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CRITERIA FOR THE NORMATIVITY OF INTERPRETATIVE LEGAL ACTS IN RUSSIAN JUDICIAL PRACTICE

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The subject. The article focuses on the concept of *acts which clarify legislation and have normative properties* (acts with normative properties, or *ANPs*). This concept was introduced in Russia's procedural legislation in 2016 in order to allow such acts to be challenged by way of judicial review. *ANPs* are different from normative acts and, in accordance with the established doctrinal classification, can be described as interpretational acts.

The purpose of the article is to examine the nature of *ANPs* and the way in which Russia's courts decide judicial review claims which seek to challenge *ANPs*.

The methodology includes interpretation of Russian procedural legislation and analysis of doctrinal researches on judicial review of ANP. The authors also analyze the materials of the empiric monitoring of judgments in *ANP* judicial review cases and ascertain the criteria of normativity which are relied upon by Russia's courts when identifying *ANPs* and distinguishing between *ANPs* and other legal acts – primarily, between *ANPs* and normative acts.

The main results, scope of application. The authors describe the drafting defects in the procedural legislation and maintain that the statutory definition of *ANP* lacks clarity. The authors put forward their own definition of *ANP* as distinguished from normative acts, on the one hand, and acts that apply legal norms, on the other hand. The authors argue that, in contrast to normative acts, *ANPs* not only lay down the will of the issuing authority, but also have a knowledge acquisition (cognitive inquiry) component in them. There is a logical and semantic link between the content of an *ANP* and the norms which are contained in a normative act and are interpreted by the *ANP*. In contrast to an act of legal application, the validity of an *ANP* depends not only on the competence of the authority that issued the ANP, but also on the validity of the normative act interpreted by the *ANP*. Further, acts of legal application, but not *ANPs*, establish a logical correspondence between individual objects and the general concepts used in legal norms.

The authors also analyze the doctrinal works on judicial review of *ANP*. The scholars who criticize the introduction of this procedure in the legislation believe the concept of ANP to be superfluous for various reasons and argue that *ANPs* are either non-normative acts or defective normative acts. The authors of this article, however, maintain that the scholars who criticize the concept of ANP do not take into account the special nature of *ANP* normativity – i.e., normativity of interpretational acts. The authors put forward a hypothesis regarding the way in which courts are likely to treat *ANP* judicial review cases, describe the materials of the empiric monitoring, and then provide the statistical result of the said monitoring.

Conclusions. The analysis of the content of judicial acts allowed the authors to identify five types of interpretational collisions between the original legislative norm and its interpretation (clarification) in an *ANP*. The reasoning of the courts was analyzed to reconstruct the criteria used by the courts to establish whether a challenged legal act has normative properties. The authors identified that the courts consider that there are two ways in which an *ANP* can acquire normative properties: either through the expression of the will of the issuing authority or through actual application of an *ANP*. The authors describe the criteria of both types of *ANP*.

The authors conclude the article with the description of the main problems revealed during the monitoring and propose their possible solutions.

1. Introduction: problem statement

In 2016, influenced by the legal position of the Constitutional Court of the Russian Federation (hereinafter — CC RF, CC), a new institution appeared in the Russian procedural legislation — an appeal against the *acts which clarify legislation and have normative properties* (hereinafter — *ANPs*), different from normative legal acts, which had been challengeable before. This legal innovation transfers into practice the theoretical debate on the notion of normativity and the relationship between normativity and interpretation. Identification of features of the new legal concept that allow, on the one hand, to state the existence of a special legal phenomenon and, on the other hand, to distinguish it from the already known phenomena, is a complex theoretical and practical problem. The purpose of this article is to use the monitoring of court practice on challenging ANPs to identify the normativity criteria used by Russian courts to identify ANPs and distinguish them from other types of legal acts — primarily normative legal acts — and to determine how courts understand the relationship between challenged explanations and clarified norms. Given the widespread inconsistency between normative acts and their application, characterized as a profound crisis of law enforcement [1, p. 160], the analysis of court practice is particularly relevant for the study of the Russian legal system.

2. The problem of the concept of *ANP* in legislation and explanations of higher courts

The problems of judicial challenge of *ANP*, discussed below, are not least due to defects in the legal-technical construction of Article 217.1 of Russian Administration Procedure Code (hereinafter — APC RF, APC) and Article 195.1 of Russian Commercial Procedure Code (hereinafter — CPC RF, CPC)[1], above all the obscurity of the concept of *ANP* and in particular the *normative properties*, namely what they are attributed to — clarifications of existing norms or norms imposed by the act in the guise of clarifications.

The statutory notion of *ANP* seems to point to the doctrinal notion of an *interpretative act*, i.e. an act of official (legal or authentic) normative interpretation, and such an official explanation is attributed normative properties, i.e. it is assumed that the body in question will be binding for all cases of interpretation and application of the interpreted norm. Accordingly, the main task of the court is to assess the consistency of such normative explanations with the actual meaning of the provisions explained by the act.

Article 217.1 Part 2 of the APC provides the following grounds for challenging the act: it has normative properties and the act does not correspond to the actual meaning of the normative provisions it clarifies. Article 217.1 Part 3 (2) of the APC partially sheds light on the notion of normative properties — they allow the challenged act to be applied repeatedly as a *generally binding prescription* against an indefinite circle of persons.

However, the two alternatives offered in part 5 of this Article for judicial decisions that may be taken following an administrative case challenging an *ANP* do not take into account the specific nature of the interpretative act. It follows from part 5 of the Article in question that the court may either (1) satisfy the administrative claim in case the contested act does not correspond to the real meaning of the normative provisions it clarifies, sets norms that are not generally binding for an indefinite range of persons and is of repeated application, or (2) refuse the claim in case the contested act does not have normative properties and corresponds to the content of the provisions it clarifies. Thus, the construction of this Article does not assume a situation where an interpretative act, the explanations of which have normative properties that it cannot fail to have, being an act of normative interpretation, corresponds to the content of the normative provisions it clarifies.

It follows that normative properties do not indicate the normativity of explanations, but the

[1] Given that the text of these articles is virtually identical, we shall hereafter use Article 217.1 of the APC RF as an example, assuming that the same reasoning is true of Article 195.1 of the CPC RF.

normativity of the rules established under the guise of an interpretative act — *generally binding prescriptions*; the finding of normative properties of an interpretative act means that the content of the normative provisions it clarifies is inconsistent, while compliance indicates the absence of normative properties. Thus, normative properties are not an essential feature of an interpretative act that characterizes the normative nature of the explanations it contains (as may be assumed from the notion of an interpretative act), but are only attributed to it when it establishes new rules under the guise of an interpretative act. In other words, according to the logic of this article, an interpretative act does not have normative properties, but acquires them only when it actually becomes normative.

Perhaps the legal and technical defects in the APC article in question have their source in the CC RF Decision No 6-P of 31.03.2015, which introduces the notion of *ANP*. The notion is not used by the Court to refer to an interpretative act, but to an act which, under the guise of interpretation, establishes a new legal regulation and as a result of this the act acquires the normative properties attributed to the rules introduced by the act rather than to the clarification. Thus, the notion of *ANP* is used by the Court in relation to a legally defective act, the validity of which, thanks to this Decision, can now be challenged. In other words, the normative properties of an explanatory act emerge as a result of the divergence of the interpretation from the actual meaning of the norms being interpreted and appear as a defect and a reason for challenge.

This conclusion is supported, inter alia, by the fact that the CC does not attribute normative characteristics to an interpretative act (paragraph 3); in addition, in the operative part of the judgment the Court uses the concept of acts which "are not formally normative acts but *actually* have normative properties", indicating that the normative properties of an interpretative act are not assumed by the CC, which is a factual defect in the act, rather than an essential feature of the act. Perhaps the absence in the CC RF Decision of a distinction between the normativity of rules and the normativity of explanations was responsible for the imperfect construction of APC norm 217.1, which excludes the existence of an interpretative act, i.e. an act which explanations have normative properties and correspond to the content of the normative provisions it clarifies.

Thus, although the purpose of the article was to enable judicial challenge of interpretative acts that establish new legal regulation under the guise of interpretation, the construction of the article is such that the notion of an interpretative act has no place in it: if the act complies with the real meaning of the legal provisions it clarifies, it is treated as having no normative properties, that is, as an individual act; if it does not, the act acquires normative properties, that is, it becomes a norm. Accordingly, every act of wrong normative interpretation, i.e. an interpretation that does not correspond to the real meaning of the legal provisions it clarifies, is regarded as an unauthorized act of law-making and therefore there can be no wrong interpretation in principle.

