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Meeting: 1340th meeting (March 2019) (DH)

Communication from the applicant (21/02/2019) in the case of OAO NEFTYANAYA KOMPANIYA YUKOS v. Russian Federation (Application No. 14902/04)

Information made available under Rule 9.1 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1340e réunion (mars 2019) (DH)

Communication du requérant (21/02/2019) relative à l'affaire OAO NEFTYANAYA KOMPANIYA YUKOS c. Fédération de Russie (requête n° 14902/04) **(*Anglais uniquement*)**.

Informations mises à disposition en vertu de la Règle 9.1 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

1340th meeting of the CMDH

Yukos Oil Company v Russia

Judgment on Just Satisfaction of 31 July 2014 final on 16 December 2014

Submissions under Rule 9(1) of the CM Rules

by

Hulley Enterprises Limited and Yukos Universal Limited (the Injured Parties)

1. The judgment on just satisfaction of 31 July 2014 in Yukos Oil Company (Yukos) v Russia (the Judgment) became final on 15 December 2014, following the judgment on the Merits of 20 September 2011 (the *Yukos* Merits Judgment). The Judgment contains specific steps for its execution and a six month time limit from the date when it became final, ie by 15 June 2015 to have a distribution plan in place with a binding timeframe.

2. In more than four years no steps have been taken to execute the Judgment [1], except the underpayment of the distinct award of legal costs and expenses[2]. €1,866,104,634 (one billion, eight hundred sixty six million, hundred and four thousand, six hundred thirty four euros) remains outstanding and due to the approximately 30,000 former shareholders in Yukos, whose identity is provided by the Judgment.

3. On 19 January 2017 the Russian Constitutional Court ruled on a reference made by the Russian Ministry of Justice (the RF Constitutional Court Judgment[3]) that execution of the Judgment is impossible in accordance with the Russian Constitution.

4. On 22 February 2017 the Russian authorities informed the CMDH that the RF Constitutional Court Judgment is 'binding [on] all Russian competent public authorities'.

5. On 1 October 2018 the Russian authorities provided one page of information under Rule 8 2a of the CM Rules (the October Page), which has now been repeated with a further page filed on 1 February 2019 (the February Page). Both the October Page and the February Page rely expressly on the conclusion of the RF Constitutional Court Judgment that it is 'impossible to fulfil the European Court direction to pay compensation to the [former shareholders in Yukos] at the expense of the Russian Federation budget or property'.

6. Those two pages are the Russian authorities' submission for consideration by the CMDH at its 1340th meeting. They contain three points:

[1] The CMDH has examined the execution of the Judgment in March and September 2015, March, June and December 2016 and in March and December 2017.
[2] A payment of €300,000 was made in December 2017, three years after the judgment became final and 33 months after default interest began to run under para 3 b of the operative part of the Judgment, but no interest was paid.
[3] Judgment 1-P; an English translation was provided as DH-DD(2017)207

(a) The RF Constitutional Court Judgment that the Judgment is 'in contradiction with the RF Constitution' means that compensation cannot be paid to former Yukos shareholders from the budget or property of the Russian Federation (Compensation Cannot be Paid);
(b) The Russian Government may consider, out of good will, payment to certain of the former Yukos shareholders from the distribution of any newly revealed property of Yukos, but only after settlement with the company's creditors (The Good Will Payment Approach);
(c) The October Page stated that the Russian authorities had no information about any such assets, so that no distribution could be envisaged. The February Page adds that State authorities took measures searching for such property but failed to find any and that 'consideration' is being given to making mutual legal assistance requests to seek further information (Mutual Legal Assistance Options).

'Compensation Cannot be Paid'

7. Under Article 46(1) of the Convention the Russian authorities' obligation is to abide by the Judgment. They have not done so. They must now fulfil their obligation.

8. As far as the first point in the October Page and the February Page is concerned, that Compensation Cannot be Paid, that position is a statement that the Russian authorities cannot and so will not abide by the Judgment. That is not in compliance with Article 46(1) and cannot be accepted. The Russian authorities are unconditionally bound to pay just satisfaction awarded by the Judgment.

9. The obstacle to the immediate execution of the Judgment is the result of the amendment of the Federal Constitutional Court Law (the Law), passed on 14 December 2015[4], one year after the Judgment became final. That amendments altered Article 104.2 and 106(2) of the Law so that, if the RF Constitutional Court concludes that the execution of a judgment of the Court is not possible in conformity with the RF Constitution, no measures to execute that Court judgment 'shall be taken within the territory of the Russian Federation'.

