMES (Sept. 11, 2012), [http://www.nytimes.com/2012/09/12/world/europe/russia-impedes-inquiry-of-fuel-supplier-gazprom.html?\\_r=2](http://www.nytimes.com/2012/09/12/world/europe/russia-impedes-inquiry-of-fuel-supplier-gazprom.html?_r=2).

<sup>22</sup> Joshua Chaffin, *Gazprom Inquiry Sheds Light on Energy Inequities*, FIN. TIMES (Sept. 5, 2012), <http://www.ft.com/cms/s/0/d7a75a3e-f76c-11e1-ba54-00144feabdc0.html#axzz2BNun4aWs>.

<sup>23</sup> Matthew Hulbert, *Gazprom: Beyond the Point of Commercial Return*, FORBES (Sept. 13, 2012, 9:19 AM), <http://www.forbes.com/sites/matthewhulbert/2012/09/13/gazprom-beyond-the-point-of-commercial-return/2/>.

<sup>24</sup> *Minister: EU Probe on Gazprom About Price*, UPI (Nov. 1, 2012, 7:12 AM), [http://www.upi.com/Business\\_News/Energy-Resources/2012/11/01/Minister-EU-probe-on-Gazprom-about-price/UPI-48361351768379/](http://www.upi.com/Business_News/Energy-Resources/2012/11/01/Minister-EU-probe-on-Gazprom-about-price/UPI-48361351768379/).

<sup>25</sup> Kanter, *supra* note 15.

<sup>26</sup> Kramer, *supra* note 21.

<sup>27</sup> *European Commission Could Fine Gazprom 10 Billion Euro*, *supra* note 12.

<sup>28</sup> *Id.*

Shortly after the probe was announced, Sergey Kupriyanov, the Press Secretary of Gazprom's Management Committee Chairmen, conveyed Gazprom's strong response to the probe. In his press conference, he stated that Gazprom was "bewildered" by the probe into their activities.<sup>29</sup> Kupriyanov went on to talk about the actions taken by the Russian Federation to prevent the European Commission from discovering any internal information from Gazprom. On September 11, 2012, Vladimir Putin signed the Decree on the Measures for Protecting the Interests of the Russian Federation in the Course of Foreign Trade Operations Performed by Russian Legal Entities. Referred to as the "Decree," the action restricts Russian strategic companies' discretion in three areas: disclosure of information, alteration of contracts, and sale of assets.<sup>30</sup>

The Decree represents an open acknowledgement of Russia's interests in its strategic companies such as Gazprom. Essentially, President Putin inserted the Russian government in between the European Commission and Gazprom. Before any information can be disclosed to foreign countries, companies or regulators, the Russian federal body must give authorized consent for such a disclosure.<sup>31</sup> Without this consent, information may only be disclosed according to rules already outlined by the Russian legislation.<sup>32</sup> Additionally, the Decree gives the Russian Federation prior approval rights over alterations in existing contracts, such as pricing policies.<sup>33</sup> Finally, foreign assets under strategic companies' control are subject to approval by the Russian government.<sup>34</sup> The foreign operations of a Russian strategic company are being reigned in under the Russian government's control.

These different provisions make it clear that the interests of the Russian Federation are aligned with these strategic companies. It also strengthens President Putin's promise to block any cooperation with the European Commission's investigation. Perhaps most illuminating on this alignment is Kupriyanov's statement that the Decree necessitates that "if

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<sup>29</sup> *Sergey Kupriyanov: Gazprom Always Abides by Legal Requirements of Countries Where it Operates*, GAZPROM (Sept. 11, 2012, 6:50 PM), <http://www.gazprom.com/press/news/2012/september/article143723/>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

any actions are capable of damaging the economic interests of the Russian Federation, such consent will be refused.”<sup>35</sup> Strategic companies, Gazprom in particular, are of utmost importance to Russia’s economic growth and global influence. The Decree noticeably does not enumerate any guidelines or criteria for what constitutes an “economic interest” of the Russian Federation. Instead, it is a governmental decision to be decided purely on political assertion of what might be an economic interest. Any action against Gazprom is an action against the Russian government. This means that any investigation or probe that could result in penalty will inevitably be deemed to damage the Russian Federation’s economic interest. These responses by Gazprom and the Russian government to the probe show a concerted effort to block any investigation into Gazprom’s foreign dealings.

Gazprom views the EC’s probe as an attempt to protect its own companies and economic best interest. Kupriyanov alleged that this action would help protect the members of the EU with “weak economies” that have been “demanding” unilateral price cuts in their gas deals.<sup>36</sup> He continued to say that rather than being a hindering force on European gas market liberalization, Gazprom has tried to promote this goal through independently accessing end users rather than going through intermediaries.<sup>37</sup> Gazprom’s stance is that the local gas interests prevented consumers from gaining better gas prices, not Gazprom itself as the European Commission (EC) probe alleges.

