



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

### THIRD SECTION

## **CASE OF KHODORKOVSKIY AND LEBEDEV v. RUSSIA (No. 2)**

*(Applications nos. 51111/07 and 42757/07)*

### JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) and (d) • Fair hearing • Defence through legal assistance • Confinement in glass cabin negatively impacting the exercise of an accused's right to participate effectively in proceedings • Systematic perusal by trial judge of written communications between the accused and their lawyers • Adversarial trial • Equality of arms • Omission to hear in person expert witnesses whose reports were used against the accused • Imbalance between the defence and the prosecution in collecting and adducing "expert evidence" • Court's unreasoned refusal to examine the defence witnesses, to adduce exculpatory evidence or to obtain disclosure of evidence in the possession of third parties • Unfair reliance of the trial court on judgments in related proceedings to which the applicants were not parties

Art 6 § 2 • Presumption of innocence • Prime Minister's confusing statements on the applicants' conviction in an earlier trial • Confusion rapidly dispelled

Art 7 • Criminal offence • Extensive and unforeseeable interpretation inconsistent with essence of the offence

Art 8 • Respect for family life • Unavailability of long-stay family visits in remand prisons

Art 18 and Art 8 • Restrictions for unauthorised purposes • Absence of ulterior motives in view of indiscriminate application of impugned legislation to all detainees of remand prisons

STRASBOURG

14 January 2020

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Khodorkovskiy and Lebedev v. Russia (No. 2),**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President*,

Georgios A. Serghides,

Helen Keller,

Dmitry Dedov,

María Elósegui,

Gilberto Felici,

Erik Wennerström, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 3 December 2019,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in two applications (nos. 51111/07 and 42757/07) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Russian nationals, Mr Mikhail Borisovich Khodorkovskiy and Mr Platon Leonidovich Lebedev (“the applicants”), on 16 March 2007 and 27 September 2007 respectively.

2. The applicants were represented by Mr A. Drel, Mr J. Glasson QC and Lord D. Pannick QC, lawyers practising in London. The Russian Government (“the Government”) were represented initially by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr Galperin.

3. The applicants complained, in particular, about their conviction for misappropriation and money laundering, and about other events related to the criminal proceedings against them. They alleged, in addition, that their prosecution had been motivated by political reasons, in breach of Article 18 of the Convention.

4. On 24 March 2014 the applications were communicated to the Government.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1963 and the second applicant was born in 1956.

#### A. Background

##### *1. The applicants' activities prior to their imprisonment*

6. Before the applicants' first arrest in 2003, the first applicant was the Chief Executive Officer ("CEO") of and a major shareholder in OAO Neftyanaya Kompaniya Yukos (Yukos plc), the head company of the Yukos group of companies (further referred to as "Yukos"), which at the relevant time was one of the largest oil companies in Russia. The second applicant was the first applicant's business partner and a close friend. From 1998 the second applicant was a director at Yukos-Moskva Ltd. He was also a major shareholder in Yukos plc. Furthermore, the applicants controlled a large number of other mining enterprises, refineries, banks and financial companies. In 2002-2003 Yukos began to pursue a number of ambitious business projects which would have made it one of the strongest non-State players on the market. In particular, Yukos was engaged in merger talks with the US-based Exxon Mobil and Chevron Texaco companies.

7. The applicants were also active as political lobbyists. From at least 2002 the first applicant openly funded opposition political parties, and a number of his close friends and business partners became politicians.

8. The first applicant asserted that his political and business activities had been perceived by the leadership of the country as a breach of loyalty and a threat to national economic security. He alleged that as a counter-measure the authorities had launched a massive attack on him personally, his company, colleagues and friends. A more detailed description of the applicants' political and business activities prior to their arrest can be found in *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 8-41, 25 July 2013.

##### *2. The applicants' first trial*

9. On 20 June 2003 the General Prosecutor's Office (the GPO) initiated a criminal investigation into the privatisation of a large mining company, Apatit plc (criminal case no. 18/41-03). In 1994 20% of Apatit plc's shares were acquired by a company allegedly controlled by the applicants. The case was opened under Article 165 of the Criminal Code ("misappropriation of assets" falling short of embezzlement), Article 285 ("abuse of official

powers”) and Article 315 (“deliberate non-compliance with a court order”) of the Criminal Code.

10. In the following years the charges against the applicants within case no. 18/41-03 (hereinafter – the “main case”) were repeatedly supplemented and amended. Thus, within that case the applicants were also charged with corporate tax evasion (Article 199 of the Criminal Code). The applicants were suspected of selling Yukos oil through a network of trading companies registered in low-tax zones, in particular in the town of Lesnoy, Sverdlovsk region. According to the GPO, tax cuts were obtained by those companies by deceit, since the companies existed only on paper and never conducted any real business in the low-tax zones which would have granted eligibility for a preferential tax regime. The GPO suspected that the applicants registered and controlled those companies through their friends and partners, in particular Mr Moiseyev, senior manager and shareholder of Group Menatep Limited, Mr Pereverzin, director of two Yukos companies registered in Cyprus (see paragraph 116 below), and Mr Malakhovskiy, director of Ratibor (see paragraph 108 below).

11. Case no. 18/41-03 led to the applicants’ conviction at their first trial in 2005. The facts related to that trial (the “first trial”) were at the heart of several applications lodged with the Court in 2003-2006 (see *Summary of the Court’s main findings in the applicants’ previous cases* at paragraph 34 *et seq.* below).

12. In October 2005, on completion of the first trial, both applicants were transferred from Moscow to two remote Russian penal colonies to serve their sentences. The first applicant was sent to penal colony FGU IK-10, located in the town of Krasnokamensk, Chita Region. The second applicant was sent to correctional colony FGU IK-3 in the Kharp township, located on the Yamal peninsula (Yamalo-Nenetskiy region, Northern Urals, north of the Arctic Circle).

13. The applicants’ prison terms as imposed in the 2005 judgment subsequently expired; however, they both remained in prison on account of new accusations brought against them within the related but separate court proceedings which are at the heart of the present case (the “second trial”).

### *3. Trials of the applicants’ former colleagues and partners*

#### **(a) Trial of Mr Pereverzin, Mr Malakhovskiy and Mr Valdez-Garcia**

14. On an unspecified date the GPO severed from the applicants’ case a new case concerning Mr Pereverzin, Mr Malakhovskiy and Mr Valdez-Garcia, directors of Yukos trading companies. The charges against Mr Pereverzin included, in particular, embezzlement and money laundering (“*legalizatsiya*”) committed in a group which also included the applicants.

15. In June 2006 the trial of Mr Pereverzin, Mr Malakhovskiy and Mr Valdez-Garcia started at the Basmanniy District Court of Moscow. That trial was held in camera and was presided over by Judge Yarlykova.

16. On 1 March 2007 Mr Pereverzin and Mr Malakhovskiy were found guilty; Mr Valdez-Garcia fled from Russia and escaped conviction. He alleged that in 2005 he had been ill-treated while in custody. In particular, Mr Valdez-Garcia claimed that he had been beaten by investigator Mr Kz. and received multiple injuries. However, the Russian authorities refused to institute a criminal investigation into those allegations.

17. On 21 June 2007 the Moscow City Court upheld the conviction on appeal.

**(b) Trial of Mr Aleksanyan**

18. Mr Aleksanyan was one of the lawyers acting for the first and second applicants. In 2006 he was arrested and prosecuted in a related but separate case (see *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008). The accusations against Mr Aleksanyan were brought to trial, but in 2010 they were dropped due to the expiry of the statute of limitations.

*4. Other criminal cases against the applicants*

19. In 2004, while the applicants' first trial was underway, the GPO decided that certain episodes related to the applicants' business operations were to be severed from the main criminal case (no. 18/41-03) against the applicants.

20. On 2 December 2004 the GPO opened criminal case no. 18/325556-04, which concerned "money laundering" by Mr Moiseyev and other "unidentified persons".

21. On 27 December 2004 the GPO informed the applicants of that decision. However, the applicants were not questioned in relation to those new charges and were not given any details or informed about the nature of the investigation.

22. On 14 January 2005 the first applicant's defence complained before the Meshchanskiy District Court (which conducted the first trial) that the GPO was conducting a parallel investigation but refusing to give the defence any information about its goals or about any charges which might result from it.