The notion of *ANP* is clarified by the Regulation of the Plenum of the Supreme Court of RF No. 50 of 25.12.2018, which assigns normative properties to the *results of interpretation of legal norms*, which (results of interpretation) are used as generally binding in law enforcement activities in respect of an uncertain circle of persons. Thus, the Supreme Court (hereinafter — SC RF, SC) resuscitates in judicial practice the doctrinal notion of an interpretative act, the normativity properties of which refer to the *explanations* of the content of the norm interpreted by the relevant body.

3. The doctrinal notion of an interpretative act

Among the main features of an interpretative act, the doctrine includes the following.

1. Interpretative acts may be issued by bodies with law-making powers (*authentic* interpretation) as well as by bodies with interpretative powers (*delegated* (*legal*) interpretation).

2. A fundamental feature of interpretative acts is the absence of normative novelty, i.e. they do not establish new legal norms, do not modify or abolish existing ones; their content cannot go beyond the content of the interpreted norms. According to A.F. Cherdantsev, "if such a provision actually... takes place, it contradicts... the legal

nature [of interpretative acts]" because "interpretative norms are provisions *intra legem* (inside the law), but not *extra legem* (outside the law)" [2, p. 157].

3. Accordingly, their content is not legal norms but "normative provisions on the *application of legal norms*" [3, p. 355] or "prescriptions on how to interpret and apply the applicable legal norms" [2, p. 158]. Such prescriptions are sometimes referred to as *interpretative norms* prescribing a certain understanding of laws, *norms of explanation*, *norms about norms* [2, p. 157], *legal provisions* [3, p. 354], *specifying normative prescriptions or normative explanations* [4, p. 35–38]. As S. S. Alekseev notes, "in relation to legal norms they are the results of the official normative interpretation of the existing law — logical conclusions from one or more interrelated legal norms formulated on the basis of legal practice data" [3, p. 355][2]. The doctrine emphasizes the auxiliary and secondary (to the interpreted provisions) nature of this kind of interpretative norms, which are "auxiliary norms of law enforcement" [3, p. 355], "the rules of understanding and application of the legislation in force" [4, p. 34–35].

4. Interpretative acts are not the result of law-making, but the generalized results of activities relating to the application of law [3, p. 355], accordingly, the provisions of interpretative acts are usually addressed to law enforcement authorities, and not to the subjects whose actions are directly regulated by the interpreted norm [2, p. 158]. In law enforcement practice, notes A.F. Cherdantsev, interpretative acts should not be taken as a basis for deciding a legal case: "The subject deciding the case must refer to the law as the legal basis for the decision. An interpretative act may be used only as one of the arguments for this or that understanding of the statute, this or that legal qualification of a fact" [2, p. 158].

The characteristics of an interpretative act proposed by the doctrine can be supplemented in order to distinguish it more precisely from normative and law-enforcement acts.

4. The intellectual-volitional nature of the interpretative act

Interpretation of a text seeks to discover its meaning and represents an act of cognition.

The simplest case is when a citizen interprets the text of the law in order to determine his further actions. This interpretation of the law is a prerequisite for any conscious action within the sphere of legal regulation. For example, a citizen who wants to ride his electric scooter in a park will read the rules of the park and, depending on the conclusion he draws, he will carry out his intention or leave the electric scooter at home. The legal advisor drafting the lease agreement is based on a certain interpretation of the civil law, in particular he assesses which of its norms are imperative and which are dispositive, how exactly the imperative norms limit the freedom of contract in this case, etc. This interpretation can be called *interpretation-understanding* and permeates all legal activity.

The second case of interpretation involves a further step — the linguistic formulation of the result of the interpretation. Two formulations of the norm emerge — the original text of the legal act and the text created by the interpreter. The claim of the interpreter is based on the assumption of logical equivalence[3] of both formulations or on the logical deducibility of the interpreted formulation from the original one (what C.E. Alchourrón and E. Bulygin called *generic subsumption* [6, p. 161])[4]. In this case there is an interpretation-understanding expressed verbally. A citizen, answering the question of his

[2] Cf.: "A common feature of acts of official interpretation is that they do not seek to create new legal norms; their significance is limited to the logical development, clarification and specification of existing law in order to implement it in the most correct and efficient manner" [4, p. 29].

[3] The logical equivalence of two judgements means (*A≡B*) that they are either simultaneously true or simultaneously false. The concept of L-equivalence, introduced by R. Carnap to explicate the substantive identity of judgements and assumes that A≡B is logically true, i.e. true in all possible worlds. For the two norms *N1* and *N2* L-equivalence can be defined as their simultaneous validity (or simultaneous lack of validity) in all possible worlds (see [5, p. 36-48]).

[4] Generic subsumption is the establishment of a logical relationship between the general concepts used in the formulation of legal norms [6, p. 161].

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wife about the possibility to ride on a scooter in the park, expresses his understanding of the text of the rules of visiting the park. The same interpretation is carried out by a legal adviser who prepares a legal opinion for the head of an organisation, or by a jurist who writes a commentary on the law. Such interpretation can be called *interpretation-explication*.

The third case of interpretation also involves the verbal expression of the result of the interpretation, but differs from the second in its implications. The interpreter does not simply explain how he understands the text being interpreted, but declares how it *is to be* understood in all cases of interpretation and application of the norm. Here, the semantic aspect (establishing of meaning) is supplemented by a pragmatic one, connected with the will of the interpreter to identify the original and secondary formulation of the norm. This interpretation is a combination of two acts, an *act of cognition* and an *act of will*. It can be called an *interpretation-explanation*, the form of which is an *interpretative act*. In other words, a *normative interpretation-explanation*, as the content of an interpretative act, is of a dual — intellectual-volitional nature[5].

The original formulation of the norm is not always identical with its literal meaning. The classic theory of interpretation from which we proceed (see for example [8, p. 387–395; 9, p. 53–62, 127–141]) supposes that the literal sense of a norm may differ from its actual sense, because in order to discover the former one uses the methods of interpretation related only to the text of the norm itself, whereas to discover the latter one uses all available interpretation tools including systemic, logical and teleological methods. If the actual meaning of the norm expressed in the interpretative act is broader than its literal meaning, one can speak of an expansive interpretation, if narrower, of a restrictive one. In both cases, the interpreter asserts the logical equivalence of the two formulations of the norm, as when the literal and the actual meanings of the norm coincide. It is not possible to fill the gap in the law by means of interpretative acts, because the very conclusion that a gap exists is one of the possible results of interpretation that presupposes the absence of a legal norm that would be applicable to the case in question. The instrument for filling in gaps is the act of law-enforcement.

An interpretative act is similar to a normative act in its effect. Both can only be issued by competent authorities, are valid and therefore can be challenged in court. It is in these features that normativity is common for interpretative and normative acts. The difference is that an interpretative act does not have a purely volitional but a mixed, cognitive and volitional nature, as a result of which there is a special logical-semantic link between the content of the interpretative act and the interpreted (original) legal norm (group of norms) of the normative act. This link means that if the original norm loses its legal force or changes, its explanation also loses its validity and that the interpretative act[6] may be declared invalid by a court not because it contradicts a higher norm, but because it is not equivalent (in a logical sense) to the original norm.

The answer to the question of whether issuing an interpretative act is norm-creating depends on the definition of the concept. If norm-creating is a change to a normative system, then issuing an interpretative act is norm-creating because it reduces uncertainty by limiting the number of ways in which the original norm can be understood. In doing so, we assume that a certain degree of uncertainty is inherent in any text written in a natural language and, accordingly, several variants of understanding of the norm are possible. If we define norm-creating as a volitional authoritative activity, the issuance of interpretative acts does not fall under this concept due to their mixed cognitive-volitional nature.

An interpretative act is similar to a law-enforcement act in terms of its characteristics. Acts

[5] In the scientific literature there is an opposition between the interpretation of law and its specification, which is understood as the issuance of official explanations, accordingly the term “interpretative act” is replaced by the term “legal specificating act”. [7, p. 149–153]. From our point of view, such usage leads to terminological confusion.

[6] Hereinafter, it refers to as non-judicial interpretative acts.

of both types are issued by specially authorized subjects, have legal validity, can be challenged in court and have a cognitive-volitional nature. At the same time, unlike within the interpretative act, within a law-enforcement act there are not one but two objects of cognition: apart from cognition of the legal norm, the law-applier also has to cognize (ascertain) the facts relevant to the case in question and relate them to the norms, i.e. to carry out *individual subsumption*[7]. Thus, whereas the act of law-enforcement relates the norm to specific facts, the interpretative act relates to other general notions, i.e. categories of facts. In addition, the structure of the law-enforcement act, which is an inference, is also peculiar: using E. Bulygin's terminology [10, p. 185] its premises are *general normative sentences* (norms grounding the decision), *interpretative sentences* (including definitions), which are the results of norm interpretation, and *empirical sentences* that describe the facts to which norms should be applied. The conclusion is an individual norm contained in the operative part of the decision.