Gazprom’s importance to Russia extends far beyond what appears on paper. Economist Anders Aslund points out that while Gazprom appeared on paper to be the most profitable in the world in 2011, posting profits of \$46 billion, that \$40 billion of that total profit curiously disappeared through corruption or inefficiency so as to make Gazprom barely cash flow positive.<sup>38</sup> Aslund refers to Gazprom as a Russian “slush fund.” He argues that Gazprom has been used by Russian politicians for their own gain.<sup>39</sup> He cites a report by opposition politicians that President Putin has stripped assets of Gazprom and distributed them cheaply to reward his political supporters.<sup>40</sup> Evidence of this is supported

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Anders Åslund, *Gazprom Crisis Casts Shadow Over Putin*, FIN. TIMES (Sept. 27, 2012, 4:08 PM), <http://www.ft.com/cms/s/0/55c1aeb0-07c6-11e2-9df200144feabdc0.html#axzz2gj7ZTVQo>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

by the market valuation of Gazprom being \$365 billion in 2008 and its valuation decreasing drastically to \$120 billion in 2012.<sup>41</sup> This could explain why President Putin has pushed so vehemently for protecting Gazprom. Political reliance on Gazprom may be even larger than previously thought. Additionally, the European Commission's inquiry may affect the costs outside of Gazprom's ordinary operation. The added cost of corruption and skimming requires Gazprom to have higher than market prices for gas. Aslund does not believe the European Commission's questioning of Gazprom's pricing rates marks the end of Gazprom's business practices.<sup>42</sup> The end result could be a break-up and privatization of the gas monopoly.

### C. EUROPE'S GOALS AND RUSSIAN HINDRANCE

Europe has tried to move towards an open, liberal gas market through a process called "unbundling." Gazprom, however, has stood in the way. In line with EU regulation, Lithuania has attempted to unbundle its natural gas sector by 2014.<sup>43</sup> However, they now face some of the highest gas prices in Europe.<sup>44</sup> Moldova, while not part of the EU, joined the Energy Community in 2009.<sup>45</sup> The EU-sponsored Energy Community promotes the integration of EU energy policy into non-EU countries. On September 12, 2012, Russia issued an ultimatum to Moldova, demanding that they renounce the EU energy policy or else Russia would not engage in negotiations on gas discounts.<sup>46</sup> The ultimatum represents the aggressive approach Russia has taken to in dividing up gas markets. While Gazprom has maintained that it "scrupulously abides by all the provisions of international law," with its tactics clearly displayed in Moldova, it is hard to see how it can avoid being found guilty of abusing its dominant market position.<sup>47</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Update 1 – Lithuania Sets Gas Unbundling Deadline for Oct 2014, REUTERS (Oct. 28, 2011), <http://www.reuters.com/article/2011/10/28/lithuania-gas-unbundling-idUSL5E7LS0YQ20111028>.

<sup>44</sup> James Kanter, Europe Threatens Gazprom with Antitrust Action, N.Y. TIMES (October 3, 2013), [http://www.nytimes.com/2013/10/04/business/international/europe-threatens-gazprom-with-antitrust-action.html?\\_r=0](http://www.nytimes.com/2013/10/04/business/international/europe-threatens-gazprom-with-antitrust-action.html?_r=0).

<sup>45</sup> Russia to Moldova: Choose Cheap Gas or EU Integration, EURACTIV (Sept. 13, 2012), <http://www.euractiv.com/europes-east/russia-moldova-chose-cheap-gas-e-news-514769>.

<sup>46</sup> *Id.*

<sup>47</sup> Gazprom Statement on Formal Stage of European Commission Antitrust Investigation, GAZPROM (Sep. 5, 2012), <http://gazprom.com/press/news/2012/september/article143314/>.



While Gazprom's actions in Moldova are outside the scope of the Treaty on the Functioning of the EU, it only serves to damage its case against the Commission. Its actions in Moldova would certainly violate Article 102's prohibition on abuse of a dominant position. Article 102 specifically enumerates as one of the possible abuses "directly or indirectly imposing unfair purchase or selling prices or *other unfair trading conditions*."<sup>48</sup> Moldova has picked up the unfortunate moniker of "poorest country in Europe" and with a GDP of just over \$7 billion (Gazprom's 2011 net profit is six times this amount), it is extremely vulnerable economically.<sup>49</sup> If Moldova renounces the EU's energy plan, Russia would offer discussing gas price cuts and debt relief which amount to \$4.1 billion, or over half of Moldova's GDP.<sup>50</sup> Gazprom faces a heavy penalty if the Commission concludes it has engaged in similar practices within the confines of the European Union.

#### D. PAST GAZPROM LEGAL ACTION

While the Russian Federation appears to be adopting a position of non-cooperation, this strategy has only resulted in recurrent legal trouble. In addition to the European Commission's probe, Gazprom has faced or is facing lawsuits from Italy, Germany, Lithuania, and Poland.<sup>51</sup> The current legal strategy taken by Gazprom appears to be one of settling lawsuits outside of court in order to avoid reaching any adjudication.

In stark contrast to President Putin's outspoken defiance of the European Commission's inquiry, Gazprom has taken a cooperation strategy with individual countries. The start to Gazprom's litigation avoidance strategy came in July of 2011, when Gazprom agreed with

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<sup>48</sup> Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 9 (emphasis added).

<sup>49</sup> According to the official exchange rate as noted by the CIA World Factbook. CIA WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/md.html>.

<sup>50</sup> *Russia to Moldova: Choose Cheap Gas or EU Integration*, *supra* note 45.