10. Article 27 of the Vienna Convention on the Law of Treaties provides: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' The Russian authorities remain obliged to abide by the Judgment by the express terms of Article 46(1). They should now expressly confirm that they will do so and explain how and when they propose to implement the binding legal obligation to pay the just satisfaction which the Judgment awarded.

11. For completeness it is necessary to deal with the remaining points made by the Russian authorities.

'The Good Will Payment Approach'

12. The Good Will Payment Approach suggests that the Russian authorities may attempt, 'as a matter of good will', part payment of their obligations to some of the former

[4] Federal Law No 7-FKZ 'On amendments to the Federal Constitutional Law 'On Constitutional Court of the Russian Federation''.

shareholders in Yukos using other people's money, after repaying creditors. Such an approach would involve failing to abide by the Judgment.

13. There are six obvious and decisive objections to this 'approach':
    (a) The Convention imposes a binding obligation under Article 46(1) to abide by the Judgment. That binding obligation is not, and cannot masquerade as, a matter of 'good will';
    (b) The Judgment identifies at [38] the beneficiaries of the award of just satisfaction as all the former shareholders in Yukos (their heirs and assigns). Making a selection, excluding certain former shareholders, as the authorities envisage would be incompatible with the Judgment and the obligation under Article 46(1) to abide by it;
    (c) The good will approach is predicated on the assumption that the Russian authorities could not use money or assets belonging to the Russian budget, but 'some other money'. It is not open to the Russian authorities to use somebody else's money, either at all, or to meet their obligations under the Judgment;
    (d) The Judgment expressly rejected the suggestion that remaining creditors of former Yukos should be paid first (or at all) before just satisfaction was payable to all the former shareholders. The Russian Government's contrary contention was expressly rejected in the Judgment at [40] to [42][5].
    (e) The Russian authorities suggest that 'their' good will payment might come from remaining assets of the former company. If any such assets exist, given that the bankruptcy process in Russia was concluded with the striking of Yukos off the register of companies, any surplus found now would belong to the former shareholders as members of the company. The Russian authorities' 'good will' approach appears to envisage taking money which (if it existed) would already belong to all the shareholders and redistributing it, as if it belonged to and could properly be controlled by, the authorities. One violation of Article 1 Protocol No 1 is probably enough in this case, without envisaging another as the means to pay the just satisfaction due.
    (f) Finally, the Russian authorities admit that they have not found, and do not know of, any remaining assets. The whole proposal is fantasy.

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[5] The Judgment provides:

[40]. 'With regard to the Government's reference to the applicant company's allegedly unmet liabilities, amounting to over USD 8 billion at the time of its liquidation, the Court takes the view that this argument is similar to the applicant company's evaluation of the consequences of the violation of Article 1 of Protocol No. 1 in respect of the enforcement proceedings (see paragraph 28 above) and remains speculative (see, *mutatis mutandis*, *S.A. Dangeville v. France*, no. 36677/97, § 70, ECHR 2002-III).

[41]. In this respect, the Court would note that it is clear from the course of the enforcement and liquidation proceedings that the domestic authorities chose not to seek repayment of the entirety of the applicant company's debt by, for instance, granting the applicant company more time. Rather, they decided to precipitate the proceedings by auctioning the applicant company's main production unit and liquidating it, notwithstanding the risk of being subsequently unable to recover some of the company's liabilities. The existence and scale of the allegedly unmet liabilities referred to by the Government resulted at least in part from the method used by the domestic authorities to recover the applicant company's tax liability.

[42]. Moreover, the fact remains that any liabilities that the applicant company may have had in respect of its creditors were either met or extinguished within the framework of the enforcement and liquidation proceedings in November 2007, and there is nothing in the case file or the parties' submissions to suggest that under domestic law the applicant company or its shareholders remain liable for any payments in favour of any of its creditors resulting from the above-mentioned enforcement or liquidation proceedings. In view of the above, the Court rejects the Government's argument as unfounded.'

Mutual Legal Assistance Option

14. Finally, the February Page adds the suggestion that, over four years after the Judgment became final, the authorities are 'considering' making mutual legal assistance requests to seek further information about possible assets of the former company, Yukos. Two points should be made.