The consequence of these features, including the individual nature of the law-enforcement act, is that there is no direct dependence of its validity on the validity of the norms that have been applied. The repeal of an applied norm does not entail the loss of validity of the act of its application; moreover, even the recognition of the applied norm as invalid from the moment of issue (retroactive repeal) is only a ground for revising a valid law enforcement act in a special procedure (under new circumstances).

The relationship between the concepts discussed above is presented in *Table 1* (see the next page).

[7] Individual subsumption is the ascertaining of correspondence between concrete objects and general concepts used in the formulation of norms [6, p. 160–161].

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Table 1.

Relationship between the concepts of interpretative, law-enforcement and normative acts

	Interpretation-explication (no legal act)	Interpretation-explanation (interpretative act)	Interpretation-explanation (law-enforcement act)	Ordinary norm-creation (normative act)
nature of act	cognitive	mixed (cognitive - volitional)	mixed (cognitive - volitional)	volitional
object of cognition	legal norm (norms), or legal norm (norms)and legal facts	legal norm (norms)	legal norm (norms)and legal facts	no
subject of act	any subject other than a specially authorized person	specially authorized subject	specially authorized subject	specially authorized subject
degree of abstractness	general or individual character	general character	individual character	general character
subsumption	individual and /or generic	exclusively generic	individual and generic, or exclusively individual	no
legal validity of act	no	yes, but the act is valid as long as the interpreted norm is valid	yes	yes
challengeability of act	cannot be legally challenged	challengeable under a special procedure (with the exception of judicial interpretative acts), on the grounds that the result of the interpretation is inconsistent with the meaning of the interpreted norm	challengeable under a special procedure on the following grounds: 1) contradiction to the norms of substantive or procedural law; 2) inconsistency of the result of interpretation with the meaning of the interpreted norms; 3) incorrect determination of the factual circumstances	challengeable under a special procedure on the grounds that it contradicts a higher norm
presumed logical relationship to other legal norms	equivalence / logical consequence	equivalence / logical consequence	logical consequence / non-contradiction	non-contradiction

5. The concept of *ANP* and an assessment of their challenge procedure in Russian legal doctrine

The emergence of a new category of legal acts subject to judicial challenge in the Russian legislation has been perceived ambiguously in the scientific literature. According to some authors, ANPs are different in their properties from normative acts, which implies the need to establish a special procedure for challenging them (see, for example: [11–13]). Other authors, on the contrary, believe that the introduction of the legal construction proposed by the CC confuses the legal terminology by multiplying the entity (see e.g.: [14–16]). Third authors are cautious in their assessment of the legislative innovations, believing that they have established exceptions "to the general rule about the advisory, i.e. legally non-binding, nature of official explanations" [17, p. 67–68].

Let us note the position of A.A. Petrov who drew attention to the fact that the CC "has begun the process of breaking down two ideologies about the system of legal acts prevailing in domestic jurisprudence: it can no longer be said that the official interpretation of a law is merely... an explanation of its meaning by an authorized body... Another aspect is now coming to the fore — does such an explanation introduce novelty into the legal regulation...? An affirmative answer to this question is one of the grounds for assessing the validity of such an interpretation in the judicial procedure". According to the scholar, this understanding brings the position of the CC closer to the realistic understanding of formal interpretation in the spirit of the French constitutionalist M. Troper's concept [18, p. 118–119].

In addition to the theoretical distinction between normative and interpretative acts, authors who favor the introduction of procedures for challenging legal explanations stand on practical considerations of the need to protect the rights and legitimate interests of citizens and legal persons against possible violations by administrative law-enforcement authorities guided by official explanations [12, p. 29; 19; 20].

The arguments of the opponents of the legislative innovations in question are as follows.

1. The opposition between the concepts of *ANP* and a *normative act* is theoretically false.

If an act has normative properties, it is normative. According to the logic of the CC RF, the acts in question are normative in content, but not in form, as they were issued by unauthorized actors. However, the nature of a legal act is determined by its content. Non-observance of the form of publication entails the lack of legal force, i.e. we are talking about defective normative acts [14, p. 38–39]. S.V. Nikitin believes that they should be challenged under the normal procedure of appealing against normative acts with some features, but eventually concludes that defective normative acts have no features that could justify a special legislative regulation [14, p. 39–40].

2. The legal position of the CC RF is not fully implemented in Article 217.1 of the APC RF.

According to S.V. Nikitin not only has the legislative implementations eliminated the problems of legal regulation of defective normative acts, but has created a number of new ones. Thus, "the interpretative acts' verification procedure established by the Article 217.1 of the APC RF does not provide for the specifics of disqualification by the court of acts adopted in violation of the formal-legal requirements for normative prescriptions... acts", while the main issue addressed by the Court in Decision No. 6-P was "the possibility of judicial review of acts that do not meet the formal requirements for normative prescriptions (defective normative acts)" [21, p. 14].

3. Article 217.1 of the APC RF does not provide for the possibility to challenge the *ANP* on formal grounds, even if it is enacted irregularly.

As the scholar notes, Article 217.1 of the APC RF directs the courts in checking interpretative acts "only to establish whether or not the explanations are of a normative nature and to compare the content of these explanations formally with the content of the act being interpreted". However, "the court may find that an interpretative act does not meet these (formal — *author's note*) requirements, but it cannot disqualify it on this ground". Thus, the courts legalize the illegal practice of authorities to issue normative acts with evasion of the established rule-making procedures [21, p. 15] (see also: [22, p. 177–178]).

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4. Some authors criticize Article 217.1 of the APC RF from the opposite perspective, following the dissenting opinion of Judge G.A. Zhilin of CC when adopting Decision No. 6-P. From this point of view, there is no problem at the legislative level and all acts attributable to *ANPs* fall under the category of non-normative acts and the corresponding procedure of challenge. Therefore, it is not legislation that should be changed, but the practice of its application that does not recognize relevant acts as non-normative [15, p. 11–12].

S.V. Nikitin's critical position can only partly be accepted. The scholar correctly notes the normative nature of *ANPs*, which in itself does not allow to classify them as non-normative acts. The problem of actual impossibility to challenge *ANP* on formal grounds does exist, but S.V. Nikitin does not take into account that the legal construction of *ANP* expresses not the concept of defective normative act, which he develops, but another theoretical concept — the interpretative act. The distinction between the concepts of *ANP* and normative act is necessary because of the theoretical features of interpretative acts we discussed above, their specific normativity (see also on this: [23–24]).

6. Challenging *ANP* practice: hypothesis and empirical basis for the study

We carried out research into the practice of challenging *ANP* as part of a law enforcement monitoring project run by St. Petersburg State University [25].

The hypothesis of the study was that the construction of Art. 217.1 APC RF and Art. 195.1 CPC RF would cause confusion in court practice between the notions of *ANP* and a *normative act*, as a result of which the former would be transferred to the latter, i.e. the normativity property, understood exclusively as the normativity of a rule and not its explanation, would be considered a defect of the challenged interpretative act. Such a transposition may take place, in particular, in decisions to reject an administrative action to invalidate *ANP* by stating that explanations that correspond to the true meaning of the interpreted act do not have normative properties, or, conversely, in a successful action by stating that explanations that do not correspond to the true meaning of the interpreted act do have normative properties.

The empirical basis for the study consisted of decisions of courts of general jurisdiction, courts of arbitration (the Intellectual Property Rights Court, hereinafter — *IPC*) and the Supreme Court of Russia from February 2016 to July 2020, which applied one of the two norms governing the procedure for challenging *ANP*. Due to the small number of relevant disputes, the entire general totality of decisions for the relevant period (102 decisions) was examined. The distribution of cases by court and instance is presented in *Table 2*. Thus, 62 judicial acts have been passed in first instance, 40 of which have been challenged in appeal or cassation instances.

Table 2.

Distribution of cases by court and instance

	Courts of arbitration	Courts of general jurisdiction	Supreme Court of Russia
First instance	1 (1%)	6 (5,9%)	55 (53,9%)
Appeal instance	0	0	39 (38,2%), including 6 (5,9%) acts of the Judicial Chamber on administrative cases of the SC RF
Cassation instance	1 (1%)	0	0
Total:	2 (2%)	6 (5,9%)	94 (92,1%)

7. Statistical results of the study

The categories of acts challenged as having the characteristics of normativity are varied in terms of legislative branch belonging. The largest number of decisions is related to challenges to tax legislation (25,5%)[8]. A significant number of challenged acts relate to the legislation on public procurement (10,8%), housing (7,8%), civil, medical, anti-monopoly legislation (6,9% each) and others.

