

EURASIAN ECONOMIC UNION REVIEW

JURISDICTION OF THE COURT OF THE EURASIAN ECONOMIC UNION OVER THE CLAIMS OF BUSINESS ENTITIES

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Abstract: The Eurasian Economic Union is a logical sequel of Eurasian Economic Community, Customs Union and Common Economic Space. The permanent judicial organ of the Union is the Court of the Eurasian Economic Union. This article addresses the specifics of procedure of submitting an application to the Court by business entities.

Keywords: Anischenko, Rodich, EAEU, Eurasian Court, EAEU Treaty, Procedure of the Court, EAEU case practice, business entities.

The Eurasian Economic Union (*hereinafter*, EAEU) started its functioning on 1 January 2015. The EAEU is an international organisation of regional economic integration among former Soviet States and is a logical sequel of Eurasian Economic Community, Customs Union and Common Economic Space. The purposes of creation of the EAEU are comprehensive upgrade, competitive growth of and cooperation between national economies. Among the purposes there is also promotion of stable development in order to raise living standards of the nations of the Member States. Accordingly, the EAEU has ambitious plans to lift the restrictions on movement of goods, services, capital and labour as well as to pursue consolidated policy within key sectors of the economy.

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Institutional part of the Treaty on the Eurasian Economic Union dated 29 May 2014 (*hereinafter*, Treaty) defines the status of the EAEU under international law.¹ Additionally, institutional part of the Treaty defines EAEU's competence, its aims and contains provisions on the institutions of the EAEU. The transfer by the Member States of their sovereign functions to the institutions of the international organisation, possessing supranational authority, raises the issue of the means of protection of the nationals whose rights and interests might be violated by the acts and omissions of such institutions. The idea of supranationality excludes national judicial remedies. In this way, the observance of the balance of interests of supranational international organisation and nationals of the Member-State is within the competence of the international court. The latter corresponds to the principle of separation of powers.²

According to Article 8(1) and Article 19(1) of the Treaty, the permanent judicial institution of the EAEU is the Court of the Eurasian Economic Union (*hereinafter*, Court of the EAEU or Court).³ The Court exercises its functions from the 1 January 2015 and acts under the Treaty and under the Statute of the Court of the Eurasian Economic Union (*hereinafter*, Statute), which is embodied in the Annex No. 2 to the Treaty.⁴ Procedure of the Court of the EAEU is defined by the Rules of the Court of the Eurasian Economic Union (*hereinafter*, Rules), which were approved by the Decision of the Supreme Eurasian Economic Council of 23 December 2014 No. 101.⁵

¹ See below starting at p. 154.

² E.V. Babkina, *Protection of Rights of Business Entities in the Court of the Eurasian Economic Union: further development or the end of integration?*. In: V.G. Shadurski et al., *BELARUS IN THE MODERN WORLD: MATERIALS FOR XIII INTERNATIONAL CONFERENCE DEVOTED TO 93 YEARS SINCE THE CREATION OF BELARUSIAN STATE UNIVERSITY*, p. 130-132 (Belarusian State University 2014), p. 130.

³ Treaty on the EAEU, *supra* note 1, art. 8(1), 19(1).

⁴ Eurasian Economic Union, *Annex No. 2 Statute of the Court of the Eurasian Economic Union*, text in Russian available at: <www.consultant.ru/document/cons_doc_LAW_170264/?frame=31#p1983>, visited on 22 June 2015.

⁵ Supreme Eurasian Economic Council, *Decision No. 101 "On the adoption of the Rules of the Court of the Eurasian Economic Union"*, text in Russian available at: <www.pravo.by/main.aspx?guid=3871&p0=F91400318>, visited on 22 June 2015

The Court of the EAEU has jurisdiction, *inter alia*, to decide on the disputes upon the claims of business entities of Contracting States in order to ensure the uniform application of (1) the Treaty, (2) international treaties within the EAEU, (3) international treaties of the EAEU with the third parties and (4) the decisions of the institutions of the EAEU by the Member States and the EAEU institutions.⁶ A business entity shall be deemed to include only legal entities and individual entrepreneurs registered as such in the Member-States as well as in the third States.