15. First, Yukos ceased to exist as a company as a result of the conclusion of the Russian Bankruptcy on 21 November 2007[6], that is over eleven years ago. The prospect of there being remaining, undiscovered, assets must be slight. The authorities have failed to find any. The possibility that they might amount to €1,866,104,634 is unrealistic. In any case, they would not belong to the Respondent Government.

16. Secondly, there is no serious prospect that any rule of law State will accept mutual legal assistance requests related to Yukos assets where those requests originate from the Russian authorities. Since the Yukos case began in 2003 the Russian authorities have made a large variety of requests for legal assistance concerning Yukos in various forms from at least eight Council of Europe States, amongst others. Requests for assistance have been made, in several cases repeatedly, to Cyprus, Ireland, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Switzerland and the United Kingdom. They have included requests for extradition and extensive mutual legal assistance and information. All have been refused on the basis that the integrity of the Yukos related proceedings in Russia and their conformity with the rule of law was doubted.

17. Most notably, and of direct relevance to the type of enquiry which the Russian authorities apparently envisage, on 18 January 2019 the Hoge Raad (Supreme Court) of the Netherlands concluded litigation which had begun in 2006 on the express question whether the Russian bankruptcy proceedings concerning Yukos could be recognised under Dutch law. The Hoge Raad affirmed the decisions of the courts below, that the Russian bankruptcy proceedings could not be recognised in the Netherlands because they furthered violations of the Convention and did not meet rule of law standards. That judgment was informed by the *Yukos* Merits Judgment and the Judgment. As the final judgment of a highly respected national supreme court it is to be expected that the Hoge Raad's judgment will, like the Court's judgments in this case, act as a powerful guide to the national legal systems in other Council of Europe Member States, which will also continue to refuse to co-operate with the Russian authorities over requests concerning the Yukos case.

18. Significantly, however, it is not only Council of Europe States which have been confronted with and have rejected requests for assistance from the Russian authorities in Yukos related matters. Israel has refused extradition and other forms of assistance and the United States of America did not give effect to the Russian Bankruptcy Administrator's attempts to include assets located in the USA within the Russian bankruptcy of Yukos.

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[6] *Yukos* Merits Judgment [304]

19. INTERPOL has also been confronted with determining the propriety of red notices and other diffusions initiated by the Russian authorities against key Yukos figures against whom spurious allegations and criminal proceedings have been initiated in Russia. It took an exceptional decision concerning one of the leading Yukos so-called core shareholders, whose spurious prosecution for allegedly organising a series of murders and attempted murders with the assistance of AV Pichugin[7] is the subject of a major application pending before the Court[8]. On 1 July 2016 the Commission for the Control of INTERPOL's Files issued a detailed decision recognising the predominantly political nature of the allegations and deleted all data concerning the data subject. It forbad the further use of INTERPOL's systems in relation to the Russian proceedings against him.

20. In short, the prospect that requests by the Russian authorities for mutual legal assistance in relation to the Yukos case or related matters will be acted upon by rule of law States is excluded by virtue of the terms of the *Yukos* Merits Judgment and the Judgment themselves and the established practice of the highest courts of many Council of Europe and other States. Those courts will not further the violations which the Court has found in the *Yukos* Merits Judgment, nor thwart the Judgment. That position is quite apart from the unrealism of imagining that undiscovered assets to which the Russian authorities might have a legitimate claim actually exist.

Conclusion

21. Under Article 46(1) of the Convention the Russian authorities' obligation is to abide by the Judgment. They have not done so. They must now fulfil that obligation.

22. The CMDH cannot be satisfied with the explanation which the Russian authorities have provided by the October Page and the February Page. That 'information' fails to explain how the authorities will comply with the terms of the Judgment. Execution of the Judgment cannot not legitimately be blocked by the authorities first amending domestic legislation, one year after the Judgment became final, and now stating that execution is impeded by that very amendment.

23. Treaties, including the Convention, require good faith compliance. The Russian authorities should set out how and when that will be achieved to show that they will now 'abide by' the Judgment, as Article 46(1) requires.

J P Gardner

Piers Gardner
For the Injured Parties
London

20 February 2019

[7] AV Pichugin currently has two cases pending before the Committee of Ministers following two separate judgments of the Court (*Pichugin v Russia* judgment of 23 October 2012 No 38623/03 and *Pichugin No 2 v Russia* judgment of 6 June 2017, No 38958/07) that he was denied a fair and public trial on two occasions and was denied the presumption of innocence. The supervision of the execution of both cases is the subject of enhanced supervision by the CMDH.

[8] Application No 26609/08, communicated 11 October 2018