<sup>51</sup> *Gazprom Agrees to Cut Gas Prices for Italy's Edison*, TURKISH WEEKLY (July 25, 2011), <http://www.turkishweekly.net/news/119981/gazprom-agrees-to-cut-gas-prices-for-italy-39-s-edison.html>; *Gazprom Signs Corrective Gas Price Contract with E.ON*, RIA NOVOSTI (July 3, 2012, 3:16 PM), <http://en.rian.ru/business/20120703/174377908.html>; *Gazprom sued for \$2bn by Lithuania over high gas prices*, *supra* note 3; Maciej Martewicz, *PGNiG to Gain \$930 Million on Gazprom Deal; Shares Rally*, BLOOMBERG (Nov. 6, 2012), <http://www.bloomberg.com/news/2012-11-06/pgnig-sees-ebitda-rising-by-up-to-932-million-on-gazprom-deal.html>.

Italy's Edison gas company to lower gas prices.<sup>52</sup> Edison had filed a suit with the Stockholm Arbitration Court.<sup>53</sup> The details of the deal were not disclosed to the public, but the Russian paper reporting the story suggested that Edison was the first in a possible sequence of companies seeking to lower their own gas prices.<sup>54</sup> Then, in a similar deal to Edison, Gazprom signed a corrective deal in July of 2012 with Germany's E.ON to lower gas prices in order to avoid an arbitration ruling in a lawsuit filed by E.ON in the Stockholm court.<sup>55</sup>

Gazprom has employed similar strategies elsewhere. In Poland, Gazprom avoided arbitration by agreeing to settle with Poland's majority gas supplier. In a disagreement over whether a discount was simply a one-off or a permanent change to the pricing model, Polskie Gornictwo Naftowe i Gazownictwo SA (PGNiG) filed a lawsuit against Gazprom in February of 2012.<sup>56</sup> PGNiG is a gas monopoly itself, controlling 98% of the market share in Poland.<sup>57</sup> The Polish company also alleged that Gazprom's policy of linking gas prices to oil prices was unfair, especially when, at the time of the filing of the lawsuit, oil prices had reached an eight-month high.<sup>58</sup> PGNiG buys 70% of its gas from Gazprom, at a price of \$550 per 1,000 cubic meters, about \$100 more than the European average.<sup>59</sup> The two sides, however, reached a settlement in which Gazprom agreed to reduce its prices for imported gas.<sup>60</sup> The exact details of the settlement are not entirely known. However, by reaching a settlement, Gazprom avoids adjudication in the case and still keeps a large importer in the fold.

Despite settling the PGNiG, E.ON, and Edison cases, Gazprom still faces a large lawsuit with Lithuania. Alleging that Gazprom has overcharged for gas from 2004 to 2012, Lithuania commenced an arbitration action against Gazprom for \$1.87 billion.<sup>61</sup> Lithuania's Energy

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<sup>52</sup> Gazprom Agrees to Cut Gas Prices for Italy's Edison, Turkish Weekly (July 25, 2011), <http://www.turkishweekly.net/news/119981/gazprom-agrees-to-cut-gas-prices-for-italy-39-s-edison.html>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Gazprom Signs Corrective Gas Price Contract with E.ON*, *supra* note 51.

<sup>56</sup> Martewicz, *supra* note 51.

<sup>57</sup> *Id.*

<sup>58</sup> UPDATE 2—Poland's PGNiG Seeks Arbitration over Gazprom Pricing, REUTERS (Feb. 21, 2012), <http://www.reuters.com/article/2012/02/21/pgnig-gazprom-idUSL5E8DL0M620120221?feedType=RSS&feedName=utilitiesSector>.

<sup>59</sup> Martewicz, *supra* note 51.

<sup>60</sup> *Id.*

<sup>61</sup> *Gazprom sued for \$2bn by Lithuania over high gas prices*, *supra* note 3.

Minister Arvydas Sekmokas claimed that the country has faced an increase of \$84 per 1000 cubic meter in 2004, to \$497 in 2012.<sup>62</sup> This increase, Lithuania alleges, is a result of Gazprom unfairly changing the gas price formula in the contract.<sup>63</sup> As this case continues to unfold, the mission is clear. Lithuania is seeking a lower gas price and is using this arbitration action as a way to negotiate a settlement with a gas price discount. In fact, the Lithuanian Energy Minister even points to the prior actions by E. On and PGNiG in saying that Lithuania had “tried to persuade Gazprom to adjust prices” and that it has followed in the paths forged by Germany and Poland.<sup>64</sup> The strategy has worked for other countries and Lithuania appears to be following their lead.