Under Paragraph 39(2) of the Statute, business entities are entitled to bring the following claims before the Court of the EAEU:

- claims on compliance of decision or separate parts of decision of the Eurasian Economic Commission (*hereinafter*, Commission) which directly affect rights and interests of a business entity in the area of entrepreneurial and other economic activity with the Treaty and/or with international treaties within the EAEU if such decision or its parts entail violation of rights and interests of the business entity provided to that entity by the Treaty and/or by an international treaty within the EAEU;
- claims on challenging the act or omission (failure to act) of the Commission that directly affects the rights and interests of a business entity in the area of entrepreneurial and other economic activity, if such act or omission entailed violation of rights and interests of the business entity provided to that entity by the Treaty and/or by an international treaty within the EAEU.⁷

In order to enforce the right to bring a claim on compliance of the Commission's decision or its parts, it is necessary to take into account Paragraphs 3 and 13 of the Regulation on the Eurasian Economic Commission (*hereinafter*, Regulation). Those provisions indicate (1) the areas within which the Commission can make decisions and that (2) the decisions of the Commission have regulatory character and are binding upon the Member States.⁸ The areas within which the Commission can

⁶ Statute, *supra* note 4, para. 39.

⁷ *Id.*, para. 39(2).

⁸ Eurasian Economic Union, *Annex No. 1 "Regulation on the Eurasian Economic Commission"*, text in Russian available at: <www.consultant.ru/document/cons_doc_LAW_170264/?frame=30#p1737>, visited on 22 June 2015, para. 3, 13.

make a decision are the following: tariff and non-tariff regulation; customs regulation; technical regulation; sanitary, veterinary-sanitary and quarantine and phytosanitary measures; credit and allocation of import duties; establishment of trade regimes towards the third States; statistics of foreign and mutual trade; macroeconomic policies; competition policies; industrial and agricultural subsidies; energy policy; natural monopolies; State and municipal procurements; mutual trade in services and investments; transport and transportation; monetary policy; intellectual property; labour migration; financial markets (banks, insurance, exchange market, securities market).⁹ The list of areas within which the Commission can make a decision is not exhaustive and can be supplemented with the Treaty and international treaties within the EAEU.

While challenging decisions of the Commission, it is also necessary to take into account Paragraph 111 of the Statute. According to the latter, the Commission's decisions and its parts, which are recognised by the Court of the EAEU as inconsistent with the Treaty and/or international treaties within the EAEU, cannot be enforced automatically, but rather the Commission brings the decision to conformity with the Treaty and/or international treaties within the EAEU. The period of time within which the decisions of the Commission should be brought to compliance with the Treaty and/or international treaties within the EAEU should be reasonable and should not exceed 60 calendar days from the moment the Court's decision enters into force unless the Court's decision stipulates other conditions.¹⁰ Elena Babkina expressed the opinion that such approach is, firstly, a 'step back' in comparison with the approach taken by the Eurasian Economic Community (*hereinafter*, EurAsEC) on the same issue and, secondly, is in contradiction with the legal consequences of recognising a decision invalid under the legal theory.¹¹

From practical point of view, business entities, which challenge the decisions of the Commission, may invoke the provisions of Paragraph 112 of the Statute. Under the Paragraph, a business entity is entitled to request

⁹ *Id.*, para. 3.

¹⁰ Statute, *supra* note 4, para. 111.

¹¹ Babkina, *supra* note 2, p. 131.

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the Court of the EAEU to suspend the effect of the Commission's decision or its parts, which are recognized by the Court of the EAEU as inconsistent with the Treaty and/or international treaties within the EAEU, starting from the date on which such decision entered into force.¹² The above-mentioned request should be reasoned.

In case the Commission fails to execute the decision of the Court there is only one authority, which can influence on the Commission. This is the Supreme Eurasian Economic Council (*hereinafter*, Council). However, neither the Statute, nor the Treaty provides a business entity, whose rights and interests were affected by the decision of the Commission, with the possibility to appeal to the Council. In accordance with Paragraphs 114 – 116 of the Statute, only the EAEU Member States and the Court of the EAEU have the possibility to appeal to the Council.¹³ Hereby, a business entity, which is interested in suspension of the effect of the decision of the Commission, has two options. Firstly, a business entity can request the Court to take measures in order to enforce the decision of the Court or, secondly, initiate the appeal to the Council by the State of its nationality.