Most of the acts challenged (87,3%) were issued by the federal executive authorities. In 8.8 per cent of cases, acts of the executive (4,9 per cent) and legislative (3,9 per cent) authorities of Russian territorial subjects were appealed against. Two court decisions dealt with the issue of declaring an act issued by a federal institution (the Russian Centre for Forensic Medicine) unlawful and one by a body of judicial autonomy (the Presidium of the Russian Council of Judges).

In the absolute majority of cases (78,4%), the challenged act was a *letter*. In 7,8% of cases the contested act was a methodological *recommendation*, in 5,9% it was a *ordinance* (of legislative and executive authorities of Russian territorial subjects), in a number of cases it was an act issued in the form of *information* and published on the institution's website, *explanations* (of the Presidium of the Judicial Council), proposals (of the Chief State Sanitary Doctor for the Astrakhan region), *annexes* to the national standard, etc.

The Ministry of Finance (21,6%), the FAS (11,8%) and the FTS (9,8%) were the most frequent subjects of alleged rulemaking. Despite the fact that the acts of the Ministry of Finance were assessed by the courts almost twice as often as those of the FAS (22 vs. 12), it was the acts of the latter that were found invalid twice as often (8 vs. 4), which is 30% of the total number of decisions to satisfy the claims. The number of decisions invalidating acts of other authorities does not exceed 2; the contested acts of 11 out of 29 authorities were not invalidated at all.

In 27 (26,5%) judgments, the courts upheld administrative claims or upheld 1st instance decisions, but in most cases (67,6%) they took the side of the administrative defendant. In 6 cases, the proceedings were terminated[9].

Thus, in most cases, the courts found the defendants' positions to be justified and their law enforcement practices to be correct, but also 27 cases out of 102 are a significant number, indicating the spread of interpretative errors and exceeding of authority on the part of the state authorities. At the same time, not a single decision of a first-instance court was reviewed by a higher court; only in one case was the decision overturned due to the administrative plaintiff's withdrawal of the claim on appeal. The results of the *ANP* challenge are presented in *Table 3* (see the next page)

[8] Hereinafter, the number of court decisions in which the acts in question were challenged is given.

[9] In 5 out of 6 cases, the reason was that the challenged act was repealed by the issuing authority, as a result of which the act ceased to affect the rights and freedoms of the administrative plaintiff. Theoretically, the question can be raised as to whether it is correct to terminate proceedings without finding the challenged act to be normative. In fact, the SC proceeded on the basis that abandoning the position set out in the contested act meant that the plaintiff lost a legitimate interest in continuing with the case. At the same time, we should agree that the cancellation of the clarification by the issuing body is not enough to conclude that the plaintiff has no interest in challenging them, as formally cancelled act may continue to be actually applied [26, p. 65–66]. For a criticism of a similar rule applicable to the challenge of normative acts, see: [27].

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Table 3.

Results of the ANP challenge

	IPC RF	Courts of general jurisdiction	SC RF (Chamber on administrative cases)	BC RF (Appellate Chamber)	**Total**
satisfied					
1 instance	0	2	14	0	**16**
2 instance	0	0	2	9	**11**
Total	**0**	**2**	**16**	**9**	**27**
dismissed					
1 instance	1	4	36	0	**41**
2 instance	1	0	2	25	**28**
Total	**2**	**4**	**38**	**25**	**69**
proceedings terminated					
1 instance	0	0	5	0	**5**
2 instance	0	0	0	1	**1**
Total	**0**	**0**	**5**	**1**	**6**

8. Position of the Ministry of Justice

Due to the Ministry of Justice's authority to register normative acts, it was involved in 82,4% of the cases examined. However, the Ministry of Justice examined the actual meaning of the provisions explained in the challenged acts in less than half of the cases (42%). In the remaining cases (58%) the Ministry did not conduct such an expertise, limiting itself to checking the formal aspects of the act's validity. Determining the normativity of the contested act usually predetermined the conclusion that the act was not authoritative, did not comply with the requirements regarding the form of the act and/or the manner in which it was adopted, and thus was deemed invalid without assessing its provisions substantively. At the same time, ascertaining the normative properties of the contested act by itself is not sufficient to conclude that it must be repealed, because the *ANP* is an act of normative interpretation and cannot lack normative properties, but this does not predetermine the conclusion that this act is normative, i.e. establishing a new legal regulation, compared with the clarified act of greater legal force. At the same time, the Ministry of Justice has often used the following reasoning: "The letter has normative properties and is a normative legal act subject to state registration" (*Appeal decision of the Appellate Chamber of the SC of 28.06.2018 No. APL18-211*). However, such a conclusion requires a comparison of the clarifying and explaining provisions — do the latter establish a new legal regulation as compared to the former? Thus, when, as a basis for declaring a contested interpretative act invalid, the Ministry of Justice points solely to the normative properties of the act without comparing the meaning of the contested explanation to the actual meaning of the clarified legal provision, it thereby excludes the possibility of interpretative acts as such, i.e. the indication of the normative properties of the contested explanation act automatically leads to its recognition as normative.

It follows that the conclusion on normativity, i.e. the establishment of a new legal regulation under the guise of explanations, cannot be made without comparing the meaning of the contested act with the meaning of the legal provision it clarifies. The SC, rejecting the Ministry's position on various

grounds, pointed out that it was of a formal nature and was not based on verifying whether the contested interpretative act was consistent with the actual meaning of the provisions it clarified. In particular, the Court noted that "the written opinion... of the Ministry... contains no indication of exactly which provisions of the Federal Law... FAS of Russia has given a different meaning, or what is the incorrect interpretation of the rules... of the law" (*SC decision of 09.02.2017 No. AKPI16-1287*). The Supreme Court disagreed with the position of the Ministry of Justice in 60% of the cases in which the Ministry stated the position that the contested act had normative properties.

In 54% of the cases, the Ministry supported the position of the administrative plaintiff, i.e. in more than half of the cases it acknowledged that under the guise of interpretation, rulemaking had actually taken place, bypassing the procedures established for issuing normative acts. However, the SC ruled to satisfy the administrative claim in only 20% of such cases. The large number of cases in which the Ministry supported the plaintiff and the SC rejected the suit is due to the fact that the Ministry of Justice often took a more formal position than the Court, assessing not so much the substantive correctness of the contested explanations as the lack of their state registration, necessary for the validity of normative acts.

From the analysis of the arguments used by the Ministry, it follows that they do not suggest a situation in which an act would have normative properties and yet be consistent with the real meaning of the provisions it clarifies, and would satisfy the formal conditions for its validity. However, it is precisely these features that characterize an interpretative act, the existence of which is not grasped by the Ministry's reasoning in the vast majority of cases. In some cases, the Ministry of Justice, as can be seen from the reasoning in court decisions, does not distinguish between a normative act and an act of normative interpretation. Thus, when opposing the claim, the Ministry's representatives used as an argument a reference to the fact that the challenged act "does not possess the attributes of a normative legal act" (e.g. *Appellate Decision of the Appellate Chamber of the SC of 10.11.2016 No APL16-462*), which an interpretative act should not possess, but this does not exclude other grounds for challenging it.

However, after the issuance of Regulation No. 50, which distinguishes between the normative act and the *ANP*, the position of the Ministry of Justice has become more correct and nuanced. Out of 45 cases examined before the adoption of Regulation No. 50, in which the Ministry stated its position, it assessed the act for its compliance with the actual meaning of the provisions it clarifies only in 29% of cases, while after the adoption of the respective Regulation the Ministry of Justice has given such assessment in more than a half of cases (56%).

9. Interpretation methods used by courts to ascertain the actual meaning of the normative provisions being explained

According to paragraph 36 of Regulation No. 50, the actual meaning of legal provisions should be determined by courts by means of philological, systemic and teleological interpretation. In all cases, the courts have provided their own interpretation of the provisions explained in the *ANP*, primarily using systemic interpretation, with occasional resort to teleological interpretation (e.g. *SC judgment of 19.02.2020 No. AKPI19-935*), and have compared the resulting interpretation as the actual meaning of the provisions explained to the administrative defendant's interpretation.