A policy of settling has and will result in further litigation by states and their energy monopolies in an attempt to lower prices. Italy, Poland, and Germany have all successfully renegotiated their gas price deals through leveraging impending adjudication in the Stockholm Arbitration Court. Lithuania has followed these countries’ lead. If Gazprom has settled with individual European Union members in the past, then why would Gazprom and Russia react so defensively to the news of a European Commission probe? While Gazprom seems to at least tolerate the policy of individual states negotiating through arbitration suits for lower gas prices, the line has been drawn when it comes to gas market reform. In Lithuania’s case, the Lithuanian government has moved to implement EU gas market reforms that Gazprom firmly believes are adverse to Russia’s gas interests.<sup>65</sup>

#### E. RECENT ENERGY ANTITRUST INQUIRIES

Despite Gazprom’s claims of bias, the European Commission has made concerted efforts to open up Europe’s energy market over recent years in other countries. In 2007, the Commission launched investigations into Belgium, Germany, France, and Italy’s gas markets.<sup>66</sup> It should be noted that these countries all do significant business with

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<sup>62</sup> *Id.*

<sup>63</sup> *Lithuania to File Lawsuit Against Gazprom*, NATURAL GAS EUROPE (Oct. 5, 2012, 12:00 PM), <http://www.naturalgaseurope.com/lithuania-files-lawsuit-against-gazprom>.

<sup>64</sup> *Id.*

<sup>65</sup> *Lithuania Sues Russia’s Gazprom over Pricing*, *supra* note 61.

<sup>66</sup> EC Natural Gas Inspections, *supra* note 4.

Gazprom.<sup>67</sup> These investigations concluded that third-party competitors were being restricted from competition.<sup>68</sup> These investigations each reached a conclusion through settlement with the companies responsible for the gas pipelines. In exchange for a conclusion on the investigation, each country's respective company agreed to open up access to their pipelines in order to promote competition in the marketplace and better options for consumers.<sup>69</sup> There were no fines, however, as part of their settlement agreements. The clauses to divest control over the pipelines became legally binding. If the agreement is violated, even if there is no evidence of abuse of dominant market position, the Commission is authorized to levy the 10% revenue penalty. On the day that the Commission announced the conclusion of the Western European investigations, it announced that it had sent inspectors to Eastern European countries to inspect the operations. While not specifically stated, this is presumably the start of the Gazprom investigation. Rather than being the sole entity investigated, Gazprom is the next stage of the Commission's plan to create a single, open European energy market. While the allegations are different in Gazprom's case, the preferable route would be similar to those of the Western European countries, a settlement agreement.

### III. THE SINGLE MARKET IDEAL

The European Union's single market ideal began in 1981 with Directorate General Karl Heinz Narjes proposing that the EU begin to remove barriers to trade.<sup>70</sup> The Single Market Program (SMP) came from his first proposal to remove customs booths across Europe, level value-added taxes, and expedite the movement of goods. The SMP has since been expanded to more ambitious goals and areas, such as energy and trademark through the passage of Single Market Act I and II.

Before the enactment of Single Market Act I, the European Commission in 2010 claimed that there were 20 million businesses, 175 million jobs and 500 million consumers contained within the EU's

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<sup>67</sup> Italy's case is discussed in further detail later as its primary gas company, Edison, was involved in a lawsuit against Gazprom and subsequent negotiations to lower the price for importing natural gas from Gazprom.

<sup>68</sup> EC Natural Gas Inspections, *supra* note 4.

<sup>69</sup> *Id.*

<sup>70</sup> Neil Fligstein & Iona Mara-Drita, *How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union*, AM. J. SOCIOL., Jul. 1996 at 1, 11, available at <http://www.jstor.org/stable/2782186?seq=2> <http://www.jstor.org/stable/2782186?seq=2>.

borders.<sup>71</sup> It is for these parties that the EC has acted, stating that European consumers benefit from a single market. In order to strengthen the EU's single market ideal, the European Commission adopted the Single Market Act, comprised of twelve "levers" to boost economic growth.<sup>72</sup> In lever six, the EC specifically enumerated energy networks as a key area to focus on. The Commission stated that it believed that transport, energy and electronic communications networks were "the backbone of the single market." It further specified that affordable energy was critical in this initiative. Of note to the current Gazprom investigation, the EC stated that it would strive to achieve "a level playing field" within its member states as well as with "countries in the EU neighbourhood."<sup>73</sup>

The actions by the European Commission to create a single energy market should push Gazprom to cooperate rather than fight the antitrust inquiry. Within a month of the announcement of Gazprom's investigation, the Commission adopted Single Market Act II.<sup>74</sup> The Act narrows the focus of its predecessor's twelve levers, examining four specific areas needing development in the single market context. The Commission again listed networks as a critical area, but gave significantly more attention to energy networks and markets. Perhaps reiterating its seriousness in its antitrust investigations, the Commission provided that "[t]o contribute to the integration of the European internal transport and energy markets, the Commission will continue to pursue vigorous enforcement of the competition rules, and in particular the antitrust rules."<sup>75</sup> If that was not specific enough, the Commission went on to identify gas markets as an area where consumers were paying unnecessarily high prices. Gazprom, not so coincidentally, has been accused of blocking the free flow of natural gas through Europe by

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<sup>71</sup> *Communication from The Commission to The European Parliament, The Council, The Economic and Social Committee and The Committee of The Regions: Towards a Single Market Act – For A Highly Competitive Social market Economy*, at 6, COM (2011) 608 final/2 (Nov. 11, 2010).

<sup>72</sup> *Communication from The Commission to The European Parliament, The Council, The Economic and Social Committee and The Committee of The Regions: Single Market Act – Twelve Levers to Boost Growth and Strengthen Confidence*, at 2, COM (2011) 206 final (Apr. 13, 2011).

