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The Legal Department of the Federal Antimonopoly Service commented on the ruling of the Supreme Arbitration Court of the Russian Federation on the case against "TNK-BP Holding" OJSC.

On 25th May 2010, the Presidium of the Supreme Arbitration Court of the Russian Federation reviewed in the exercise of its supervisory power judicial acts of arbitration courts upon a claim of "TNK-BP Holding" OJSC on invalidating the FAS Russia's decision and determination on the case against the company as well as authorization of administrative charges. The Presidium of the Supreme Arbitration Court overruled them and passed a new judicial act dismissing the claim of "TNK-BP Holding" OJSC in full. The Presidium of the Supreme Arbitration Court also gave interpretation of legal norms that is mandatory and should be applied by arbitration courts considering similar cases.

In the FAS Russia's opinion, many conclusions made by the Supreme Arbitration Court of the Russian Federation and formulated in the ruling are important for developing antimonopoly enforcement practice.

1. Determining the product and geographic boundaries of the markets of motor petrol and aviation kerosene, the Presidium of the Supreme Arbitration Court pointed out that the method specified in Sub-clause "a" Clause 5 of No.108 Regulations cannot be applied to analyze and assess competitive environment on the market where the buyer, that has dominant position, sells the goods to its subsidiaries. The Supreme Arbitration Court indicated that market boundaries should be determined through stage-by-stage analysis, the findings of which must be assessed with reference to Articles 4 and 5 of the Federal Law "On Protection of Competition" in conjunction with information and data obtained through all established procedures.

2. The Supreme Arbitration Court made a conclusion on characteristics of the wholesale market of oil products, particularly, the substitutability of the goods on this market as the buyers of the goods produced on refineries are members of the buyer's group of persons and are wholesale resellers that do not sell oil products retail to the end customers.

3. The Supreme Arbitration Court established that the territory of the Russian Federation constitutes the geographic boundaries of the markets in question, because vertically-integrated economic entities that have collective dominance on these markets were selling oil products in all regions of the Russian Federation.

4. The Supreme Arbitration Court concluded that FAS Russia had established dominant position of "TNK-BP Holding" OJSC on the wholesale markets of oil products jointly with "Gazprom Net" OJSC, "Rosneft" Oil Company" OJSC and "LUKOIL" OJSC under Part 3 Article 5 of the Federal Law "On Protection of Competition".

5. The Supreme Arbitration Court pointed out that the fact of wholesale sale of motor petrol and aviation kerosene inside the group of persons does not mean that economic entities - members

of this group lose independence in civil law relations and it cannot constitute the grounds for making conclusions on the absence of such a market. Market shares should be calculated on the basis of the total quantity of oil products produced at the refineries and sold to the first buyer, regardless of the fact if the buyer is a member of the group of persons of the dominant economic entity.

The Supreme Arbitration Court took into consideration Part 2 Article 9 and Article 10 of the Federal Law "On Protection of Competition", which extrapolate the prohibition to create discriminatory conditions and fix different prices for the same goods that are economically, technologically or otherwise unjustified, to all economic entities within or outside vertically-integrated groups.

6. Concluding that "TNK-BP Holding" OJSC fixed monopolistically high prices for the goods, the Supreme Arbitration Court pointed out that in the absence of a comparable market, the second criteria specified in Part 1 Article 6 of the Federal Law "On Protection of Competition" is sufficient to prove monopolistically high prices.

7. Ruling whether "TNK-BP Holding" OJSC was guilty in an administrative violation, the Supreme Arbitration Court indicated that if the company has a possibility to sell motor petrol and aviation kerosene in compliance with the Federal Law "On Protection of Competition" and did not observe the Law by abusing market dominance, it is sufficient to find the company guilty in committing the antimonopoly violation.