

30 July 2014

To all our clients and friends

INFORMATION MEMORANDUM Concerning the Revised Administrative Code of the Republic of Kazakhstan and Related Legislative Amendments

Kazakhstan has adopted the revised Administrative Code (hereinafter, the "Code") to enter into force on 1 January 2015¹.

The revised Code reforms the Kazakh legislation on administrative violations (hereinafter, the "administrative legislation"), the revisions being primarily intended to bring the legislative norms in line with the Kazakhstan Constitution.

In connection with the revised Code's adoption, the Law of 5 July 2014² (hereinafter, the "Law")³ accordingly amends certain legislative acts of the Republic of Kazakhstan. The Law is to be enacted starting 1 January 2015, except for certain provisions.

This Information Memorandum offers a brief analysis of some key innovations in the administrative legislation.

1. General Code Overview

Generally, the revised Code details and makes more specific certain provisions of administrative legislation, concurrently introducing new institutes, which amend, to a certain extent, the administrative liability imposition regime.

A number of administrative violation elements are transferred to the RK Criminal Code⁴ to be now regarded as a criminal infraction. In particular, illegal medical activities and illegal issuance or forgery of prescriptions or other documents entitling to obtain narcotics or psychotropic substances, as well as illegal limitation of the right of access to information resources, will now be qualified as criminal acts.

Some elements of violations described in general terms in the current Code are now subdivided into several more concretized elements. For instance, the new Code subdivides such element

¹ Except for subparagraph 8) of the fifth part of Article 281 of the Code, which is to be enacted starting 1 January 2016.

² RK Law No. 236-V "On Introduction of Amendments into Certain RK Legislative Acts on the Issues of Legislation on Administrative Violations" dated 5 July 2014.

³ The Law also amends the RK Code "On Marriage and Family" and RK legislative acts regarding child's rights protection. These amendments are mostly intended to improve the normative and legal framework in the field of protection of minors' rights and legitimate interests.

⁴ The revised RK Criminal Code of 3 July 2014.



as violation of the RK labor legislation into definite elements, such as, for example, admission to work without employment agreement, failure to grant leaves, and other.

However, the Code eliminates a number of grounds allowing for exemption from administrative liability: active repentance, insignificance of violation, change in situation, or illness, which, in our view, toughens the general norms regarding imposition of administrative liability.

Unfortunately, the revised Code does not correct a gross error – the Special Part provides for sanctions not envisaged by the General Part. As an example, Article 328 of the Code provides for a fine *in the amount of one thousand percent of the environmental emission charge rate*, which is not provided for in Article 44 of the Code that contains an exhaustive list of administrative fines.

2. Key Novelties

2.1. *Composition of Administrative Legislation*

The revised Code suggests that the provisions regarding administrative liability imposition are to be established exclusively by the Code, in which connection all norms containing special provisions regarding imposition of administrative liability are eliminated from other RK legislative acts.

In particular, the RK Civil Procedure Code no longer sets forth that civil legal proceedings apply to disputes arising out of administrative legal relations.⁵ The procedure for appealing the actions or omissions of an authority (official) conducting proceedings in an administrative violation case is henceforth established by the Code.

2.2. *Retroactivity*

The revised Code expands the scope of instances falling within the law retroactivity provisions and concretizes the Code's retroactivity rule.

The retroactivity rule applies to those violations, which are committed prior to the Code enactment and in respect of which the administrative sanction imposition resolution has not yet come into force. The revised Code norms apply where the Code provides for a less strict administrative sanction, or where the administrative liability is not stipulated at all, or where the Code sets out a norm otherwise improving the offender's position.

2.3. *Principles and Objectives of Legislation*

- 2.3.1. The state (public) administration procedure is now subject to protection, because a large number of administrative violations constitute a breach of public administration rules.
- 2.3.2. The amendments resolve the conflict relating to applying the presumption of innocence principle only to individuals. The Code mandates application of the principle to any persons.
- 2.3.3. The current principle of offenders' equality before the law is brought in line with Article 14 of the Kazakhstan Constitution, which declares everyone's equality before the law.

⁵ At the same time, the RK Civil Procedure Code now introduces the procedure for review of cases in disputes arising in the sphere of state and local administration.

Now the principle of equality before the law and court is set in respect of all participants in administrative proceedings.

- 2.3.4. The Code formulates the provisions regarding independence of not only courts (judges), but also of other governmental agencies (officials) that review administrative disputes.
- 2.3.5. It is now allowed to use in administrative proceedings the electronic media as a source of information containing data of personal nature.

2.4. General Part

- 2.4.1. The provision regarding concurrent imposition of administrative liability on individuals and legal entities for one and the same violation is cancelled.

The guilt of legal entity will now be determined via the form of guilt of its representative, as well as an employee of an individual entrepreneur or a legal entity who performs organizational-and-administrative or administrative-and-economic functions.

- 2.4.2. The revised Code decreases the number of administrative sanctions and measures of administrative-and-legal influence.

For example, it cancels the for-a-fee taking of an item that served as the instrument of offence and the enforcement measures of medical nature.