<sup>73</sup> *Id.* at 22.

<sup>74</sup> *Communication from The Commission to The European Parliament, The Council, The Economic and Social Committee and The Committee of The Regions: Single Market Act II – Together for New Growth*, at 1, COM (2012) 573 final (Mar. 10, 2012).

<sup>75</sup> *Id.* at 6.

unfairly linking the prices of natural gas and oil.<sup>76</sup> The timing of the announcement of an inquiry into Gazprom is noticeably close to the adoption of the endeavors contained in Single Market Act II.

The European Commission's endeavor to create a single, unencumbered energy market in the EU is not a new concept. Article 102, Title VII of the Treaty on the Functioning of the European Union explicitly forbids antitrust activity in European energy markets. Article 102 states:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers<sup>77</sup>

The treaty provides the Commission with the grounds on which Gazprom can be fined. Looking at the Gazprom scenario in the context of Title VII, first, Gazprom must hold a dominant position in a market. Certainly, this is true. Providing Europe with a quarter of their entire natural gas enables Gazprom with inordinate bargaining power. The fact that Gazprom was able to leverage their control over natural gas prices in exchange for deals to build gas pipelines is evidence of this dominant position. Next, the Commission will analyze whether Gazprom's actions while in this dominant position violated the subsections of Article 102. Both subsection A and B can be construed quite broadly. Subsection A merely requires that any action taken by Gazprom result – whether they directly or indirectly intended it to – in gas prices that could be deemed unfair. Subsection B is even broader, as it requires only that any action by Gazprom be seen as limiting the gas market. The Commission has already stated that limitations on markets are prejudicial to consumers and businesses.

The broad scope for antitrust violations means that Gazprom faces an uphill battle in trying to evade penalties from the European

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<sup>76</sup> James Kanter, EU Opens Inquiry into Gazprom Trade Practices, N.Y. Times (Sep. 4, 2012), <http://www.nytimes.com/2012/09/05/business/global/eu-opens-inquiry-into-gazprom-trade-practices.html>.

<sup>77</sup> Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union art. 102, May 9, 2009, 2008 O.J. (C 115) 1.

Commission. Not only are the subsections enumerated within Article 102 broad, but the provision also allows for the Commission to find companies guilty of antitrust violations outside of those explicit provisions. By including the phrase “such abuse may, in particular, consist in,” the EU has mitigated the importance of finding a negative result (limit on markets, unfair purchase prices), and instead placed the determining factor on whether or not an entity abused its dominant position.

While there are several instances of companies cooperating with the EC in exchange for exemption from penalties, if Gazprom chooses to fight the inquiry rather than to cooperate, they should look to prior examples to see how the European Court has ruled in antitrust cases. The most prominent example of which is the *Microsoft* case.

#### IV. THE *MICROSOFT* CASE

The European Court in *Microsoft* stated that while having a dominant position does not alone constitute a violation of antitrust rules, possessing a dominant market position imbues a “special responsibility.”<sup>78</sup> This responsibility requires that a company make sure to not allow its undertaking to “impair genuine undistorted competition on the common market.”<sup>79</sup> In *Microsoft*, the company Microsoft was accused of keeping certain “interoperability” information from competitors. This information was critical to competitors developing their own software. In explanation of Article 82, the court stated that while businesses are typically able to choose who they engage in deals with, the responsibility of dominant position means that freedom of contract now comes with limits.<sup>80</sup>

The European Court essentially imposed responsibility on Microsoft to provide software and information that would damage their own sales and profitability. Article 82, and now its modern version, Article 102, should be viewed as a limit on the freedom of business. The court in *Microsoft* construed Article 82 as not only covering practices that may prejudice consumers, but also those practices that “indirectly prejudice them by impairing an effective competitive structure.”<sup>81</sup> These

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<sup>78</sup> Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 E.C.R II-3601.

<sup>79</sup> *Id.* at 3606.

<sup>80</sup> *Id.* at 3607.

<sup>81</sup> *Id.*

practices are not limited to those specifically enumerated within the treaty's text. Instead, the court opened the door for any practice to be examined in an antitrust violation context as long as a loose link can be proven between that dominant undertaking and a potential negative impact on the competitive market. Instead of saying that Microsoft cannot limit its competition, the Court instead phrased it in terms of the dominant undertaking cannot "strengthen" its position in the market by unfairly withholding information.<sup>82</sup> The motivation for this contention lies in the European goal of a single market. By limiting competitors in the software and technology market through withholding "indispensable" interoperability information, Microsoft not only stunts the market, but disincentivizes innovation.<sup>83</sup>

While the court examined the conduct of Microsoft and its effect on the technology market, certain concerns about Microsoft's practices also apply to Gazprom and the energy market. One particular concern of the court was that Microsoft, through bundling its software together, could prevent consumers from ever choosing a competitor.<sup>84</sup> This applies to the Gazprom case as well. With accusations of Gazprom raising natural gas prices in retaliation for countries trying to establish their own energy markets, Gazprom would effectively eliminate consumer choice. This proposition contravenes with the European energy market ideal.