The courts used teleological interpretation in cases challenging *authentic interpretation acts*, which accounted for 3,9% of the sample. In all cases, these were interpretative acts of the regional legislature, which may explain the use of this method of interpretation, which allows to compare the identity of the legislature's purpose in adopting the law with its interpretation in an authentic interpretation act. Thus, the court, noting that "interpretation purpose is the ascertainment of the legislator's true will expressed in the norm and its correct application", concluded that there was no sufficient evidence that the legislator's interpretation of the norm was consistent with the legislator's will when it was adopted and satisfied the plaintiff's claims (*Lipetsk Regional Court decision of 19.10.2017 in case No. 3a-32/2017*). In that decision, the court also used an argument to the

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principle — prohibition of retroactive effect of a new legal regulation introduced under the guise of interpretation, which violates the principle of legal certainty, and, in particular, explains: the official interpretation of a normative act must not change its meaning, the act of normative interpretation is inseparable from the interpreted act itself, so it must not contain an essential novelty, because by clarifying the existing norm, it has retroactive effect on application of the interpreted normative act.

The Supreme Court, while upholding the decision of the court of first instance, formulated a position on the correlation between law-making and law enforcement: the interpretation does not create a new rule of law, the interpretation should not replace law-making even in case of gaps in legal regulation, eliminating of such gaps requires new normative acts. The court treats the gap as an ambiguity of the interpreted legal norm that cannot be eliminated through interpretation. Its legal and technical construction is recognized by the court as not complying with the requirements of formal certainty, clarity, unambiguity of legal norms and their consistency in the system of legal regulation, which creates an unreasonably wide margin of discretion for the law-applier, possibility of its arbitrary application and leads to the violation of rights and lawful interests of the subjects of relevant relations. Such a gap is considered by the court to be fundamentally irrecoverable in law enforcement activities and can only be eliminated by amending the normative act, which will be applied to legal relations that have arisen after its entry into force.

Moreover, in this decision the SC formulated a position concerning expansive and restrictive types of interpretation, which are often regarded as an expression of the judge's discretion allowing arbitrary expansion or limitation of the meaning of the applicable norm. The Court noted that interpretation does not aim to circumvent the prescription of the law, to expand, narrow or change the meaning of a legal norm. The meaning of a norm as a result of interpretation is determined not by arbitrary narrowing or expanding its meaning, but primarily by systemic interpretation, i.e. by ascertaining logical connections between legal norms (*Appeal decision of the Chamber on administrative cases of the SC of 14.02.2018 No 77-APG17-6*).

10. Types of conflicts between interpretative and interpreted acts

A.F. Cherdantsev distinguishes three types of conflicts between interpretative and interpreted acts: 1) incorrect interpretation that contradicts the actual content of the legal norm (*interpretatio contra legem*); 2) unjustified expansive interpretation, the result of which goes beyond the scope of the actual content of the legal norm (*interpretatio praeter legem*), 3) unjustified narrowing of the scope of application of the legal prescription [2, p. 163].

These types of conflicts can be adjusted and supplemented. The first type describes all types of conflicts between interpretative and interpretative acts. Based on the analysis of court decisions in administrative cases the following types of conflicts can be distinguished, each of which is also a case of unauthorized issuance of an act.

1. *Unjustified expansive interpretation, the result of which goes beyond the actual content of the legal norm.*

Such interpretation often results in the *ANPs* setting additional requirements for business entities or imposing on them responsibilities not provided for by law. Thus, Letter No. 23275-EE/D28i, AC/45739/15 of the Ministry of Economic Development and the FAS of 28.08.2015 established an additional requirement for participants in procurement for current repair works, namely that they also have experience of contract execution for construction, reconstruction and capital repair works, which limited the plaintiff's access to state and municipal procurements. Thus, the requirement of experience in capital repair works had been interpreted unreasonably broadly and extended to participants in the procurement of current repair works. The court concluded that the Letter did not correspond to the actual meaning of the regulatory provisions it explained and that it was unauthorized (*SC decision No. AKPI16-574 of 22.08.2016*).

By Letter No SD-4-3/18072 of 16.10.2015, the FTS unreasonably expanded the range of entities in respect of which tax control measures can be carried out — the counterparties of the audited taxpayer were included in that range. In the

plaintiff's view, by giving the tax authorities the right to inspect the rooms of persons in respect of whom no tax audit is being carried out, the letter effectively imposes on those persons a corresponding obligation to submit to such actions. The court concluded that this explanation does not correspond to the actual meaning of the Tax Code provisions providing for tax control measures exclusively in relation to the taxpayer being audited (*SC decision No. AKPI19-296 of 10.06.2019*).

In addition, as a result of an unjustifiably expansive interpretation, the statutory exception has been transformed by the *ANP* into a general rule (*SC decision of 20.08.2018 No. AKPI18-629*) and this interpretation has also been used to deprive citizens of social support measures (*SC decision of 14.06.2018 No. AKPI18-393*).

2. *Unjustified narrowing of the scope of a legal provision.* An unjustifiably narrow interpretation often results in the administrative plaintiff being deprived of the right to access a benefit. For example, the Voronezh Regional Court concluded that letter No. 82-11/9456 of the Voronezh Regional Department of Social Protection dated 09.09.2015 arbitrarily limited the circle of persons entitled to receive state social assistance, whereas determining such a circle of persons falls within the powers of the federal authorities (*Voronezh Regional Court decision No. 3a-672/2017 of 13.11.2017*).

An unjustified restrictive interpretation in FAS Letter No. RP/83261/19 of 24.09.2019 resulted in the violation of the rights of business entities to participate in the procurement after the end of the suspension period, as the FAS narrowed the scope of the concept of "suspension of tenders" to "suspension of tenders as regards the conclusion of a contract" (*SC decision of 14.05.2020 No. AKPI20-161*).

3. *Filling a normative gap with an interpretative act.* An example of filling a normative gap with the help of *ANP* are the provisions of MES of Russia Letter No. 19-5-39, RF Ministry of Social Protection No. 1-2924-18 and RF Ministry of Labor of 03.08.1994 which defined the list of people who are family members of citizens who died as a result of the Chernobyl nuclear plant disaster, while the legislation contains no definition of this circle of people. According to the plaintiff, this resulted in a restriction of the circle of subjects entitled to compensation and benefits. The Supreme Court concluded that an unauthorized regulatory framework had been implemented in this case (*SC decision No. AKPI19-507 of 02.09.2019*).

Similarly — as an unauthorized establishment of a new legal regulation — the court has also considered other cases of filling a normative gap by an interpretative act (e.g. *SC decisions of 27.11.2017 No ACPI17-892, 15.06.2018 No ACPI18-367, 23.04.2019 No ACPI19-112, 28.01.2020 No ACPI19-952*), with the gap being filled in some cases by an unjustifiably expansive interpretation of concepts.

4. *Filling the "gap of recognition" with an interpretative act.* The notion of a gap of recognition introduced by C.E. Alchourrón and E. Bulygin [28, p. 74] characterizes the situation of uncertainty of a rule. From the court's point of view, the *ANP*, even as an act of authentic interpretation, cannot overcome the uncertainty of the norm. Thus, the subject of interpretation in the Resolution of the Lipetsk Regional Council of Deputies of 27.07.2017 No. 335-ps was the provision according to which the failure to meet the financial and economic indicators of the business plan of the investment project by more than 10 percent per annum is a ground for withdrawal of the state guarantee. The ambiguity of this provision lies in the possibility of interpreting it in two senses: failure to meet all the indicators in the aggregate or failure to meet one of them. In the Court's view, the Council chose one of the two different meanings given to the interpreted provision and thus set out the provision it had previously adopted in a different construction, which, in the Court's view, is only possible by amending the legal act (*Lipetsk Regional Court decision of 19.10.2017 in case No. 3a-32/2017*).

5. *Interpretation of concepts the definition of which, according to current legislation, is not within the competence of the issuing authority.* An example of *ANP* with an unauthorized interpretation defect is Letter No AD/26584/15 of the FAS dated 28.05.2015, which provides a normative definition of methods of prevention, diagnosis, treatment and medical rehabilitation. On the basis of this Letter, the plaintiff was imposed an administrative fine for

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breach of advertising law. The court upheld the claim, stating that the clarification of legislation in the area of healthcare is not within the authority of the FAS (*SC decision No. AKPI16-546 of 18.08.2016*).

The SC found a similar defect in other FAS letters in which it decided on the interchangeability of medicines (*SC decision of 24.07.2017 No. AKPI17-441*), defined the concept of "provision of vital activities of population in the Far North and equated areas" (*SC decision of 21.10.2019 No. AKPI19-662*), interpreted provisions of taxation and levy legislation (*SC decision of 09.12.2019 No. AKPI19-798*), etc.

Statistical data on the types of conflicts between the interpretative and interpreted acts are presented in Table 4.

Thus, of the 62 contested interpretative acts, only 16 were declared invalid.