23. According to the Government, criminal case no. 18/325556-04 was eventually joined with criminal case no. 18/41-03. The outcome of this particular criminal investigation is unclear.

*5. Yukos bankruptcy*

24. In late 2002 Yukos plc was subjected to a series of tax audits and ensuing tax proceedings, as a result of which it was found guilty of repeated

tax fraud, in particular for using an illegal tax-evasion scheme involving the creation of sham companies in 2000-2003.

25. On 15 April 2004 proceedings were started against Yukos plc in respect of the 2000 tax year and it was prevented from disposing of certain assets pending the outcome of the case.

26. On 26 May 2004 Moscow City Commercial Court ordered it to pay a total of 99,375,110,548 roubles (RUB) (approximately 2,847,497,802 Euros (EUR)) in taxes, interest and penalties.

27. Yukos plc appealed and the appeal proceedings began on 18 June 2004. On 29 June 2004 the appeal court dismissed the company's complaints, including those alleging irregularities in the procedure and a lack of time to prepare its defence.

28. On 7 July 2004 Yukos plc filed an unsuccessful cassation appeal against the 26 May and 29 June 2004 judgments and simultaneously challenged those judgments by way of supervisory review before the Russian Supreme Commercial Court. Yukos plc claimed, among other things, that the case against it was time-barred; under Article 113 of the Russian Tax Code, a taxpayer was liable to pay penalties for a tax offence only for a three-year period, which ran from the day after the end of the relevant tax term.

29. The Presidium of the Supreme Commercial Court sought an opinion from the Constitutional Court, which confirmed on 14 July 2005 that the three-year time limit under Article 113 should apply. However, where a taxpayer had impeded tax supervision and inspections, the running of the time-limit stopped once the tax audit report had been produced. On the basis of that ruling, on 4 October 2005 the Presidium dismissed Yukos plc's appeal, finding that the case was not time-barred, because Yukos plc had actively impeded the relevant tax inspections and the Tax Ministry's tax audit report for 2000 had been served on Yukos plc on 29 December 2003, that was, within three years.

30. In April 2004 the Russian authorities also brought enforcement proceedings, as a result of which Yukos plc's assets located in Russia were attached; its domestic bank accounts partly frozen and the shares of its Russian subsidiaries seized. On 2 September 2004 the Tax Ministry found Yukos plc had used essentially the same tax arrangement in 2001 as in 2000. Given that the company had recently been found guilty of a similar offence, the penalty imposed was doubled.

31. Overall: for the tax year 2001, Yukos plc was ordered to pay RUB 132,539,253,849.78 (approximately EUR 3,710,836,129); for 2002, RUB 192,537,006,448.58 (around EUR 4,344,549,434); and, for 2003, RUB 155,140,099,967.37 (around EUR 4,318,143,482). Yukos plc was also required to pay bailiffs an enforcement fee, calculated as 7% of the total debt, the payment of which could not be suspended or rescheduled. It was

required to pay all those amounts within very short deadlines and it made numerous unsuccessful requests to extend the time available to pay.

32. On 20 July 2004 the Ministry of Justice announced the forthcoming sale of Yuganskneftegaz plc, Yukos plc's main production entity. On 19 December 2004 76.79% of the shares in Yuganskneftegaz plc were auctioned to cover Yukos plc's tax liability. Two days earlier, bailiffs had calculated Yukos plc's consolidated debt at RUB 344,222,156,424.22 (EUR 9,210,844,560.93).

33. Yukos plc was declared insolvent on 4 August 2006 and liquidated on 12 November 2007.

## **B. Summary of the Court's main findings in the applicants' previous cases**

### *1. Lebedev v. Russia, no. 4493/04, 25 October 2007*

34. The above case concerned the second applicant's arrest and detention pending the first trial. The Court found several breaches of Article 5 of the Convention on account of the second applicant's pre-trial detention. It also found that there was no failure on the part of the State to fulfil its obligation under Article 34 with regard to the second applicant's temporary inability to meet one of his lawyers.

### *2. Khodorkovskiy v. Russia, no. 5829/04, 31 May 2011*

35. The above case concerned the first applicant's arrest and detention pending the first trial. The Court found no violation of Article 3 of the Convention in respect of the conditions of his pre-trial detention between 25 October 2003 and 8 August 2005. It found a violation of Article 3 in respect of the conditions of pre-trial detention between 8 August and 9 October 2005 and the conditions in the courtroom before and during the trial. The Court further found several breaches of Article 5 in respect of the first applicant's arrest and pre-trial detention.

36. The Court found no violation of Article 18 of the Convention in respect of the first applicant's complaint that the State had used the criminal prosecution for a political end and in order to appropriate the company's assets. While the Court admitted that the applicant's case might raise a certain suspicion as to the authorities' real intent, it reiterated that claims of political motivation for a prosecution required incontestable proof, which had not been presented (see *Khodorkovskiy*, cited above, § 260).



3. *Khodorkovskiy and Lebedev v. Russia, nos. 11082/06 and 13772/05, 25 July 2013*

37. The above cases concerned certain aspects of the second applicant's detention pending the first trial that had not been examined in *Lebedev* (cited above), and the first trial of both applicants.

38. The Court found a violation of Article 3 in respect of the conditions of the second applicant's detention in the remand prison and in the courtroom. It also found several breaches of Article 5 of the Convention in respect of the second applicant's pre-trial detention.

39. With regard to the first trial, the Court found no violation of Article 6 § 1 of the Convention on account of the alleged partiality of the trial judge. However, it found a violation of Article 6 § 1, taken in conjunction with Article 6 § 3 (c) and (d), on account of breaches of lawyer-client confidentiality and the unfair taking and examination of evidence by the trial court.

40. The Court further found no violation of Article 7 of the Convention with respect to the allegedly unforeseeable interpretation of the tax law which led to the applicants' conviction.

41. It found a violation of Article 8 of the Convention on account of the fact that the applicants had been sent to remote correctional facilities to serve their sentences.

42. The Court also found a violation of Article 1 of Protocol No. 1 in respect of the first applicant on account of the imposition of civil liability for tax arrears payable by Yukos.

43. The Court found no violation of Article 18 of the Convention in respect of the applicants, confirming its position as stated in *Khodorkovskiy*, cited above, § 260, that the standard of proof in cases where applicants allege bad faith of the part of the authorities is high (*Khodorkovskiy and Lebedev*, cited above, § 903). It stated, in particular, that whereas it was prepared to admit that some political groups or government officials had had their own reasons to push for the applicants' prosecution, this did not make the applicants' prosecution illegitimate, in that the accusations against them had been serious, and even if there had existed a mixed intent behind their prosecution, this did not dispense them from responding to the accusations (*ibid.* § 908).

44. Finally, the Court found that the authorities had failed to respect their obligation under Article 34 of the Convention, as a result of harassment of the first applicant's legal team by enforcement agencies.

4. *OAO Neftyanaya Kompaniya Yukos v. Russia, no. 14902/04, 20 September 2011*

45. The above case concerned complaints by Yukos plc of irregularities in the proceedings concerning its tax liability for the 2000 tax year and

about the unlawfulness and lack of proportionality of the 2000-2003 tax assessments and their subsequent enforcement.

46. The Court found a violation of Article 6 § 1 and 3 (b) of the Convention as regards the 2000 tax assessment proceedings on account of the insufficient time available to Yukos plc to prepare the case at first instance and on appeal.

47. The Court also found a violation of Article 1 of Protocol No. 1 regarding the imposition and calculation of the penalties concerning the 2000-2001 tax assessments on account of the retroactive change in the rules on the applicable statutory time-limit and the consequent doubling of the penalties due for the 2001 tax year.

48. It also found that there had been no violation of Article 1 of Protocol No. 1 as regards the remainder of the 2000-2003 tax assessments. Likewise, it held that there had been no violation of Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1. The Court found, in this regard, that Yukos plc had failed to show that other Russian taxpayers had used or were continuing to use the same or similar tax arrangements and that it had been singled out.

49. The Court further found a violation of Article 1 of Protocol No. 1 in the enforcement proceedings against Yukos plc. Given the pace of the enforcement proceedings, the obligation to pay the full enforcement fee and the authorities' failure to take proper account of the consequences of their actions, the Russian authorities had failed to strike a fair balance between the legitimate aims sought and the measures employed.