Nevertheless, there are several differences between the *Microsoft* case and the Gazprom investigation. First, there is a discernible difference in how software and technology markets behave compared to energy markets. Microsoft held proprietary technology that was "indispensable" in developing further technology. Therefore, by withholding such software, Microsoft was essentially curbing technological development in the market, albeit from competitors. In Gazprom's case, Gazprom's natural gas supply constitutes a major portion of the larger gas market.<sup>85</sup> It cannot though, control the entire market. So while its actions certainly influence gas prices and the gas market, there are other factors and exporters of natural gas. In particular, the United States' shale gas production has emerged as a major

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<sup>82</sup> *Id.* at 3615.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Matthew Hulbert, *Gazprom Tightens Control over European Supply*, FORBES (Nov. 26, 2012), <http://www.forbes.com/sites/matthewhulbert/2012/11/26/gazprom-takes-southern-corridor-spoils/>.



competitor to Gazprom.<sup>86</sup> This lessens the European market's dependence on Russia and Gazprom for its natural gas and weakens the argument that Gazprom's actions are indispensable. However, Gazprom's sizeable contribution to the European energy market is critical to supplying the millions of consumers.

Secondly, Russian-Euro relations will play a large factor in the investigation and its results. Microsoft is not a state-owned corporation and, therefore, the penalties levied against it were losses by the shareholders. The United States did not react in immediate defense of its corporation as did Russia for Gazprom. In Gazprom's case, however, the Russian state controls the corporation by holding a majority of shares.<sup>87</sup> Therefore, any fine or penalty laid down by the Commission would directly impinge upon Russian government's benefit from Gazprom. Putin has already made his stance very clear, no cooperating with European officials. Gazprom employees have not been authorized to give over any information to the Commission which will hamper the investigation.<sup>88</sup> This move has been characterized as a move to protect Gazprom, perhaps to prevent discovery of any illicit activities or unfair practices.<sup>89</sup>

In contrast, the *Microsoft* case held no shortage of document discovery. The 300 plus page court decision is only trumped by the thousands of pages documenting Microsoft's activities.<sup>90</sup> The European Commission will be hard pressed to find similar amounts of information into Gazprom's activities. European officials will also be investigating the deals that Gazprom made with different governments. This means that EU countries cooperating with the investigation face possible repercussions in their future dealings with Gazprom.<sup>91</sup> The European and Russian goals seemed to be destined for conflict as Russia seeks to expand its operations into international markets whereas Europe tries to

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<sup>86</sup> PwC: *Expansion of Shale Gas Market Bolstering Outlook for U.S. Chemicals Industry*, MANUFACTURING.NET (Oct. 9, 2012), <http://www.manufacturing.net/news/2012/10/pwc-expansion-of-shale-gas-market-bolstering-outlook-for-us-chemicals-industry>.

<sup>87</sup> Roman Kupchinsky, *Russian Energy Strategy – The Domestic Factor*, EUROPEAN DIALOGUE, <http://eurodialogue.org/energy-security/Russian-Energy-Strategy%E2%80%93The-Domestic-Political-Factor> (last visited Mar. 11, 2013).

<sup>88</sup> *Putin Signs Decree 'To Protect' Gazprom*, BBC NEWS BUSINESS (Sept. 11, 2012), <http://www.bbc.co.uk/news/business-19559194>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Jan Techau, *Russia's Geopolitical Gazprom Blunder*, CARNEGIE EUROPE (Nov. 6, 2012), <http://carnegieeurope.eu/strategiceurope/?fa=49911>.

decrease its dependence on international gas.<sup>92</sup> Russia appears to be the bully behind the teacher's back, making silent, threatening gestures to other school children not to tattle.

One of the critical similarities, and evidence that the European Court would import similar reasoning from *Microsoft* to the *Gazprom* case, is that both technology and energy have identified as critical areas in establishing a European single market. In both Single Market I and Single Market II, the Commission stressed that it would focus on several types of trade networks, including energy and technology.<sup>93</sup> Additionally, the similarity in language between the two treaties means that there is not a significant barrier to the Court adapting similar logic to the *Gazprom* case. Coupled with the imperative of creating an energy market, both the Commission and the Court have strong motivations to uphold a penalty against *Gazprom* should the corporation choose to fight the inquiry into their activities.

#### A. PREDICTING RUSSIAN ACTION IN REGARDS TO GAZPROM

Given the history of legal settlements, the failure of *Microsoft* to effectively resist European inquiry and the discrepancies in charged gas prices, what does *Gazprom* do? Russia has taken a hard line stance against the European Commission's investigation. President Putin made sure to let the world know how important *Gazprom* is to Russian economic interests through The Decree. Russian officials have been downright hostile. The Russian Ambassador responded to the inquiry by quipping that the "EC is welcome to investigate Mars if it wants to."<sup>94</sup> Other Russian officials have pointed to the economic and political motivation driving the inquiry. The *Forbes* editorial on *Gazprom* and Putin predicted that Putin will continue his total rejection of the EC probe's validity.<sup>95</sup> The problem is, that whether or not the probe is "valid," it is very real.

Of particular importance to the investigation into *Gazprom* is the situation in Lithuania. The EC probe is focusing on eight

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<sup>92</sup> Vladimir Putin, *Speech at a Gala Evening to Celebrate the 15th Anniversary of Gazprom's Incorporation*, (n.d.) (transcript available at <http://www.gazprom.com/about/history/events/15years/speech01/>).