Table 4.

Types of conflicts between the interpretative and interpreted acts

	Type of conflict	Number of interpretative acts declared invalid	Number of court decisions on the satisfaction of the administrative action
1	Unjustified expansive interpretation	4	7
2	Unjustified restrictive interpretation	2	3
3	Filling a normative gap with an interpretative act	5	8
4	Filling the "gap of recognition" with an interpretative act	1	2
5	Unauthorized interpretation (substantive aspect)	4	7
	Total	**16**	**27**

See the next page.

11. Arguments of the courts

In order to uncover how exactly the courts understand the category of acts with normative characteristics, it is necessary to refer to the arguments that are used to justify the presence/absence of such characteristics.

The judicial reasoning comes down to 5 arguments used to justify decisions granting the administrative action and 14 arguments denying it. In addition to the arguments below, two symmetrical arguments were used in both types of decisions: on the correctness of interpretation (compliance with the actual meaning of the legislation) when rejecting the administrative action and on the erroneous interpretation when granting the action. The need for at least formal reference to these arguments stems from the formulation of the procedural law and they are therefore present in all of the decisions reviewed and are not discussed in this context.

11.1. The reasoning of the courts in upholding a claim

1. The contested act has acquired its normative properties indirectly — through law enforcement activities. The absence in it of reference to the territorial bodies (or subordinate organizations) of the authority that adopted the act does not indicate in itself that the relevant explanation does not apply to them — such a conclusion must be based on a systemic interpretation of the act (e.g., *the SC decision of 18.08.2016 No. AKPI16-546*; *Appeal decision of the Appellate Chamber of the SC* of 12.05.2016 No. APL16-124).

Whereas the first part of this argument (on law enforcement practice) reflects paragraph 3 of Regulation No. 50 of the SC, the second part (on the need for a systemic interpretation of the contested act) extends the application of its paragraph 2, referring not to the *ANPs* but to the normative acts.

2. The challenged act has been applied in a specific case involving the administrative plaintiff (e.g. *SC decision of 18.08.2016 No ACPI16-546*).

This argument (*S2*) substantiates, on the one hand, that the administrative plaintiff has a legitimate interest in challenging the act and, on the other hand, confirms that the act has acquired normative properties in law enforcement practice (criterion of Paragraph 3 of Regulation No. 50).

3. The powers of the body adopting the act do not relate to the branch of law (administration) to which the act belongs (e.g. *SC decision of 22.08.2016 No ACPI16-574*).

Argument *S3* involves assessing the competence of the issuing authority. The difficulty is that the peculiarity of *ANPs* is that they have in principle not been adopted as normative acts and have not been registered as such. Therefore, both the procedural legislation and Regulation No. 50 only explicitly provide guidance on the need to check the authority of the body which issued the normative act, as part of the assessment of compliance with the procedure for its adoption. Extending these provisions to *ANPs* would render the legislative designation of this category of acts meaningless, as all of them would automatically be invalidated due to non-compliance with the procedure of adoption as a normative act.

This formal position, as has already been noted, was often taken by the Ministry of Justice, which pointed out in its responses to the administrative lawsuit that the contested act contained legal norms, but was issued in violation of the procedure for its preparation and state registration. In addition to non-compliance with this procedure, an express prohibition on rulemaking in the form of issuing letters was also violated. However, the courts rejected this argument, pointing out that “it is impossible to agree with the Ministry of Justice’s assertion ... that the Letter has features of a normative ... act, since no new norms binding on an unspecified circle of persons have been established by the contested act” (*SC decision of 06.03.2018 No. AKPI17-1154*).

However, an action or a legal act may be imputed to an authority only insofar as it relates to its powers, so the legal assessment of the legality of such actions cannot ignore the competence of the body to which these actions are attributed. The provisions on federal executive bodies contain a standard clause stipulating the power to give

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explanations to state bodies, local government bodies, legal entities and natural persons (usually in the case of federal ministries) or only to legal entities and natural persons (usually in the case of federal services) on matters falling within their sphere of activity. It is such norms, as well as norms establishing general powers to exercise public administration in the respective field, that are cited by the courts as the basis for the power to issue *ANPs*. It seems, however, that the criteria for the necessary powers of public authorities to issue explanations should be laid down in legislation or at least in the general explanations of the SC.

4. The body that issued the act does not have rule-making powers, or the power to issue such norms falls within the competence of a higher authority (e.g. *Appeal decision of the Appellate Chamber of the SC of 06.03.2018 No. APL18-18*).

Argument *S4* is close to *S3* and also relates to an assessment of the competence of the enacting authority. However, in this case, the SC explicitly refers to a lack of *rulemaking* power rather than the power to interpret existing legislation. This understanding of *ANPs* creates additional difficulties in distinguishing them from statutory acts, because instead of the most explicit criterion of the form of a document (e.g. the form of a letter not provided for rulemaking) the SC seems to use the criterion of the very existence of rulemaking powers. This raises the question: how should the contested act, if issued in the form of an order rather than a letter, be qualified as a *normative act* issued in violation of procedure, or as an *ANPs*? It should also be noted that in all judicial acts containing this argument, the issue of rulemaking powers has arisen together with the statement that the challenged act does not correspond to the actual meaning of the normative provisions it explains and establishes a new legal regulation.

5. The norm to be explained does not meet the requirement of formal certainty and its uncertainty can't be overcomed by interpretation (e.g., *Appeal decision of the Chamber on administrative cases of the SC of 14.02.2018 No 77-APG17-6*).

Argument *S5* correlates with paragraph 35 of Regulation No 50 which states that a contested act must be declared invalid if it does not meet the requirement of certainty. However, in the judicial act cited as an example, the SC concludes from the vagueness of the act in question that its interpretation is invalid. This argument is highly questionable since the essence of interpretation is to remove uncertainty of the content of the interpreted norm — if the content of legal norms were always quite clear and certain, there would be no need for interpretation itself.

The frequency with which the courts used the relevant arguments is presented in *Table 5*.

Table 5

Arguments in court decisions when satisfying an administrative lawsuit

Argument	*Number of decisions*	*Share in the total number of court decisions granting the lawsuit, %*
S1	18	66,67
S2	3	11,11
S3	13	48,15
S4	3	11,11
S5	1	3,70
Total number of judicial decisions on the satisfaction of the administrative action	27	100

11.2. The reasoning of the courts in dismissing a lawsuit

1. The contested acts have not been officially published, notified to subordinate or territorial bodies and organizations, not sent for enforcement / not applied to the administrative plaintiff (e.g. *SC decision of 05.12.2016 No. AKPI16-1012*).

This argument (*D1*) is a reflection of arguments *S1* and *S2* and justifies the lack of practice in the application of the act.

2. There is no evidence of the use of the contested act in the enforcement activities of the executive authorities (e.g. *SC decision of 16.06.2016 No. AKPI16-427*).

Argument *D2* is close to *D1* and also reflects arguments *S1* and *S2*. The difference between them is that the former refers to the intent of the subject of the challenged act, while the latter refers to law

enforcement practice.

3. The contested act does not prescribe the rights and obligations of an unspecified circle of persons, therefore it does not establish generally binding rules of conduct intended for repeated application, while the act has not acquired normative properties through law enforcement activities either (e.g. *Appeal decision of the Appellate Chamber of the SC of 29.11.2016 No APL16-489*).

The key element of argument *D3* is to address the content of the challenged act, suggesting as possible alternatives 1) that it contains an explicit prescription addressed to an indefinite circle of persons, or 2) that it acquires normative properties through actual enforcement. The question arises, how should *ANP* be formulated, if not in the form of a prescription? It can be assumed that forms of rule expression other than prescription include a) an explanatory description of the legislation in force using the indicative verb, b) a recommendation and c) a statement of administrative precedent.

This reveals the problem with the construction of Article 217.1 of the APC, which we discussed earlier, in that it ignores the important distinction between the normativity of a rule and the normativity of its interpretation. In fact, "prescribing the rights and obligations of an unspecified circle of persons" is interpreted as unauthorized law-making (norm-making under the guise of interpretation), although, in fact, any normative (as opposed to causal) interpretation has normative properties due to the fact that it is addressed to an unspecified circle of persons and involves repeated application. The difference lies in the special relation of the normative provisions contained in explanations (interpretative norms) to the interpreted norms, the secondary nature of the content of the former in relation to the latter. As such, explanations are normative, i.e. of a general nature, prescribing how to interpret and apply the interpreted norm.

4. The contested act is a summary of earlier practice, so it is just informative (e.g. *SC decision of 09.02.2017 No ACPI16-1287*).