50. Finally, the Court held that there had been no violation of Article 18, taken in conjunction with Article 1 of Protocol No. 1. It found that Yukos plc's debt in the enforcement proceedings resulted from legitimate actions by the Russian Government to counter the company's tax evasion. Noting, among other things, Yukos plc's allegations that its prosecution was politically motivated, the Court accepted that the case had attracted massive public interest. However, apart from the violations found, there was no indication of any further issues or defects in the proceedings against Yukos plc which would have enabled the Court to conclude that Russia had misused those proceedings to destroy Yukos plc and take control of its assets.

### **C. The applicants' second trial**

#### *1. Opening of case no. 18/432766-07*

##### **(a) The applicants' transfer to Chita and their attempts to change the venue of the investigation**

51. At the relevant time the applicants were serving their sentences following their conviction in the first trial. The first applicant was serving

his sentence in penal colony FGU IK-10, located in the town of Krasnokamensk, Chita Region (see *Khodorkovskiy and Lebedev*, cited above, § 322). The second applicant was serving his sentence in correctional colony FGU IK-3 in the Kharp township on the Yamal peninsula (see paragraph 12 above).

52. On 14 December 2006 the investigator ordered the transfer of both applicants to a pre-trial detention facility (SIZO-1 or FBU IZ-75/1 of the Zabaykalskiy Region) in the town of Chita. The second applicant was transferred there on 17 December 2006 and the first applicant on 21 December 2006. The applicants remained in the Chita remand prison until their transfer to a remand prison (SIZO-1) in Moscow in February 2009 as the criminal case was referred by the GPO to the Khamovnicheskiy District Court of Moscow for trial (see paragraph 72 below).

53. On 3 February 2007 the investigator decided to sever several episodes from criminal case no. 18/41-03 and to open a new case. The new case was assigned case number 18/432766-07. The Deputy General Prosecutor ordered that the investigation in that case was to be conducted in the Chita region.

54. On 5 February 2007 the applicants were charged with the crimes punishable under two provisions of the Criminal Code: “embezzlement” (Article 160) and “Money laundering” (Article 174 (1)). According to the bill of indictment, those crimes had been committed by the applicants in Moscow in their capacity as former senior managers of Yukos plc and affiliated companies.

55. On 7 February 2007 a group of lawyers for the applicants travelled from Moscow to Chita. At Domodedovo airport (Moscow) the applicants’ lawyers were stopped and detained for one hour by police working in the airport security unit. Their papers were verified and their belongings were also checked using special equipment and X-ray apparatus. In the course of the searches confidential papers being carried by the lawyers were examined and video-recorded.

56. On the same day, in the pre-flight security zone of Chita airport, GPO investigators approached Ms Moskalenko, one of the lawyers for the first applicant, and ordered her to sign a formal undertaking not to disclose information from the case materials in file no. 18/432766-07. She made a handwritten note on the form, stating that she had been coerced into signing the form and that she had not been given access to the documents in case file no. 18/432766-07. On 8 and 15 February 2007 Ms Moskalenko filed a formal complaint with the GPO, stating that the two episodes in the airports amounted to harassment of the applicants’ lawyers and breach of their professional privilege.

57. In February 2007 the applicants lodged a complaint under Article 125 of the Code of Criminal Procedure (the “CCrP”) about the

decision to investigate the new cases in Chita. They claimed that since the acts imputed to them had been committed in Moscow, they ought to be investigated in Moscow, and that the applicants should be transferred to a remand prison there.

58. On 6 March 2007 the GPO initiated disbarment proceedings in respect of Ms Moskalenko, referring to her absence from Chita when the first applicant was studying the materials of the case. The first applicant was obliged to issue a statement confirming that he was fully satisfied with Ms Moskalenko's work. On 8 June 2007 the Qualifications Commission of the Bar refused to disbar Ms Moskalenko.

59. On 20 March 2007 the Basmanniy District Court found that the GPO's decision to conduct the investigation in Chita had been arbitrary and that the investigation should be conducted in Moscow. That ruling was upheld on 16 April 2007 by the Moscow City Court. However, the applicants remained in the Chita remand prison.

60. In July 2007 the defence filed an application with the Prosecutor General, asking that a criminal case be opened in respect of the GPO officials who had failed to follow the order contained in the Basmanniy District Court's decision of 20 March 2007 concerning the proper place of the investigation. However, this request was refused.

61. On 25 December 2007 the Supreme Court of Russia, at the GPO's request, examined the case by way of supervisory review and ordered the lower court to reconsider whether Moscow was the proper place for the investigation in the applicants' case.

62. On 30 January 2008 the Basmanniy District Court held that the GPO's decision to designate Chita as the place of investigation did not breach the applicants' constitutional rights and did not hinder their access to justice. Consequently, the court confirmed the validity of that decision. On 7 April 2008 the Moscow City Court upheld the lower court's ruling.

**(b) The applicants' attempts to have the proceedings discontinued**

63. On 28 March 2007 the first applicant lodged a complaint before a judge under Article 125 of the CCrP. He complained about actions by the GPO investigators, specifically that he had been given no details about the parallel investigations; that conducting the investigation in Chita was unlawful, since all of the operations imputed to the applicants had taken place in Moscow; that the courts which authorised his detention in the Chita remand prison lacked jurisdiction; and that the GPO had harassed his lawyers by subjecting them to unlawful searches, threatening them with criminal prosecution and trying to disbar Ms Moskalenko, one of his lawyers. The applicant claimed that all of these elements, taken in aggregate, amounted to an abuse of process. He sought a court order directing the GPO to stay the proceedings. The applicant insisted on his

personal attendance at the examination of the motion by the court, but the court decided that it was impossible to transport him from Chita to Moscow.

64. On 27 June 2007 Judge Yarlykova of the Basmanniy District Court of Moscow examined the complaint. The applicant's lawyer challenged the judge on the ground that she had earlier presided at the trial of Mr Pereverzin, Mr Malakhovskiy and Mr Valdez-Garcia, and could therefore have preconceived ideas about the first applicant's guilt. However, Judge Yarlykova refused the recusal application, and dismissed the complaint on the merits.

65. On 19 September 2007 the Moscow City Court upheld the ruling by Judge Yarlykova. In particular, the Moscow City Court agreed with her that under Russian law a judge was not competent to supervise procedural decisions taken by the prosecution bodies in the performance of their functions, and that the judge's only role in this respect was to verify that the constitutional rights of the participants in criminal proceedings had been respected.

66. On 16 April 2008 the first applicant resubmitted his complaint of 28 March 2007 seeking discontinuation of the criminal proceedings against him and Mr Lebedev. He also referred to various breaches of the domestic procedure, to bad faith on the part of the authorities and to infringements of the rights of the defendants and professional privilege of the applicants' lawyers. The applicant lodged this complaint before the Basmanniy District Court of Moscow, but the judge transmitted the motion to a court in Chita, referring to the fact that the investigation was taking place there.

67. On 29 September 2008 Judge Ivanoshchuk of the Ingondinskiy District Court of Chita rejected the motion, on the ground that the investigator's actions were not subject to judicial review. On 26 December 2008 that decision was confirmed by the Chita Regional Court.

**(c) The applicants' preparation for the trial**

68. According to the applicants, the bill of indictment and the appended written materials ran to 188 volumes.

69. When the materials of the case file were given to the defence for examination, the applicants and their lawyer had access to one copy of the file, which they were only allowed to study in the presence of an investigator. When they wished to discuss materials or legal issues in private, the investigator removed the case file.

70. According to the applicants, they were not allowed to keep copies of the case file in their cells.

71. Having received the bill of indictment together with the case file, the defence asked the prosecution to clarify the charges. In their view, the prosecution had failed to demonstrate which facts it intended to prove through which item(s) of evidence. They also submitted that the amounts of oil allegedly misappropriated by the applicants were defined in a random

manner, and that the bill of indictment was badly written. However, their request was rejected and the prosecution decided that the bill of indictment was acceptable as it stood and was ready to be submitted to the court.