<sup>93</sup> *Report on Competition Policy 2012*, at 2, COM (2013) 257 final (May 7, 2013), available at [http://ec.europa.eu/competition/publications/annual\\_report/index.html](http://ec.europa.eu/competition/publications/annual_report/index.html).

<sup>94</sup> *Gazprom: Beyond the Point of Commercial Return*, *supra* note 23.

<sup>95</sup> *Id.*

Southern/Central EU members, one of which is Lithuania. In reaction to the news, Lithuania “hailed” the launching of the probe.<sup>96</sup> As mentioned above in the paper, Gazprom has yet to settle its dispute over pricing with Lithuania. However, now Lithuania has become a focus for the EC probe. Even before the probe was announced, the EC ordered inspections of 10 EU nations in Eastern/Central Europe.<sup>97</sup> One of these raids took place at the Lithuania gas monopoly Lietuvos Dujos which imports the entirety of its gas from Gazprom.<sup>98</sup> Of critical importance is the fact that Lithuania has tried to implement EU-sponsored fair competition measures.<sup>99</sup> Lithuania has made a significant effort to diversify its gas sources such as a Baltic natural gas terminal.<sup>100</sup> It is hard to see a defense to the rise in gas prices in Lithuania to rates of \$100 per 1000 cubic meters above the European advantage when Lithuania is trying to implement the ideals of the Single Market Acts. Gazprom should appreciate the significance of the opportunity presented to the EC to plant a flag for a new European energy policy.

Gazprom has started to change its stance in one aspect. In an effort to avoid sanctions by the EC, Gazprom would create two subsidiaries to each handle a different aspect of providing natural gas. One subsidiary would control the distribution network while the other would deal with the transportation of the natural gas.<sup>101</sup> The business practice of bundling has been identified as one area in which Gazprom has acted in an anti-competitive manner, however, unbundling fails to adequately address the price fixing concerns. The point is clear, however, while President Putin has acted to hinder the investigation, the Russian government still recognizes the potential consequences of the EC’s inquiry. However, it is unlikely that Gazprom will be able to avoid the inquiry and it must acknowledge it directly through cooperation with the European Commission.

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<sup>96</sup> *Lithuania Hails EU’s Gazprom Anti-Trust Probe*, EU BUSINESS (Sept. 5, 2012), <http://www.eubusiness.com/news-eu/russia-energy-gas.i78>.

<sup>97</sup> Celine Loubette, *EU Launches Anti-Trust Case Against Gazprom: Commission*, YAHOO! NEWS SINGAPORE (Sept. 5, 2012), <https://sg.news.yahoo.com/eu-launches-anti-trust-case-against-gazprom-commission-173945422.html>.

<sup>98</sup> *Id.*

<sup>99</sup> *Lithuania Hails EU’s Gazprom Anti-Trust Probe*, *supra* note 96.

<sup>100</sup> *Id.*

<sup>101</sup> *Gazprom May Unbundle to Escape EU Claims*, EURACTIV (Sept. 21, 2012), <http://www.euractiv.com/energy/gazprom-unbundles-escape-eu-clai-news-514954>.

## B. MICROSOFT'S FINAL LESSON

The last important lesson that Microsoft can teach Gazprom is seen in the recent developments between Microsoft and the European Commission. Microsoft reached a settlement agreement with the European Commission in 2009 in relation to a 2007 claim that they were still withholding interoperability data.<sup>102</sup> The company bowed to the Commission's list of concerns by changing its software in certain ways and making interoperability information more available to competitors.<sup>103</sup> Through this settlement, Microsoft avoided another heavy penalty. While it does represent a change in strategy, the damage may already have been done. Despite the eventual cooperation, the resolution of the 2004 dispute between Microsoft and the Commission remains elusive.

Not only was Microsoft forced to pay over a billion dollar in fines, fees, and interest for not paying the fines and fees promptly, the company was slapped with an additional fine of \$1.3 billion for its lack of cooperation.<sup>104</sup> This brought the total fine levied by the EC to around \$2.4 billion.<sup>105</sup> The battle over the 2004 ruling is not over. In June of 2012, Microsoft received only slight relief from the penalty levied against them when their appeal to annul the 2004 fine was rejected, but the fine was reduced by around \$60 million.<sup>106</sup> Nearing a decade after the original court decision and two decades after the conduct that led to the decision, Microsoft is still spending money fighting the European Commission's inquiry. While compared to the company's entire profits the penalty levied is not crushing, the loss of resources, time, and lost re-investment opportunity could be found to have impaired Microsoft's growth. A company cannot continue to hemorrhage capital in the billions of dollars and remain competitive.

While Microsoft seems unsatisfied by the aftermath of the 2004 decision, it has certainly changed its approach when dealing with the

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<sup>102</sup> Stuart Johnston, *Microsoft Settles with the European Commission*, DATAMATION (Dec. 16, 2009), <http://www.datamation.com/entdev/article.php/3853896/Microsoft-Settles-With-the-European-Commission.htm>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Associated Press, *EU Fines Microsoft a Record \$1.3 Billion*, NBC NEWS (Feb. 27, 2008), [http://www.msnbc.msn.com/id/23366103/ns/business-world\\_business/t/eu-fines-microsoft-record-billion/#.UP5SZYnjmsg](http://www.msnbc.msn.com/id/23366103/ns/business-world_business/t/eu-fines-microsoft-record-billion/#.UP5SZYnjmsg).