- 2.4.3. The revised Code excludes the norms providing for exemption from administrative liability in connection with active repentance, in case of insignificant offence, a change in situation, or illness.
- 2.4.4. The amended Code provides for more instances of exemption from administrative liability due to parties' conciliation.

For instance, this applies to violations of requirements pertaining to banking customer services.

2.5. Special Part

- 2.5.1. As mentioned above, some elements of administrative violations are transferred to the RK Criminal Code as criminal offences.
- 2.5.2. The Special Part unites certain elements and introduces new elements of administrative violations, such as the breach of secrecy of microcredit extension and adds new types of violations in production and/or circulation of certain types of oil products and excisable goods, for instance, the owners' lease out of tank farms or reservoirs concurrently to two or more persons, and other.
- 2.5.3. The sanctions provided for by the Special Part have been changed.

For example, the norm regarding violation of rules relating to pharmaceutical activities now excludes the sanction in the form of activities suspension.

The Code cancels the existing "spread" of administrative fines, now securing the absolutely definite amount of administrative fines for a violation, which is intended to introduce a differentiating mechanism of the fines payment and imposition.

Thus, the fine amount may be decreased (by up to 30%) in cases and in accordance with the procedure established by the Code. The differentiated payment of fines (50%–50%) is applied in case of shortened administrative proceedings. If 50% of the fine is paid within the term established by the Code, the administrative violation case is recognized as reviewed on the merits.

- 2.5.4. The Special Part of the Code divides the persons subject to administrative liability into categories, as follows: individuals, small medium and large business entities, and officers.

Individual entrepreneurs and legal entities that are small business entities are collectively referred to as small business entities.

2.6. *Administrative Proceedings*

- 2.6.1. The revised Code introduces a differentiating order providing for a normal and shortened procedure for bringing individuals to administrative liability.

Shortened proceedings are applied in case the individual's guilt is established and the individual pleads guilty and agrees with the amount of imposed fine, with some exceptions, for example, where violation cases are reviewed by tax authorities.

- 2.6.2. Important is introduction of the institute of reconsideration of effective resolutions in administrative violation cases and resolutions issued upon the results of review of appeals and protests thereon based on the newly discovered circumstances.
- 2.6.3. The Code introduces provisions regarding mandatory keeping of court session minutes in first instance courts.
- 2.6.4. The Code puts forth specific timeframes for drawing up a protocol in case of identifying an administrative violation in the course of inspection⁶. In this case, the protocol is to be drawn up immediately after completing the relevant inspection.
- 2.6.5. Now it is possible to use electronic form of the administrative violation protocol alongside with the hardcopy form. The Code does not specify how the electronic form of the protocol is to be signed.
- 2.6.6. The Code establishes for the first time that the fact of protocol return by the person against whom the case has been instituted is recognized as refusal to sign the protocol.
- 2.6.7. The Code introduces an amendment pursuant to which, when calculating a period, it should also include non-working time, except for the cases where the period is calculated in days. Probably, this rule is to apply only in cases where periods are calculated in hours, because the norm, if interpreted literally, is generally vague.
- 2.6.8. Suspension or prohibition of activities (certain types thereof) is applied also as an injunctive measure in proceedings over administrative violation cases.
- 2.6.9. Such type of procedural decision as return of administrative violation protocol is excluded. This should probably mean that cases are to be reviewed based on the available protocols, without the possibility to "revise and improve" them, i. e., the possible flaws of the protocol may be interpreted in favor of the offender.

⁶ Pursuant to the RK Law "On State Control and Supervision in the RK" dated 6 January 2011.

- 2.6.10. For the first time, the Code establishes the possibility for the court or authority (official) to recognize as incorrect the legal evaluation of the act and to change the qualification of offence.⁷
- 2.6.11. The Code sets the period of limitation (1 year) for the enforcement of resolutions imposing administrative sanctions,⁸ except for resolutions regarding violations in the sphere of RK taxation and antimonopoly legislation, where the period of limitation is 5 years.
- 2.6.12. The Code introduces the institute of interaction between the Kazakhstan authorities and competent institutions and officials of foreign states in administrative violation cases.

3. Changes Introduced by the Law

3.1. *RK Civil Procedure Code*

- 3.1.1. The RK Civil Procedure Code establishes the procedure for reviewing the cases in disputes arising in the sphere of state and local administration.
- 3.1.2. The Law cancels the concept of "corporate disputes" due to its no longer being relevant.

3.2. *Provisions Regarding Imposition of Administrative Liability*

All norms containing special provisions regarding imposition of administrative liability have been excluded from the RK legislative acts.

4. Other Novelties

The Code of 5 July 2014 also contains other regulations regarding the review procedure for disputes stemming from administrative legal relations, and the Law contains editorial changes to the RK legislative acts in connection with the revised Code adoption.

Since such regulations have not yet been applied in practice, in our view, implementation of the revised Code's provisions may cause certain difficulties.

Should you have any questions regarding the revised Code application, we would be happy to provide the appropriate advice.

Best regards,

AEQUITAS Law Firm

⁷ Changing the qualification to an article providing for a less strict administrative sanction.

⁸ The same period is introduced into the RK Law "On Enforcement Proceedings and Status of Court Enforcement Officers" dated 2 April 2010 with respect to submission for enforcement of court resolutions passed in administrative violation cases.