## *2. Second trial*

### **(a) Preliminary hearing**

72. On 14 February 2009 case no. 18/432766-07 was referred by the GPO to the Khamovnicheskiy District Court of Moscow for trial. In the Khamovnicheskiy District Court the case was assigned no. 1/23-10. The applicants were transferred from the Chita remand prison to a remand prison in Moscow (see paragraph 52 above).

73. On 3 March 2009 the trial began with a preliminary hearing, held in camera. The case was heard by a single judge, Judge Danilkin. He was assisted by four secretaries.

74. The prosecution team was composed of five prosecutors. The defence team was composed of over a dozen lawyers.

#### *(i) Conditions in the courtroom*

75. From 17 March 2009 the hearings were public. The two applicants were held in a glass dock which, unlike the rest of the room, was not air-conditioned and was poorly ventilated. The applicants were brought to the courtroom each day in handcuffs and were heavily guarded.

76. The applicants sought the court's permission to sit outside the glass dock near their lawyers, but permission was not granted. According to the applicants, while in the glass dock they were unable either to discuss the case with their lawyers confidentially or to review documents. All their conversations during the hearings were within earshot of the guards. Furthermore, the judge reviewed all the documents which the defence lawyers wished to show their clients.

#### *(ii) Motions by the defence at the preliminary hearing*

77. At the preliminary hearing the defence filed several motions, all of which were rejected. Thus, the defence sought the discontinuation of the proceedings for abuse of process. However, Judge Danilkin ruled that it was premature to terminate the case without assessing the entire body of evidence and hearing the parties' positions. The applicants appealed but to no avail: on 1 June 2009 the Moscow City Court ruled that Judge Danilkin's ruling was not amenable to appeal by the defence.

78. The defence further complained that the prosecution had failed to submit to the court a list of the defence witnesses who were to be called to the court by a subpoena. The defence contended that they were thus unable to secure the presence of those witnesses at the trial. The defence referred to Article 220 (4) of the CCrP in this respect. Judge Danilkin replied that the

absence of a list of defence witnesses to be summoned did not invalidate the bill of indictment, and that the defence would be free to request that the witnesses be summoned during the trial if need be.

79. The defence asked the judge to order discovery of evidence and suppress certain items of evidence contained in the prosecution case file, but all motions to that end were refused.

80. The defence challenged the territorial jurisdiction of the Khamovnicheskiy District Court, but this objection was dismissed by the judge.

81. The defence repeated their request to have the bill of indictment reformulated in order to connect the evidence and factual assertions on which the prosecution case relied and to clarify the prosecution's legal arguments. Judge Danilkin refused that motion, stating that the law did not require the prosecution to do a better job and to re-write the bill.

*(iii) Detention of the two applicants during the second trial*

82. At the preliminary hearing the prosecution requested an extension of the applicants' detention on remand and on 17 March 2009 that request was granted. The court did not set a time-limit for the extension in its order. The applicants argued that in the subsequent months detention orders were extended with delays; as a result, some periods were not covered by any valid detention order. In addition, in the applicants' opinion, the review of the detention order of 17 March 2009 was unnecessarily delayed.

83. Over the following months the applicants' detention on remand was repeatedly extended. In the opinion of the defence, those extensions were unlawful. The first applicant went on hunger strike in protest against the extensions. In 2011 the Supreme Court acknowledged that the applicants' detention had been unlawful and issued a special ruling in this respect, addressed to the Chair of the Moscow City Court.

**(b) The case as presented by the prosecution**

84. The Khamovnicheskiy District Court of Moscow concluded the preliminary hearing on 17 March 2009 and proceeded to the prosecution's presentation of the case.

85. The prosecution presented their case between 21 April 2009 and 29 March 2010. According to the prosecution, between 1998 and 2003 the applicants, as owners and/or managers of the companies which had a controlling stake in Yukos plc, misappropriated 350 metric tonnes of crude oil produced by Yukos's subsidiaries and subsequently laundered the profits by selling the oil through a chain of affiliated trading companies. The sums thus accumulated were transferred to the accounts of hundreds of foreign and Russian companies, controlled by the applicants. The prosecution claimed that those acts amounted to misappropriation or embezzlement

(Article 160 of the Criminal Code) and money laundering (Article 174.1 of the Criminal Code).

86. The facts and the legal arguments relied on in the prosecution case are described in more detail below. The following summary is based on the text of the judgment with which the second trial concluded; it reflects only those elements of the case as presented by the prosecution which were retained by the court as the basis for its conclusions.

*(i) Obtaining de facto control over the Yukos group*

87. Yukos was created in the course of the privatisation of the State oil sector in 1995. The first applicant was a majority shareholder of Group Menatep Limited, which acquired a large block of shares in Yukos plc at one of the privatisation auctions. As a result, Group Menatep Limited became the majority shareholder in Yukos. The second applicant also owned an important block of shares in Group Menatep Limited and was its director. Thus, as majority shareholders in Group Menatep Limited, both applicants could play a decisive role in shaping Yukos's business strategy. In 1997 the first applicant was elected President of the Board of Directors of Yukos.

88. In addition, in order to secure the loyalty of certain senior executives in Yukos, the applicants created a secret parallel system for distribution of the group's profits. Thus, in 1996 the applicants concluded an oral agreement with Yukos senior executives, under which Group Menatep Limited undertook to pay 15% of Yukos's profits Tempo Finance Limited. Those Yukos senior executives were the beneficiaries of Tempo Finance Limited. Such payments were regularly made between 1996 and 2002, when they amounted to several hundred million United States dollars (USD). In 2002 the agreement between Group Menatep Limited and Tempo Finance Limited was reformulated and concluded in writing. As a result, the applicants secured the loyalty of several leading Yukos senior executives and obtained not only strategic but also operative control over the group (pages 569 et seq. of the judgment). The influence of the minority shareholders within Yukos was thus reduced to a minimum.

89. Through Yukos the applicants gained partial control over Yukos' main subsidiaries, in which Yukos owned 50% or more of the shares: oil-extracting companies, refineries, crude-oil storage terminals, etc. Yukos' biggest oil-extracting subsidiaries were Yuganskneftegaz plc, Samaraneftgaz plc and Tomskneft plc (hereinafter "production entities"). Again, the applicants had recourse to various techniques in order to reduce the influence of the minority shareholders in those companies.

90. The applicants initially controlled the production entities on the basis of "management agreements". Thus, on 19 February 1997 such an agreement was imposed on Yukos plc by Rosprom Ltd, another company which belonged to the applicants and in which the second applicant was a



deputy president of the executive board (*pravleniye*) in 1997-1998. Under that agreement Yukos plc delegated to Rosprom the power to take decisions which would otherwise be within the competence of the executive bodies of Yukos plc. The management agreement was approved by the general meeting of shareholders of Yukos. On 14 April 1998 Rosprom signed an agreement in similar terms with Tomskneft plc.

91. In 1998 the applicants registered new companies which operated under “management agreements” with the production entities belonging to the Yukos group. Thus, Yukos Explorations and Production Ltd was to operate the group’s oil-extracting facilities, whereas Yukos Refining and Marketing Ltd was created to operate the refineries. Both Yukos Explorations and Production Ltd and Yukos Refining and Marketing Ltd were controlled by Yukos Moskva Ltd, in which the first applicant was head of the board of directors (from 3 July 1998 until 31 March 2000). From 2000 Yukos plc was administered by Yukos Moskva Ltd.

92. Although from 2000 onwards the first applicant was no longer the head of the board of directors of Yukos Moskva Ltd and became merely one of its directors, he continued to define the group’s policy as the major shareholder in Group Menatep Limited and, in this capacity, was able to influence the production entities’ operative decisions. The second applicant was the deputy head of the board of directors of Yukos Refining and Marketing Ltd and Yukos Moskva Ltd and was *de facto* the financial director of those companies and of the group as a whole.

93. The system of “management agreements” made it possible to protect the mother company (Yukos plc) from civil and other liability for abusive interference in the business of its subsidiaries (page 308 of the judgment). Under those agreements the managing companies – such as Rosprom, Yukos Refining and Marketing Ltd and Yukos Explorations and Production Ltd – were required to act in the best interests of the production entities. However, in reality they acted in the applicants’ interests only.