Argument *D4* refers to the origin of the provisions of the contested act, namely that they were formulated on the basis of an analysis of law enforcement practice. From the evidence of this fact, the conclusion is drawn that the contested act is informative (not prescriptive) in nature. At the same time, such a conclusion is questionable, because even the norms of statute are often the result of a generalization of law enforcement practice, but it cannot be inferred from this that they are informative in nature; if this argument is taken in combination with the others, it appears redundant, because in any case the conclusion that the act does or does not have normative properties would have other grounds.

5. The contested act is recommendatory in nature (e.g. *SC decision of 11.08.2016 No. AKPI16-560*).

Argument *D5* contrasts the recommendatory and binding nature of the challenged act. This seems to refer to an assessment of the general binding nature of the act by its intrinsic meaning — a recommendation cannot be binding. However, the question arises — can an act which is recommendatory in its meaning based on the distinction reflected in the argument *D3* become binding not because of its content, but because of the law enforcement practice? The answer to this question should be in the affirmative. If the law enforcement decisions treat non-compliance with the recommendations as an offence and following the recommendations has no alternative, then the recommendatory acts acquire a binding meaning.

6. The reference to the contested act in the reasoning of the law enforcement act does not mean that it has acquired normative properties for an indefinite range of persons and has been intended for repeated application (e.g., *SC decision of 29.08.2016 No. AKPI16-592*).

Argument *D6* rejects the reference in the reasoning of the law enforcement act to the challenged act as evidence of its normativity (binding on an indefinite number of persons). Formally and logically the reasoning of the SC is quite correct here, because, based on the distinction made in argument *D3*, the conclusion about normativity can be drawn either from the content of the act itself (which is not at issue here) or from law enforcement practice, for the formation of which an act of law is not sufficient. However, since practice

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consists of many separate acts, a reference to one of those acts is necessary but not sufficient proof of its existence and, in this sense, the argument is not entirely correct. The correct formulation should point to the inadequacy of a single enforcement act to prove the existence of an enforcement practice. However, this argument *is directly opposed* to argument *S2*, according to which the application of a challenged act in a particular case involving the plaintiff is regarded as evidence of the existence of a law enforcement practice which gives the act its normative properties. Moreover, in the majority of cases in which lawsuits challenging explanations which acquired normative characteristics through actual enforcement have been upheld, the reasoning of the judicial acts has only indicated the application of the challenged act to the plaintiff.

7. The fact that an executive authority has taken actions consistent with the contested act does not mean that those actions are unlawful and there is no reason to believe that the executive authority was guided specifically by the contested act (e.g. *SC decision of 11.04.2016 No. AKPI16-53*).

Argument *D7* refers to evidence of the existence of a law enforcement practice and implies the need to identify the intention of the law-applier acting in accordance with the challenged act. This problem can be compared to the classical theory of customary law (the counterpart of which is law enforcement), which implies, in addition to the requirements for the actions of which the custom was formed, requirements for the subjective meaning given to these actions by the actors themselves and by third parties. The psychological attribute of custom is that the observance of custom is caused by the belief in its legal obligation (*opinio necessitatis*) and makes it possible to distinguish between legal custom and other repetitive actions conditioned by mores or proprieties [29, p. 89]. Similarly, according to the SC, evidence of an *opinio necessitatis* of the law-applier acting in accordance with the challenged act is necessary. Evidence of such a subjective attribute would appear to be references to the challenged act in the enforcement decisions, but such an assumption is inconsistent with argument *D6*, according to which reference in the reasoning of the enforcement act to the challenged act does not mean that the act has acquired normative properties by virtue of this fact.

8. The contested act is issued as an act of casual interpretation, in response to an individual or executive body's request (e.g. *SC decision of 16.06.2016 No ACPI16-427*).

Argument *D8* indicates the type of interpretation (i.e. refers to the content of the interpretative act), but also describes the purpose of the issuing authority — to reply to the request. The argument suggests that the response to an appeal must always be regarded as an act of causal interpretation, since it is addressed to a particular person. However, this argument is somewhat at odds with the possibility that an act could become normative not because of its content or form but because of the practice of law (argument *D3*), since it is possible to imagine the practice of law as giving normative value to a certain response to an appeal as a precedent of interpretation.

9. The unofficial publication of a contested act (in an electronic legal reference system or in a periodical) does not confirm that it has normative properties, because otherwise it would mean that any such act would automatically have normative properties simply because its content is made available to the public (e.g. *SC decision of 16.06.2016 № ACPI16-427*).

Argument *D9* relates to the analysis of the intention of the issuing authority and is that the unofficial publication of a contested act cannot be evidence of the issuing authority's intention to give a general interpretation of the law that is binding on all subjects of the relevant relationship.

10. The contested act was not signed by an authorized official (e.g. *Appeal decision of the Appellate Chamber of the SC of 12.04.2018 No. APL18-87*).

Argument *D10* also relates to the procedure for issuing an act and suggests that the will of the authority must be expressed through the signing of a document by an authorized official. However, decisions of public officials may be taken (approved) in various forms, such as signing a document, putting a resolution on a document signed by another person, etc., and these actions may be done both in the traditional written and electronic form.

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Therefore, the argument under consideration is correct if there is no relevant decision *in any form*.

11. The executive authorities have the right to exercise control over the activities of their territorial bodies and subordinate organizations, which can also take the form of letters to them explaining certain issues of the organisation of their work (e.g. *Appeal decision of the Appellate Chamber of the SC of 28.11.2019 No. APL19-392*).

Argument *D11* is the *opposite* of argument *S1*, which is that a challenged act can acquire normative properties indirectly, through law enforcement practice. Obviously, the existence of the power to explain legislation does not only not prevent, but on the contrary, contributes to the formation of law enforcement practice.

12. The contested act does not meet the criteria for a normative act established by applicable law (e.g. *Chelyabinsk Regional Court decision of 29.06.2017 No 3a-181/2017*).

Argument *D12* indicates that the challenged act does not meet the criteria set out in the current legislation for normative acts, assuming primarily formal criteria — adoption procedure, official publication, etc. This argument, which suggests a confusion between normative and interpretative acts, is highly questionable, because if the challenged act met the formal criteria, it would have to be challenged under the procedure established for normative acts.

13. The contested act reproduces the content of another normative act in an edition that does not affect the understanding of the explained legal provisions (e.g. *SC decision of 26.10.2017 No ACPI17-729*).

When using argument *D13*, the problem arises of the criterion that would allow to distinguish the reproduction of the content of another normative act (albeit in a slightly different wording) from its correct interpretation.

14. The administrative plaintiff is in fact challenging a federal law, but it is not within the competence of the SC to test the statute (e.g. *SC decision No ACPI19-774 of 10.12.2019*).

Argument *D14* is close to argument *D13* and suggests that the challenged act conveys the meaning of the law, which is in fact what the administrative plaintiff is challenging. This argument seems redundant, since any act which constitutes a correct explanation of the valid law expresses the meaning of the latter, accordingly, to challenge such an act is to disagree with the meaning of the law. In order to reject an administrative action, it is sufficient for the court to point out the correctness of the interpretation expressed in the challenged act.

The frequency with which the courts used the relevant arguments is presented in *Table 6*.

Table 6

Arguments in court decisions when dismissing of an administrative lawsuit

Argument	*Number of decisions*	*Share in the total number of court decisions dismissing the lawsuit, %*
D1	14	20,30
D2	5	7,25
D3	5	7,25
D4	1	1,45
D5	7	10,15
D6	5	7,25
D7	5	7,25
D8	10	14,50
D9	4	5,80
D10	1	1,45
D11	1	1,45
D12	1	1,45
D13	2	2,90
D14	1	1,45
Total number of judicial decisions dismissing administrative lawsuits	69	100,00

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Out of 19 arguments in favor of the satisfaction or rejection of the administrative lawsuit 9 can be considered quite correct (*S1–S3*, *D1*, *D2*, *D7*, *D9*, *D10*, *D13*), the correctness of 6 arguments is doubtful in any part (*S4*, *D3*, *D5*, *D6*, *D8*, *D14*), 4 arguments (*S5*, *D4*, *D11*, *D12*) seem to be totally incorrect, while 6 arguments totally or partially contradict each other (*S2* and *D6*, *D3* and *D8*, *S1* and *D11*).

12. The normativity of the *ANP*: results of the analysis of judicial reasoning

On the basis of the analysis of judicial reasoning, despite the noted contradictions and inconsistencies, it is possible to reconstruct the courts' understanding of the legal phenomenon of *ANP*.