The practice of the Court of the EAEU and the practice of the Court of the EurAsEC show that the majority of claims submitted by business entities including entities of the third States challenging the decisions of the Commission concern the application of the measures of tariff and non-tariff regulation. Also the claims often concern measures of protection of home market, namely, the decisions on introduction of antidumping duties and classification of selected goods.

For instance, on 15 April 2015, the Panel of the Court of the EAEU by its Order initiated proceedings upon the application of Russian Customs Broker "Unitrade" CJSC for recognition of the Decision of the Commission Board dated 18 July 2014, No. 117 "On the classification of the refrigerating machine 'chiller' as per the uniform Commodity Trade Nomenclature of Foreign Trade Activities of the Customs Union" as being non-compliant with international treaties concluded within the Customs Union

¹² Statute, *supra* note 4, para. 112.

¹³ *Id.*, para. 114-116.

and on cancellation thereof.¹⁴ On 14 May 2015, the first hearing was held. During the hearing the Court of the EAEU considered the application of the Claimant (“Unitrade” CJSC), heard the counsels of the Parties and expert opinions, and analysed adversarial documents and other case materials. On 19 May 2015, the proceedings were ceased on the basis of Article 56(1)(c) of the Rules of the Court, since the Claimant waived its claim.¹⁵

The Court of the EAEU also considered the application of “Gamma” LLP on challenging the omission of the Commission. Under the ‘omission’, the Claimant presumed non-fulfilment by the Commission of its functions to control and monitor the compliance with the provisions of international treaties and to take measures with regard to detecting violations. The omissions of the Commission entailed the collection of the Rent Export Tax by Kazakhstan Tax Authorities as a result of importation of coal into the Russian Federation. Under the Resolution of the Court of March 10, 2015 the Court dismissed the claims of “Gamma” LLP. The Court of the EAEU noted that there was no evidence that the Commission violated the rights and interests of the Claimant provided to it by the Treaty and international treaties within the EAEU.¹⁶

As of 20 May 2015, the Court of the EAEU considered only three applications filed by business entities. None of those applications resulted in the Decision of the Court.¹⁷

For the purposes of exercising the right for judicial protection it is necessary to take into consideration the provisions of Paragraphs 43 – 45 of the Statute. Under those provisions, pre-court dispute resolution is obligatory.¹⁸ In this way, the Court of the Union cannot initiate proceedings if the Claimant did not approach a Member-State or Commission in order to

¹⁴ Court of the Eurasian Economic Union, *Order of 15 April 2015*, text in Russian available at: <courteurasian.org/sm.aspx?guid=12983>, visited on 22 June 2015.

¹⁵ Court of the Eurasian Economic Union, *Order of 19 May 2015*, text in Russian available at: <courteurasian.org/sm.aspx?guid=13123>, visited on 22 June 2015.

¹⁶ Court of the Eurasian Economic Union, *Order of 10 March 2015*, text in Russian available at: <courteurasian.org/sm.aspx?guid=12843>, visited on 22 June 2015.

¹⁷ Court of the Eurasian Economic Union, *Official Database of the Acts*, text in Russian available at: <courteurasian.org/main.aspx?guid=22851>, visited on 22 June 2015.

¹⁸ Statute of the Court, *supra* note 4, para. 43-45.

settle a dispute by means of consultations, negotiations or by any other means specified in the Treaty or in international treaties within the EAEU. There are exceptions to that rule, which are provided by the Treaty. The procedure for consideration of the claims challenging the Commission's decisions or its parts or concerning acts or omissions of the Commission is regulated by the Decision of the Board of the Eurasian Economic Commission No. 46 of 19 March 2013.¹⁹ Under Article 9(1)(f) of the Rules of the Court, the information concerning the fulfilment by a business entity of the pre-court dispute resolution procedure should be indicated in the application.²⁰ In accordance with Article 33(2)(b) of the Rules, non-compliance with the pre-court dispute resolution procedure entails rejection of the application.²¹ Also, before filing an application, a business entity should pay a fee for the Court to proceed with the application. The amount of the fee and payment procedure is defined by the Decision of the Supreme Eurasian Economic Council No. 85.²²