94. The applicants thus created a vertically-integrated group of companies where all important decisions were taken by them and their accomplices and then imposed on the production entities. The latter thus lost any independence. This enabled the applicants to redirect sales of the oil extracted by the production entities and prevent the minority shareholders in those entities and in Yukos plc from sharing the profits generated by the sales of crude oil.

*(ii) Manipulating the price of oil within the group*

95. In 1996 the applicants used their influence to compel the two production entities – Yuganskneftegaz plc and Samaraneftegaz plc – to conclude “general agreements” with Yukos. Those agreements contained an undertaking by the production entities not to sell their produce independently in the future, but only through Yukos. The agreements

defined the principles for calculating the price of oil, which was based on the price of “oil well fluid” and provided for an independent evaluation of market prices for this “oil well fluid”. On the basis of those general agreements Yukos and its production entities concluded contracts for the sale of crude oil on conditions which were unfavourable to the production entities. Those deals were concluded “on the basis of malicious collusion with the representative of another party” and were thus contrary to Article 179 of the Civil Code (page 647 of the judgment; page 9 of the decision of the court of appeal). In 1998 a general agreement in similar terms was signed with Tomskneft plc.

96. Some of the directors representing the minority shareholders in the production entities objected to the practice of concluding contracts under such conditions, and even threatened Yukos with lawsuits. They claimed that the prices indicated in those contracts were much lower than the market price and that the production entities were thus deprived of their profits. However, the applicants overcame their resistance. To do so, they requested and obtained approval for the existing schemes of oil sales from the general meetings of shareholders. Those approvals covered all past sales and future sales for the next three years. The prosecution, with some exceptions, did not specify how many votes the applicants had at the general meeting of shareholders, how many votes they needed to approve the sales of oil, and in what way these approvals were in breach of the Public Companies Act.

97. In order to obtain these approvals the applicants used various techniques. In particular, general meetings of the shareholders in the production entities were always presided by one of the Yukos executives. In addition, although Yukos and other companies affiliated with the production entities and owning shares in them ought to have been regarded as “interested parties” under the Public Companies Act of 1995 and, as such, should have been excluded from the voting, they did not acknowledge a conflict of interests and voted at those meetings along with other shareholders (page 9 of the decision of the court of appeal).

98. In some cases, where the applicants did not have the necessary number of votes, they succeeded in neutralising the resistance of “dissident shareholders” by having their shares seized by a court. Thus, in 1999 a Kaluga court opened proceedings against a group of “dissident shareholders” in Tomskneft plc. In those proceedings a certain Mr V. challenged those persons’ title to the shares in Tomskneft plc. According to the documents, Mr V. owned one share in Tomskneft plc. However, in reality he was not even aware of those proceedings or of the fact that he owned any shares. The lawyers working for the applicants had obtained from him, by deceit, a power of attorney. They then purchased one share in Tomskneft plc in his name, brought a lawsuit against the “dissident shareholders” and lodged a request for interim measures. Those measures consisted, *inter alia*, of a temporary prohibition on voting by the “dissident

shareholders” at the general meetings. On 16 March 1999 a judge in a district court in the Kaluga Region issued an injunction against the “dissident shareholders”, as requested by the “plaintiff”. The applicants’ lawyers brought with them a court bailiff to the next general meeting of shareholders of 23 March 1999. Referring to the injunction of the Kaluga court, he prevented “dissident shareholders” from voting. As a result, the applicants obtained a qualified majority at the general meeting and all the contracts of sales between Tomskneft plc and Yukos were approved. A few days later the injunction was lifted, the applicants having already obtained what they wanted.

99. At some point in 2000 the production entities started to sell the oil to Yukos and to the trading companies at auctions. However, the auctions were manipulated by its organiser, who was a senior Yukos executive and loyal to the applicants. Thus, the conditions for prospective buyers were formulated in such a way as to exclude any external competitor. Only the companies affiliated with the applicants, and controlled by them, participated in those auctions. The lead appraising expert who was supposed to define a fair price for the crude oil had previously worked with the applicants in the Menatep bank, and therefore acted in their interests. As a result, the price of crude oil in the sales contracts was much lower than the real market price which the production entities would have received if they sold the oil independently.

*(iii) Redirecting sales in order to accumulate profits in the Russian trading companies*

100. In order to accumulate profits from the sale of oil extracted by the production entities and, at the same time, to minimise tax liability, the applicants registered over a dozen different trading companies on the territory of several low-tax zones in Russia. Thus, such trading companies were registered in Mordoviya, Kalmykia, the Chelyabinsk Region and the Evenk Autonomous Region, and in the districts known as ZATOs, in particular in Lesnoy ZATO and Trekhgorniy ZATO. The judgment cited the limited-liability companies Mitra, Grunt, Business-Oil, Vald-Oil, Erlift, Flander, Muskron, Alebra, Kverkus, Kolrein, Staf, Kvadrat, Fargoil, Ratibor and others as examples.

101. Some of those companies were created by private individuals who agreed to be nominal owners of those companies but who had never participated in their business activities and had only signed documents (page 503 of the judgment). Thus, Fargoil was registered in the name of Mr S. as the sole owner, whereas Ratibor was created by Ms V. When asked to do so, Mr S. and Ms V. ceded their shares to companies indicated by the applicants’ accomplices.

102. In essence those trading companies were sham entities, which were created for the sole purpose of avoiding payment of the full amount of taxes

for which the Yukos group would otherwise have been liable had it sold oil directly from Moscow. The difference between the very low price paid to the production entities and the high price paid by the final buyer of the oil was concentrated partly in the Russian trading companies and partly in foreign trading companies (see below).

103. The Russian trading companies existed only on paper, had the same nominal directors (Mr Pereverzin, Mr Malakhovskiy and several other persons) and held their money in accounts in two Moscow-based banks affiliated with the applicants: DIB bank and Trust bank. All their business operations – preparing contracts, signing shipment orders, submitting tax returns, making bank transfers, etc. – were conducted in Moscow, by a group of employees working for Yukos and its affiliates. Physically the oil and its derivatives did not change hands: the crude oil was transported directly from the wells to the refineries and then, after processing, to end-customers. The intermediate companies were necessary only for concentrating profits and avoiding taxes. Although *de facto* the applicants controlled the trading companies, *de jure* the companies were presented as independent traders.

104. The prosecution provided data on money flows between the trading companies and the production entities and compared the price paid to the latter with the market price of oil. Thus, for example, in 1998 Yuganskneftegaz plc sold through the trading companies 25,322,612,411 tonnes of crude oil for RUB 6,622,270,514; Samaraneftegaz plc sold 7,450,791,000 tonnes for RUB 2,097,566,309; Tomskneft plc sold 199,506 tonnes for RUB 41,577,050. In total, according to the prosecution, the applicants and their accomplices thus misappropriated 32,972,909,411 tonnes of crude oil in 1998, worth RUB 25,645,695,514.

105. It appears that the value of the “misappropriated” oil was calculated on the basis of the “world market price” indicated in the judgment. Thus, for example, in January 1998 the market price of crude oil at the world market varied between RUB 667.7 per ton and RUB 673.77 per ton, while the production entities received RUB 435.96 per ton. In December 1998 the world market price of crude oil varied between RUB 1229.68 and RUB 1340.84 per ton, whereas the production entities were paid at a rate of RUB 250.08 per ton.

106. The judgment contained conflicting information on the price paid by Yukos or the trading companies to the production entities. Thus, on page 14 of the judgment it is indicated that in July and September 1998 they were paid RUB 250.08 per ton, while the market price varied between RUB 369.40 (in July) and RUB 638.99 (in September). At the same time, according to a report by the Khanty-Mansyisk branch of the Antitrust Committee, quoted by the court on page 177 of the judgment, Yuganskneftegaz plc was selling oil to Yukos in July-September 1998 for

RUB 144.5–207.58 per ton, whereas the average market price in that region was RUB 288 per ton.

107. As follows from the judgment (pages 164 and 354; pages 29 and 30 of the decision of the court of appeal), in order to avoid transactions between the production entities and trading companies being subjected to tax audits, the applicants tried to ensure that the price at which the trading companies purchased oil from the production entities did not deviate from the average market price by more than 20%.