From the point of view of law enforcement, the acts in question can acquire normative properties in two ways — through an expression of will of an authority aimed at a general official explanation of the legislation in force, or through the law enforcement practice of the authorities under the jurisdiction of the entity that issued the act (argument *D3*). This is not two necessary attributes of *ANP*, but two attributes, each of which is sufficient to classify the relevant act in this category.

Common to both types of acts are the requirements as to the authority issuing the challenged act, which are assumed in the decisions but are only directly set out in paragraph 3 of Regulation No. 50 which provides for their issuance by bodies with powers of authority. However, in order for the contested act to be regarded as a correct interpretation, the body which issued it should also have competence to interpret the law — it should relate to the relevant branch of law (administration) (argument *S3*) and yet not belong to any other or higher authority (argument *S4*). This competence must be distinguished from the power to establish legal regulation in the relevant field, as the results of the latter are statutory acts and are contested in a different way. In addition, there is an implied negative requirement on the form of the challenged act — it must not have been adopted in the form envisaged for the issuance of normative acts.

The characteristics of acts whose normative nature is based on the *will of an authority* can be divided into two groups.

1. *Characteristics of the form in which the act is issued.*

According to the practice of the SC, the challenged act must be *signed by an authorized official* of the issuing authority (argument *D10*) and the authority must *have taken steps to make its content known to a wide range of people*. This includes the official publication of the act or its communication to lower enforcement authorities (arguments *S1*, *D1*). The question of the form in which an authority publishes an act has not been studied in detail in court practice, but when considering a claim to invalidate an act published in the form of posting information on the authority's website, such form of publication, per se, was not assessed as not entailing normativity (*SC decision of 12.01.2018 No AKPI17-98*; *Appeal decision of the Appellate Chamber of the SC of 12.04.2018 No. APL18-87*). However, the unofficial publication of the contested act does not confirm its normative properties (argument *D9*).

2. *Features that characterize the content of the act.*

The *ANP* must prescribe *the rights and obligations of a personally indefinite number of persons*. However, the act *must not be an act of causal interpretation*, i.e. a response to an individual appeal (argument *D8*). The interpretative act must have a *binding rather than recommendatory character* (argument *D5*) and must *not be a generalization of earlier practice* (argument *D4*). The content of the challenged act must have *some interpretative novelty*, i.e. it must be different from a mere reproduction of the clarified statutory act (arguments *D13*, *D14*).

However, the ambiguity of the language used by courts to describe the normativity of *ANPs* does not allow for a clear distinction between their normativity and the normativity of normative legal acts, as both contain prescriptions about the rights and obligations of an indefinite range of persons, which introduces uncertainty into the content of this attribute.

The characteristics of acts that acquire normative properties through *actual enforcement of*

law can also be divided into two groups.

1. *Features that characterize the actions of law enforcement agencies that make up a practice.* *The practice should consist of decisions by the enforcing authority following from the provisions of the challenged act*; its existence must be proved by the administrative plaintiff. A decision against the plaintiff itself may be such evidence (argument *S2*), but it is unclear whether it can be the only evidence, as in some cases the courts have held that it is insufficient (argument *D6*).

2. *Features that characterize the beliefs of law enforcement agencies.* The SC practice assumes that the relationship of logical correlation between the provisions of the challenged act and the decisions of the enforcing authorities is not sufficient to conclude the existence of a law enforcement practice — there must be grounds to believe that the *enforcing authorities were guided specifically by the challenged act* (argument *D7*), i.e. to have a kind of *opinio necessitatis* concerning them. It may be assumed that such evidence must be a reference to the challenged act in the law enforcement decision.

It should also be noted that a number of arguments encountered in judicial practice are not consistent with the two types of *ANPs* that we have identified and, accordingly, these arguments are not consistent with the arguments from which we have derived these characteristics. These arguments include:

1) argument *D11*, which is the opposite of argument *S1* and suggests that the authority that issued the act has the power to control the activities of its territorial bodies and subordinate organizations, as proof that the act does not have normative properties;

2) *D12* argument of not fulfilling the criteria of a normative act, which effectively blurs the basic distinction between normative acts and *ANPs.*

13. Conclusion: problems of law enforcement and proposed solutions

1. *The problem of the ambiguity of the concept of ANP.* As a result of the study, the hypothesis of confusion in judicial practice between the concepts of *ANP* and a *normative act* was fully confirmed. In the judicial decisions reviewed, both the rejection of an administrative lawsuit to invalidate an *ANP*, referring to the fact that explanations that are consistent with the meaning of the act to be explained do not have normative properties, and the opposite case, where the courts, in granting the claim, indicate that explanations that are not consistent with the meaning of the act to be explained do have normative properties, are widely represented. In both cases, the contested act appears as an elusive entity — if normative properties of the interpretative act are found, the courts qualify it as a normative act adopted in violation of the form and procedure of the issuing authority and/or in excess of the authority of the issuing authority; in the absence of normative properties, the courts treat the interpretative act as an individual act or an act of casual interpretation (interpretative precedent).

The main *problem* lies in the interpretation of the notion of “normative properties”. It is clear that such properties relate primarily to the results of interpretation, otherwise if normative properties meant normativity of rules, there would be no distinction between normative and interpretative acts. However, the ambiguity of the language used by courts to describe the normativity of *ANPs* leads to the fact that it is difficult to distinguish it from the normativity of normative legal acts, which may lead to the impression that the normativity of the former is itself a defect, appearing if the interpretation contained therein is erroneous. In reality, the normativity of explanations is not a defect but an inherent property, but the difference between the normativity of a *normative legal act* and the normativity of *ANP* is that the latter is secondary to the norms being explained.

An obvious *solution* would be to adjust the construction of Art. 217.1 APC and Art. 195.1 CPC, which would legitimize the doctrinal notion of an interpretative act. A minimum adjustment could consist in replacing the conjunction “and” in Part 5 paragraph 2 with the conjunction “or”: the court shall decide to reject the claims made if the challenged act (or part of it) does not have normative properties *or* it is consistent with the content of the normative provisions that it explains. Such an innovation would eliminate the existing

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inconsistency whereby the recognition of an act as interpretative, whose explanations have normative properties and correspond to the actual meaning of the provisions it clarifies, is excluded from the grounds for refusing a claim.

However, it seems that instead of the cumbersome and unclear concept of *ANP*, the legislator could use the doctrinally developed concept of an interpretative act, an act of normative interpretation, as well as the concept of a precedent of interpretation, or interpretative precedent, an act of causal interpretation that acquired normative properties through law enforcement.

2. ***The problem of ANPs publication forms.*** In the practice of the SC, a challenged act is recognized as possessing normative properties in two cases: 1) when it contains an explicit prescription addressed to an indefinite circle of persons, or 2) when it acquires normative properties through actual law enforcement.

The problem is the uncertainty of how *ANP* can be formulated, if not in a prescriptive form. A possible solution to the problem seems to be the definition of such forms in the APC and CPC or in the explanations of the SC. Clarification is needed in particular for forms such as recommendations and interpretative precedents.

3. ***The problem of the authority of the ANP publication.*** In Regulation No. 50, the feature of issuance of an act by an authorized body refers only to normative acts (paragraph 2), but in the judicial practice we have analyzed, the problem of the competence of the body that issued the challenged act is not circumvented, with only the substantive, but not the procedural, aspect of competence actually being assessed.

The *problem* is that the criteria for assessing the relevant competence are unclear, in the absence of an explicit legislative basis for such an assessment. A possible solution could be to introduce the concept of an interpretative act in the APC and the CPC, as well as the criterion of competence to adopt interpretative acts as a prerequisite for assessing such an act as legally valid.

4. ***The problem of contradictions between the arguments used to justify a judicial decision.*** The *problem* is the use in judicial practice of arguments that are inconsistent with the set of other arguments, in particular the *D11* and *D12* arguments discussed in detail above. A possible solution to the problem is for the courts to change their practice towards greater uniformity and to reject these arguments.

5. ***The problem of proof of the existence of law enforcement practice.*** Paragraph 3 of Regulation No. 50 states that the use of a contested act in law enforcement practice is a necessary criterion for its qualification as possessing normative characteristics. However, in the practice of the SC itself, the criterion of the use of a contested act in law enforcement practice is no longer necessary but sufficient.

The *problem* is the vagueness of the criteria for identifying the facts proving the existence of law enforcement practice, as a result of which there is ambiguous wording in court decisions questioning as evidence even the court's reference to the challenged act when deciding against the administrative plaintiff (which contradicts argument *S2*, used by the SC in other acts).

A possible *solution* to the problem seems to be the introduction of rules in the APC and CPC specifying the facts to be proved by the administrative plaintiff. In any case, evidence of the existence of practice in the application of the contested act should include the law enforcement decisions referring to it.

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