<sup>106</sup> James Kanter, *In European Court, a Small Victory for Microsoft*, N.Y. TIMES (June 27, 2012), [http://www.nytimes.com/2012/06/28/business/global/in-european-court-a-small-victory-for-microsoft.html?\\_r=1](http://www.nytimes.com/2012/06/28/business/global/in-european-court-a-small-victory-for-microsoft.html?_r=1).

Commission's inquiries. Shortly after the EU court reaffirmed the 2004 decision in June of 2012, the Commission again threatened to investigate Microsoft for antitrust violations claiming that Microsoft had not lived up to its 2009 settlement agreement.<sup>107</sup> In response to this announcement, rather than fight the EC, Microsoft immediately apologized saying that the company "deeply regret[s] that this error occurred."<sup>108</sup> Microsoft acknowledged that it had made a mistake and had fallen short of its responsibility to the 2009 settlement agreement, but insisted that it was an error rather than blatant defiance.<sup>109</sup> However, it may be too little, too late. The lead antitrust official within the European Commission stated publically that if evidence of a breach is found, another fine will be levied.<sup>110</sup>

The announcement marks a stand by the European Commission to make sure that all other technology companies understand that the Commission is serious about its antitrust concerns. In the words of one Commission official on the Microsoft case, "talk is cheap."<sup>111</sup> The Commission is committed to making its messages permanent and will punish any further defiance of the fair competition rules. As mentioned earlier, the Commission can levy a fine up to 10% of a company's global annual revenue, meaning that for Microsoft, defying the settlement could cost an extra \$7 billion.<sup>112</sup> Additionally, the EC believes that its investigations result in success and real change in the markets. Several officials observed that positive changes can already be seen in the technology sector as a result of the 2009 settlement agreement with Microsoft.<sup>113</sup> This is evidence that the EC will pursue actions and investigations in market sectors that it believes are critical to the economic interests of the European Union as a whole, such as the energy sector. The Microsoft case serves as an example for Gazprom and the European Commission.

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<sup>107</sup> James Kanter, *Europe Opens New Microsoft Inquiry*, N.Y. Times (July 17, 2012), [http://www.nytimes.com/2012/07/18/technology/europe-reopens-antitrust-hostilities-with-microsoft.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2012/07/18/technology/europe-reopens-antitrust-hostilities-with-microsoft.html?pagewanted=all&_r=2&).

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

<sup>111</sup> EU Fines Microsoft a Record \$1.3 Billion, *supra* note 105.

<sup>112</sup> Kanter, *supra* note 106.

<sup>113</sup> Id.

## V. CONCLUSION

The European Union has long pursued a dream of a single, internal market among its 27 national economies. Contrary to this goal, however, are the companies which control a monopoly-sized stake in the market. In 2004, the European Commission levied a heavy fine against tech-giant Microsoft. Five years later, the Commission levied another fine, resulting in a multi-billion dollar settlement. Now, Gazprom faces a similar fate. If the EU finds evidence of market manipulation, the Commission will once again protect its market ideal by assigning Gazprom a large penalty. With penalties that threaten to severely hinder Gazprom's activities in the form of millions, possibly billions, of Euros, Gazprom must treat the European Commission's inquiries as a serious economic threat.

Russia may be right that the inquiry is economically motivated, however, that fact offers little solace if the Commission finds evidence of abusing a dominant market position. By dealing with European countries, Gazprom assumes the risk of dealing with the European Union's governance. With the European Union rules, comes the single market ideal. The European Union and, in particular, the European Commission have long stood by their dream for creating internal energy markets. The alternative to assuming this risk would be to completely withdraw from supplying Europe with natural gas, which would be unacceptable. Instead, Gazprom and the Russian Federation face a fork in the road. The pair can either resist the European Commission's probe which would inevitably lead to sanctions regardless, spending resources and money fighting a multi-decade legal battle similar to the one Microsoft fought. However, there is another way. By adopting a strategy of cooperation similar to the ones of smaller gas companies – agreeing to abide by Commission rules – Gazprom could continue to do business in the European Union while avoiding heavy penalties.

Gazprom and the Russian Federation must take active steps to cooperate with the European Commission's probe. The EC has claimed that all it wants is for Gazprom to play by fair free-market rules like all European companies. If Gazprom is unable to cooperate with these rules, there will be a fine levied against them. Denying European investigators access to Gazprom's documents and employees may impede the investigation, but it will not be able to stop it. The European Commission has access to the countries that Gazprom exports to, and countries like

Lithuania seem happy to oblige the EC inquiry.<sup>114</sup> Instead, Gazprom must adapt and cooperate. In the words of Anders Aslund, “The longer Mr. Putin denies reality, the deeper Gazprom’s crisis will grow.”<sup>115</sup> Fighting the European Commission is costly. Just ask Microsoft.

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<sup>114</sup> Loubette, *supra* note 97.

<sup>115</sup> Åslund, *supra* note 38.