108. In order to obscure the *modus operandi* of the scheme, the applicants regularly re-directed sales and money flows from existing trading companies to new ones. From January 2000 all sales of oil extracted by the production entities went through Yukos-M. As from December of that year, most of the sales of Yukos oil were conducted through Y-Mordoviya. In the spring of 2001 some of the oil sales were re-directed to Ratibor, Sprey and Terren. However, the nature of the sales always remained the same: the production entities were selling oil to the trading companies at a very low price. That price was defined at farcical auctions, staged every month by the applicants' accomplices. Thus, in February 2000 the oil was sold by the production entities to Yukos-M at RUB 750 per ton, whereas on 31 January 2000 the world market price for the "Urals (Med)" and "Urals (R'dam)" oil was on average RUB 5,535.59. In November 2000 the production entities were receiving RUB 1,200 per ton of oil from the trading companies, whereas the world market price was RUB 6,040.77 per ton on average. The overall price of oil sold in 1998-2000 through that scheme amounted to RUB 158,492,156,000. The judgment concluded that the pecuniary damage caused by the applicants to the production entities (Samaraneftegaz plc, Yuganskneftegaz plc and Tomskneft plc) was equal to that amount.

109. In 2001 sales of crude oil and oil derivatives were channelled essentially through Fargoil, another trading company controlled by the applicants. All profits were concentrated in Fargoil's accounts, in two banks controlled by the applicants: Menatep Spb and DIB. For example, according to the prosecution, in 2001 the applicants misappropriated oil worth RUB 147,394,294,000. Part of that amount was spent to cover the operating costs of production entities; the remaining part remained in the hands of the applicants and their accomplices. Their net profit from the operations conducted through Fargoil in 2001 amounted to RUB 65,837,005,000.

110. From January 2002 Fargoil was buying oil from Ratibor, which, in turn, received oil from the production entities by "winning" at the monthly auctions. From September 2002 Ratibor was removed from the scheme and all sales went through Evoil, which started to "win" at the auctions and sell the oil on to Fargoil. By the end of 2002 Evoil acquired from the production entities 24,512,893 tonnes of oil, for which it paid only RUB 48,636,878,082. According to the judgment, this represented 20-25% of the real market price for this oil on the world market. In July-August

2003 the applicants decided again to redirect money flows by including in the sales scheme a new trading company, Energotrade, also headed by Mr Malakhovskiy as director. Energotrade replaced Fargoil as the main buyer of oil from Evoil, which, in turn, purchased it from the production entities.

111. Yukos plc was also involved in the sales scheme. At some stage Yukos plc played the role of the initial buyer of oil from the production entities; later Yukos plc was replaced with other trading companies and participated in the sales mostly as a commissioner, while the trading companies, such as Fargoil, remained nominal owners of the oil extracted by the production entities. In 2002, as a commissioner, Yukos plc received 0.2% of the gross product of the sales of oil on the international market. The gross product of sales which Yukos plc, as a commissioner, transferred to the accounts of Fargoil, as the nominal owner of the oil, amounted in 2002 to RUB 144,546,628,965. Thus, given the world price of oil, and the costs of production and logistics, in 2002 the net profit to the applicants and their accomplices amounted, for the sales conducted through Fargoil, to RUB 104,852,978,164. As regards the sales of oil and its derivatives on the internal market, in 2002 Fargoil received RUB 75,627,685,010.33 (gross money inflow). The net profit to the applicants and their accomplices, after deduction of the production costs of the oil and its derivatives, amounted to RUB 25,164,128,293 for that period. The prosecution referred to the amounts misappropriated by the applicants as a result of the operations on the internal market and abroad in 2003.

112. According to the prosecution, between 1998 and 2000 the applicants misappropriated oil worth RUB 492,486,604,892. In 2001-2003 the applicants misappropriated oil worth RUB 811,549,054,000, while their net profits from operations with oil amounted to RUB 399,939,564,505.

*(iv) Exporting oil profits from Russia*

113. In addition to setting up many Russian trading companies, the applicants created a network of foreign firms registered in various off-shore zones, such as Cyprus, Lichtenstein, Gibraltar, the British Virgin Islands, the Isle of Man, etc.

114. Since the price of crude oil at the border (i.e. in a contract between a Russian trading company and a foreign trading company) was well known, the applicants ensured that the price of Yukos oil would be on average 1 rouble more than the price of oil exported by other big oil companies (page 336 of the judgment).

115. From 1997 most of Yukos's international oil sales went through a long chain of intermediaries, which usually took the following form: a production entity – Yukos plc itself or one of the Russian trading companies – an off-shore trading company, controlled by the applicants – a Swiss trading company controlled by the applicants – the real foreign buyer of the oil. The applicants included so many intermediaries in the scheme in order

to make it deliberately opaque. Only at the last stage of the chain was the oil sold for the market price. The international sales went through foreign trading companies such as South Petroleum Ltd (Gibraltar), PFH Atlantic Petroleum Ltd (Cyprus), Baltic Petroleum Trading Ltd (Isle of Man), and then to Behles Petroleum SA (Switzerland). Behles Petroleum played a central role in the international sales scheme, since the applicants needed a Swiss counterpart in order to have a veneer of respectability. Behles Petroleum was a real trading company, in the sense that it had personnel involved in selling oil to end-customers.

116. From 2000 the sales scheme was reorganised. Henceforth most of the revenue from foreign sales of Yukos oil went to two Cyprus companies: Routhenhold Holdings Ltd and Pronet Holdings Ltd. Both companies had Mr Pereverzin as director. Mr Pereverzin was the applicants' business partner and worked with them in the Menatep bank in the 1990s. Routhenhold Holdings and Pronet Holdings served as a "final point" in the sales chain for Yukos export operations. Those and other trading companies in Cyprus were registered at the applicants' request by ALM Feldmans, a Moscow-based law firm, which also organised the opening of the necessary bank accounts, submitted the necessary forms and reports, etc.

117. In order to extract capital accumulated in the accounts of Russian trading companies such as Ratibor and Fargoil, the applicants also employed another method. Thus, at their request in 2000 ALM-Feldmans registered two companies in Cyprus: Nassaubridge Management Ltd and Dansley Ltd. Nassaubridge subsequently became the sole owner of Fargoil, while Dansley became the sole owner of Ratibor. The money "earned" by Fargoil and Ratibor was then transferred to Nassaubridge and Dansley in the guise of dividends.

*(v) Dispersing the capital in order to protect it from lawsuits*

118. Throughout the period under examination the applicants created a number of interconnected companies abroad, which were intended to serve as a "safety cushion" in the event of lawsuits brought by shareholders in Yukos or the production entities or by the State.

119. Thus, in 2001 a minority shareholder in Tomskneft plc started a public campaign against the applicants, accusing them of misappropriation of the oil extracted by Tomskneft plc. In order to protect themselves against possible audits and lawsuits, the applicants created, through their accomplices, several new letter-box companies, also registered in off-shore zones. These included: Wellington Interests Ltd, Arley Ltd, Beserra Ltd, Corden Ltd, Casphrain Ltd, Neptune Human Resources Ltd, Travis Ltd, Worcester Ltd, Zulfa Hodlings Ltd, and others. The off-shore trading companies transferred money to "cushion companies" under different agreements. Thus, South Petroleum transferred USD 60,293,115 to Wellington Interests under an agreement, dated 1997, which described that

amount as a “loan” from South Petroleum to Wellington Interests. South Petroleum subsequently signed an agreement with Corden, stipulating that the former ceded to the latter the right to reclaim from Wellington Interests money due under the 1997 loan agreement, in exchange for a payment of USD 6,008,200. Thus, South Petroleum sold Wellington Interests’ debt to Corden for about 10% of its price. The remaining 90% was henceforth in new hands and was better protected from possible lawsuits. South Petroleum also transferred USD 15,940,000 to Arley. That money transfer was presented as a payment for promissory notes issued by Arley. However, those promissory notes were not supported by the debtor’s assets and their real economic value was close to zero. As a result, the accounts of the trading companies were drained and the money was concentrated in the “cushion companies”. South Petroleum and Baltic Petroleum Trading also transferred considerable sums of money to their corporate owners in the guise of payment of dividends. Thus, South Petroleum and Baltic Petroleum Trading transferred USD 32,848,000 as dividends to their founding company – Jurby Lake Ltd, a company registered in the Isle of Man.