The requirements to content of the application are embodied in Article 9 of the Rules. The application can be divided into two parts:

1. Reference information:

- the name of the Court, information about the Claimant (name of individual entrepreneur/name of legal entity and registration information), domicile, including the official name of the State, address (address for service) as well as phone and fax numbers and e-mail (if available);

¹⁹ Board of the Eurasian Economic Commission, *Decision No. 46 on the procedure for considering the claims challenging Commission's decisions or its parts or concerning acts or omissions of the Commission of the Eurasian Economic Union*, text in Russian available at: www.tsouz.ru/eek/RSEEK/RKEEK/2013/8z/Documents/P_46.pdf, visited on 22 June 2015.

²⁰ Rules, *supra* note 5, art. 9(1)(f).

²¹ *Id.*, art. 33(2)(b).

²² Supreme Eurasian Economic Council, *Decision No. 85 on determination of the amount, currency, procedure of payment, use and return of the fee, paid by a business entity when applying to the Court of the Eurasian Economic Union*, text in Russian available at: www.pravo.by/main.aspx?guid=3871&p0=F91400219, visited on 22 June 2015. From the 1 of January 2015 till the 31 of December 2015 the fee amounts to 37, 000 of Russian rubles.

- information on challenged Decision of the Commission (name, number, date of the decision, the source of publication) and/or description of the acts or omissions of the Commission;
- information on compliance with pre-court dispute resolution procedure;
- date of submission of application.

2. Substantive Part:

- rights and interests which, as claimed by the business entity, were violated by the challenged decision, act or omission of the Commission as well as factual background and arguments on which the claim of the business entity is based;
- the claims of the business entity under Paragraph 39(2) of the Statute.²³

The following documents should be attached to the application:

- a. challenged decision of the Commission (concerns disputes mentioned in the second part of Paragraph 39(2) of the Statute);
- b. copy of legal entity's/individual entrepreneur's registration certificate;
- c. documents which confirm the compliance with the pre-court dispute resolution procedure;
- d. power of attorney or other documents which confirm the authority to sign the application;
- e. document confirming payment of the fee;
- f. documents which confirm that the copy of application and attached documents were sent to the Respondent;
- g. other documents and information which support the claims of business entity.²⁴

The application and attached documents should be provided in one printed copy as well as in one electronic copy. Failure to comply with the above-mentioned requirements pertaining to the application and attached documents results in the Court of the EAEU not taking further actions on the application as is stipulated by Article 33(3) of the Rules.²⁵

²³ Rules, *supra* note 5, art. 9(1, 2).

²⁴ *Id.*, art. 9(3).

²⁵ *Id.*, art. 33(3).

It is apparent that the scope of disputes, which can be submitted by business entities to the Court for consideration, is extremely narrow for now. If the EAEU Members want the Court to play active role in enforcement of integration ideas and principles enshrined in the Treaty they obviously need to make the Court's jurisdiction *ratione materiae* broader. For example, the jurisdiction *ratione materiae* could cover the disputes concerning challenging of laws and regulations which are adopted within the EAEU and affect rights and interests of business entities. It is also reasonable to provide the right to go to the Court to individuals who are not business entities, but who participate in business activities or other economic activities. The latter can be necessary when such individuals exercise investment activities. In case of adoption of the legal acts that violate rights and interests of individuals within the EAEU, such individuals, at the moment, do not have a right to challenge compliance of such legal acts as well as acts or omissions of the Commission. Besides, as is reasonably noted by Elena Babkina, the absence of prejudicial jurisdiction of the Court inevitably entails the reduction of the effect of integration.²⁶ In the absence of the effect of integration the role of the Court in the promotion of declared principles of integration by means of protection of rights of business entities becomes lower. Additionally, in the absence of the effect of integration there is no place for the uniform judicial practice on cases concerning the application of law of the EAEU in the EAEU Member States.

Nevertheless, we believe that emerging judicial practice, active position of the Court of the EAEU and persuasiveness and progressiveness of its decisions will allow broadening the jurisdiction of the Court of the EAEU to such extent, which will be in conformity with the aims and purposes of the Eurasian integration.

²⁶ Babkina, *supra* note 2, p. 131.