



Challenging the recommendations
made by the Federal
Antimonopoly Service of Russia —
amendments proposed by
the Constitutional Court

APRIL 2015

VEGAS LEX

On 31 March 2015, the Constitutional Court of the Russian Federation published Decree No. 6-P “On the case concerning the constitutionality of Paragraph 1 of Part 4 of Article 2 of the Federal Constitutional Law – On the Supreme Court of the Russian Federation, and Subparagraph 3 of Paragraph 1 of Article 342 of the Tax Code of the Russian Federation on the complaint of Gazprom Neft Open Joint Stock Company (hereinafter referred to as the “Decree No. 6-P”).

The reason for consideration of the case was a complaint made by Gazprom Neft (hereinafter referred to as the “Company”), in which the applicant indicated that it unsuccessfully tried to challenge the Letter of the Federal Tax Service of the Russian Federation dated 21.08.2013 No. AS-4-3/15165 “On taxation of mineral extraction” in the Supreme Court and the Supreme Arbitration Court of the Russian Federation. The courts refused to consider the Company’s case, citing the fact that the contested letter was not a regulatory legal act.

The Constitutional Court of the Russian Federation, taking into consideration the complaint of the Company, acted as a “positive” legislator, by introducing into the national legal system the term “**legal act with regulatory properties**”. We believe that this position taken by the Constitutional Court was due to the existence of legal uncertainty in the judicial practice of determining the regulatory properties of a legal act.

Based on the Decree No. 6-P, we can conclude that the criteria for determining the

presence of regulatory properties of a legal act are:

- existence of regulations **that are not contained in the current legislation**, or do not directly follow from it¹;
- failure to comply with these regulations entails adverse consequences for the economic entity²;
- its use by law enforcement authority is unlimited in time.

The letters sent by the Federal Antimonopoly Service of the Russian Federation (the FAS Russia), within the framework of providing methodological guidance to territorial offices, contain all the above-listed criteria, due to the following characteristics when the following legal acts are applied:

(a) according to the Order of the FAS Russia dated 26.04.2011 No. 308³ for the central office of the FAS Russia – an obligation was placed to bring to the territorial offices the positions of the FAS Russia on the interpretation of legal regulations and the generalization of legal practice⁴. Within the framework of providing methodological guidance, via a letter dated 22.12.2014, the head of the FAS Russia has produced recommendations (explanations) on the application of Articles 14.31, 14.31.1, 14.31.2, 14.32, 14.33 of the Administrative Violations Code of the Russian Federation;

(b) moreover, the said recommendations (explanations) contain regulations that are not found in the current legislation. One of these regulations makes it impossible, in the opinion of the FAS Russia, to apply the

¹ For example, (i) imposition of additional obligations, not covered by higher regulatory acts; (ii) a restrictive interpretation of higher regulatory laws, which will lead to the actual impossibility of their application in relations with an economic entity; (iii) distortion of the actual meaning of the interpretation of legal regulations.

² As an example may serve (i) commencement of an antitrust case; (ii) establishment of violations of antitrust laws by an economic entity; (iii) imposition of an administrative penalty, as a fine at a higher rate.

³ Order of the Federal Antimonopoly Service dated 26.04.2011 No. 308 “On approval of the annual training plan to provide guidance to regional offices of the FAS Russia and the monitoring of its implementation”.

⁴ Order of the the FAS Russia from 27.03.2014 No. 206/14, approving the Plan to provide methodological guidance to regional offices of FAS Russia in the year 2014.

legal positions of the Constitutional Court of the Russian Federation, stipulated in Decree No. 4-P⁵, to turnover-based fines. Thus, for the regional offices of the FAS Russia, in their relations with an economic entity, the position on the impossibility of reducing the size of a turnover-based fine, when there is an apparent disparity in the committed administrative offense, is currently mandatory;

(c) Meanwhile, the error in such an interpretation of antitrust laws, follows from the interpretation of provisions of the Administrative Violations Code of the Russian Federation, as well as confirmations by the relevant court practice, including the Resolution of the Arbitration Court of the Volga District dated 17.09.2014 on case No. A65-30421/2013, Decree of the Arbitration Court of the Volga-Vyatka District dated 27.11.2014 No. F01-4867/2014 on case No. A29-3401/2013.

Thus, the above-mentioned recommendations of the FAS Russia, as well as any other recommendations of the antimonopoly authority, which worsen the situation of an

economic entity, as compared to the higher legal acts, and which are mandatory for the regional offices of the FAS Russia, have regulatory (general regulatory) properties.

The recognition of the illegal nature of recommendations of the FAS Russia by the courts, according to the rules of Chapter 37 of the Arbitration Procedure Code of the Russian Federation, may serve as a new legal justification in seeking revision of previously made judicial acts. Therefore, the developments in the interpretation of procedural rules for challenging legal acts stipulated in Decree No. 6-P, are important for use as a tool to protect the economic interests of economic entities.

To summarize, we would like to note that the Decree of the Constitutional Court No. 6-P, and its repeated broad interpretation in court practice, can provide a powerful impetus to the removal from the Russian legal system the obviously illegal departmental acts of the FAS Russia, which will help streamline relations between antitrust authorities and economic entities.

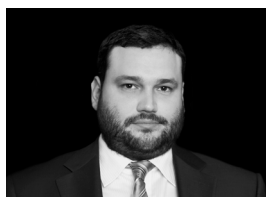
⁵ Decree of the Constitutional Court of the Russian Federation dated 25.02.2014 No. 4-P "On the case concerning the constitutionality of certain provisions of Articles 7.3, 9.1, 14.43, 15.19, 15.23.1 and 19.7.3 of the Administrative Violations Code of the Russian Federation, in connection with the request of the Arbitration Court of Nizhniy Novgorod region and complaints of the limited liability companies Baryshsky Meat-Packing Plant and VOLMET, open joint stock companies Plant Rekond, Operational and Technical Communications Centre and Elektronkompleks, closed joint stock companies GEOTECHNIKA P and RANG, and budgetary health institution of the Udmurt Republic (Neyron City Children's Hospital No. 3 of the Ministry of Health of the Udmurt Republic)".

Contacts



ALEXANDER SITNIKOV
Managing partner

sitnikov@vegaslex.ru



EVGENIY RODIN
Partner, Head
of Energy practice

rodin@vegaslex.ru



ALEXANDER KISELEV
Associate of Energy
practice

kiselev@vegaslex.ru

For further information on the services of VEGAS LEX, please visit our website www.vegaslex.ru

The above information was provided for informational purposes only and it cannot be used as professional advice. Where required VEGAS LEX recommends obtaining professional advice.