120. In January 2000 the authorities in certain States started investigations in respect of some of the off-shore companies affiliated with the applicants on suspicion of money laundering. The applicants, having decided that it was not safe to work through those companies, changed the structure for distributing and laundering the profits derived from the sale of Yukos oil. For that purpose the applicants again turned to the law firm ALM Feldmans. The latter registered the company Wildlife Resources Corporation on British Virgin Islands. By concluding fake agreements for the exchange of oil sales, the applicants organised the transfer of USD 20,005,000 from Jurby Lake to Wildlife Resources Corporation.

*(vi) Funding ongoing operations and investments in Russia*

121. To secure funding of ongoing operations the applicants needed to return part of the capital from the Russian trading companies and foreign firms which were involved in the sales of oil, and which accumulated significant amounts of money in their accounts (such as Ratibor, Fargoil, Energotrade, etc.). To do so, they used the “promissory notes scheme”. Under that scheme, promissory notes were used as a vehicle for transferring money from the trading companies to the production entities. The same scheme was used to transfer money to “empty” companies which were later used for investment purposes. As a result of this chain of transactions, promissory notes were exchanged for real money. The money was also redistributed in the form of loans between the different companies making up the Yukos group.



*(vii) Buy-back of Yukos shares; payments to the creditors of Menatep*

122. In 1997-1998 Menatep bank, which owned a large block of Yukos plc shares, borrowed money from two foreign banks – Daiwa Europe and West Merchant Bank. Thus, Menatep borrowed over USD 100,000,000 from Daiwa on a security of 336,551,055 simple shares in Yukos (which represented 13.82% of its shareholding capital), and over USD 125,000,000 from West Merchant Bank on a security of 340,908,790 simple shares in Yukos plc (15.24% of its shareholding capital).

123. After the financial crisis of August 1998 Menatep defaulted; as a result, Daiwa Europe and West Merchant retained the shares. The applicants decided to return the shares to Yukos by buying them back from the two banks, but not openly. In the official negotiations with the two banks, the applicants persuaded their managers that Menatep was insolvent and that, in view of the financial crisis in Russia, it would be unable to repay the full amount of the two loans. Representatives of Daiwa and West Merchant proposed a restructuring plan, but the applicants artificially protracted the negotiations. At the same time the applicants conducted secret parallel negotiations with Standard Bank of London. As a result, Standard Bank of London agreed, for a commission, to buy the shares from Daiwa Europe and West Merchant and transmit it to DIB bank, controlled by the applicants. In 1999 DIB bank signed an agency agreement with the Standard Bank of London and transferred a pre-payment to it; on the basis of that agreement Standard Bank approached Menatep's two creditors (Daiwa and West Merchant) and acquired their claims against Menatep, together with the shares, at a significant discount. Standard Bank of London paid the two banks about 50-60% of the original amount of the loan, received the shares, and immediately thereafter transferred those shares to DIB bank. DIB bank paid Standard Bank the price of the shares and its commission. Later DIB bank sold Yukos plc shares to several companies controlled by the applicants, including Yukos Universal Ltd and Wilk Enterprises Ltd.

124. To finance the above operation the applicants decided to use money from Yukos plc itself. However, they did not wish to show who was really purchasing the shares. To give the whole scheme a gloss of legality, the applicants organised the following chain of transactions. The necessary sums of money were accumulated in the accounts of Flander and Alebra, two Russian trading companies involved in the operations with Yukos oil. Yukos issued 35 promissory notes, worth RUB 6,228,253,842, at an interest rate of 30% per annum. The date of issue for those promissory notes was indicated as 1 October 1999; they were due for payment after 28 December 2000. Yukos then transmitted those promissory notes to MQD International Ltd, a company registered in the British Virgin Islands. MQD, acting through a network of intermediary foreign companies (such as Jerez Ltd and Mezview International Ltd), then sold the promissory notes to DIB, which re-sold them to Flander and Alebra. Flander and Alebra paid

RUB 7,257,663,538.11 for those notes, an amount which already included the interest accrued. This sum went to Mezview International, which transferred it to Yukos Universal Limited. The latter, in turn, paid it to DIB bank in exchange for the Yukos shares. As a result of that operation, Yukos Universal and Wilk Enterprises received Yukos shares, whereas Flander and Alebra received Yukos plc promissory notes, which Yukos would have to buy back when the time came. In essence, the buyback of the Yukos shares for the benefit of the applicants was funded by Yukos plc itself, with money earned from the oil extracted by its subsidiaries.

125. In 1999 the Central Bank of Russia withdrew Menatep bank's licence and a liquidation procedure was initiated. In the process of liquidation, the applicants, on behalf of Yukos, proposed to some of Menatep's foreign creditors that the latter's debts could be covered by Yukos's money; at the same time, the applicants sought to extinguish Menatep's financial obligations to Yukos itself. As a result of a chain of transactions, which were economically unfavourable to Yukos, Menatep extinguished its debts whereas Yukos paid some of Menatep's creditors significant amounts of money (page 589 of the judgment). This enabled the applicants to avoid a major conflict with Menatep's foreign creditors.

*(viii) Reorganisation of the company in the 2000s. Withdrawal of capital in 2003-2004*

126. In the early 2000s the applicants started to prepare the group for the listing of Yukos shares on the international stock market. For that purpose they reorganised the internal structure of the group, made it more transparent for international investors and even started to include some of the Yukos trading companies (such as Ratibor or Fargoil) in the consolidated financial reports that were prepared in accordance with the international rules of accounting (Generally Accepted Accounting Principles, GAAP). At the same time, the applicants did not disclose to the auditors PricewaterhouseCoopers (PwC) their links to some of the companies which participated in the sales chain, such as Behles Petroleum, South Petroleum and Baltic Petroleum (page 567 of the judgment), and did not disclose the true nature of the operation for the secret buyback of Yukos shares from Daiwa and West Merchant banks.

127. Under the Russian accounting rules, most of the Yukos affiliates were considered as independent actors. The system of subsidiaries was organised in such a way as to conceal some of the affiliation links from the Russian authorities and the public in general (page 606 of the judgment). In the official tax returns for 1999-2004, submitted by Yukos plc to the Russian tax authorities under the then applicable rules of accounting, none of the companies registered in the Lesnoy and Trekhgorniy ZATOs was included in the list of "persons affiliated with Yukos plc" (pages 326 and 328 of the judgment). At the general meetings of Yukos shareholders in

2002 and 2003 the first applicant addressed the shareholders, but did not mention the risks related to transactions with affiliated companies, which required approval by the competent bodies of Yukos. Many Russian minority shareholders were not aware of the existence of “consolidated financial reports” prepared under the GAAP rules (page 611 of the judgment), because these were available only in English and were only published on the company’s website. The prosecution concluded that the applicants deliberately misinformed the shareholders about the inner structure of the company and the affiliation links between Yukos and the trading companies.

128. Finally, even after the reorganisation and inclusion of some of the Yukos subsidiaries in the GAAP reports, those companies remained bound by secret obligations and “equity option contracts” with the companies affiliated with the applicants, which were not mentioned in the consolidated reports. Those secret agreements permitted the applicants to assume control of those companies or their funds at any moment.

129. According to the prosecution, although the applicants reinvested a large part of the profits from the sale of oil to Yukos and its subsidiaries, and included the financial results of those subsidiaries in the consolidated report under the GAAP system, this served only the interests of the applicants themselves. It raised the capitalisation of Yukos and inflated the price of its shares. Thus, in 1999 under the Russian accounting rules, Yukos’s profits amounted to USD 228 million, whereas, according to the consolidated report which included trading companies and was prepared under the international rules (US GAAP), Yukos’s profits amounted to USD 1,152 million. In 2000-2002 the applicants, through Yukos Capital, concluded a number of very profitable deals with small blocks of Yukos shares. By attracting foreign investors on the open market and selling them a small part of Yukos’s capital, the applicants tried to legalise their own status as lawful owners of the shares. The applicants concealed from the foreign investors the fact that they fully controlled the company and its profits.

130. After the start of the criminal case against the applicants, many of the documents concerning Yukos’s foreign affiliates were physically removed from Yukos’s offices and transferred to the companies’ foreign offices, out of reach of the Russian authorities. The applicants never provided information about the foreign subsidiaries to the Russian authorities and kept all documents in their offices abroad. As a result, when the applicants lost control over the “mother company”, i.e. Yukos plc, they were still able to control some of the “daughter companies” abroad, which had accumulated significant assets.

131. According to the prosecution, after their arrests in July and October 2003 the applicants continued to withdraw capital from the trading companies which were formally affiliated with Yukos and which

accumulated proceeds from the sales. Those funds were transferred to companies controlled by the applicants, specifically to Yukos Capital S.à.r.l. In September and October 2003 a large proportion of the funds concentrated in the Yukos affiliates (USD 2.6 billion) was withdrawn from their accounts and transferred for the purchase of a large block of shares in Sibneft plc, another large Russian oil company (pages 562 *et seq.* of the judgment). Using that block of Sibneft shares as security, Yukos plc borrowed USD 2.6 billion from Société Générale, a French bank. That amount was transferred to the accounts of Yukos and its subsidiaries so that they might continue their usual operations.

132. While in remand prison, the first applicant, acting through his lawyer and in consort with the second applicant, ordered his accomplices and business partners to transfer money from the accounts of Nassaubridge and Dansley to the accounts held by the company Brittany Assets Limited in Citibank and Barclays Bank, and onwards to Yukos Capital S.à.r.l. (page 23 of the decision of the court of appeal). Some of those sums were returned to Yukos and its subsidiaries, that is, the production entities and trading companies. However, this money was transferred in the guise of a loan with interest, so that Yukos plc became indebted to Yukos Capital. In total, Yukos Capital provided over USD 2 billion to Yukos and its affiliates in loans. According to the prosecution, those loans were supposed to maintain the process of oil extraction in the expectation that the company would remain in the hands of the applicants.

**(c) Motions by the defence for the removal of evidence**

133. In the course of the proceedings the prosecution submitted to the court a large volume of documentary evidence and expert evidence. That evidence was intended to demonstrate the applicants' leading role in setting up the schemes described above, to prove the unlawfulness thereof, and to quantify the losses of the minority shareholders and the amounts of property "misappropriated" and "laundered" by the two applicants. The case for the prosecution relied, to a large extent, on evidence obtained as a result of multiple searches and seizures in the premises of Yukos, in the applicants' houses, in the offices of the lawyers who provided legal services to Yukos and to the applicants personally, and in the banks which managed the accounts and assets of Yukos and its affiliates.

134. In response, the defence sought to have evidence obtained by the prosecution in the course of many searches and seizures conducted in 2003-2007 removed from the case file. Some of those motions were not examined directly at the trial, the court having decided that they would be resolved in the judgment.

(i) Prosecution evidence obtained as a result of searches and seizures

135. According to the applicants, the court ultimately rejected all the motions lodged by the defence for the removal of evidence.

(α) Motions rejected in the judgment

136. The motions which were ruled on in the judgment concerned the following items (pages 628 *et seq.* of the judgment):

- seizures in the Trust Bank and Activ Bank in 2004-2005;
- search warrants ordering search and seizure in the premises of ALM Feldmans of 12 November 2004 and 14 December 2004;
- record of the search in the premises of ALM Feldmans on 12 November 2004 (seizure of documents) and 15 December 2004 (search);
- search warrant for the premises at 88a, Zhukovka village, of 8 October 2003;
- record of the search of 9 October 2003;
- seizure warrants concerning documents in the possession of PwC, dated 3 March 2005 and 7 June 2005;
- record of the seizures of 14 March 2005 and 8 July 2005 in the premises of PwC;
- record of the seizures in the premises of PwC of 19 January 2007 and 8 February 2007;
- seizure warrant by the Basmanniy District Court of Moscow of 26 December 2006;
- records of the seizures of 9, 10, 12, 16 and 19 January 2007, based on the search warrant of 26 December 2006.

137. The defence pointed out that the contested evidence was obtained on the basis of search and seizure warrants issued by the prosecution without prior approval by a court. In the opinion of the defence, seizures in the banks, law firms and audit companies could not have been conducted on the sole basis of a decision by the prosecutor. The defence referred, *inter alia*, to Ruling no. 439-O of the Constitutional Court of 8 November 2005, which indicated that a search in a lawyer's office was possible only with the prior approval of a court. According to the defence, only the seizures of 29 December 2006 and 17 January 2007 had been based on a court warrant (issued on 26 December 2006 and 15 June 2007 respectively). Other seizures (those of 14 March 2005, 8 July 2005, 9, 10, 12, 16 and 19 January 2007 and 8 February 2007) had been conducted without such a court warrant and their results were therefore invalid.

138. The court refused to remove evidence from the case file. It held that the CCrP required a court warrant only for seizures where a document to be seized contained information about the bank accounts and deposits of private individuals (Article 183 of the CCrP, read in conjunction with Article 29, part 2 point 7). However, all of the documents seized in the Natsionalniy Bank Trust, Investitsionniy Bank Trust (previously known as

DIB bank) and Aktiv Bank concerned the bank accounts of legal persons. In addition, the lawfulness of the seizures in those three banks had already been confirmed in the judgment concerning Mr Malakhovskiy and Mr Pereverzin of 1 March 2007. With reference to Article 90 of the CCrP, the court ruled that those court findings in the previous case “can be considered established without additional verification” (page 631 of the judgment).

139. As to the seizure in the law offices of ALM Feldmans, the court noted that Ruling No. 439-O was adopted by the Constitutional Court on 8 November 2005, whereas the impugned searches had been carried out in 2004. In addition, the documents seized from ALM Feldmans did not concern the “provision of legal assistance to persons or organisations”. The documents obtained concerned the operations of one of the partners in ALM Feldmans, Mr Iv., who managed the accounts of several commercial organisations which had been used by the members of the organised group to legalise the assets which they had misappropriated. The court also referred to the rulings of the Basmani District Court of 21 September 2007 and 30 October 2007, whereby the defence motion to exclude evidence had been dismissed.

140. The court refused to suppress documents obtained as a result of the seizures in the office of Mr Drel, the lawyer for the two applicants, during the search at 88a, Zhukovka village, of 9 October 2003. The court found that the documents seized were not from his case files and did not concern the provision of legal assistance to persons and organisations. The documents in question concerned Mr Drel’s participation in the financial operations in favour of persons who were part of the organised criminal group. The office of ALM Feldmans was registered at a different address in Moscow. The reference by the applicants’ lawyers to section 8 of the Advocacy Act was misplaced. Article 182 of the CCrP did not contain any requirement to obtain a court warrant in the event of a search in a lawyer’s office. In addition, the lawfulness of the search in the premises located at 88a Zhukovka village had been confirmed by the judgment of 16 May 2005, in the first case against the applicants.

141. Seizures in the premises of PwC on 3 March 2005 and 7 June 2005 were found to be lawful, since in the period before 5 June 2007 Articles 29 and 183 of the CCrP did not require a court warrant for a seizure in an office of an audit firm.

142. The court found that the seizures of documents in the premises of PwC on 10, 12, 16, 19 January and 8 February 2007 had been lawful, having been authorised by the Basmani District Court. Given the volume of documents to be seized, one warrant from the Basmani District Court sufficed to cover several consecutive days of seizure.

143. The defence sought to exclude documents obtained during the search of 17 December 2004, conducted in Mr Pereverzin’s flat without a

court order. However, the court found that those documents were to be admitted: the search was conducted without a court warrant because it was an “urgent search”, and immediately afterwards the investigator applied to a court and obtained approval for the search (ruling of the Basmani District Court of 17 December 2005). Under Article 165 part 5 and 182 of the CCRP the investigator had a right to examine objects and documents obtained during the search before having obtained a court’s approval for the search itself (page 636 of the judgment).

(β) Motions rejected directly at the trial

144. Furthermore, the defence sought exclusion of a number of documents produced by the prosecution: some did not contain either signatures or official stamps, or had been added to the case file without the necessary formalities. Pages were missing from some other documents. Some of the documents had been obtained during searches at which no inventory of objects and documents seized had been made. However, the court dismissed those objections as unfounded, irrelevant or unimportant.

145. The defence objected to the use of a written record of the questioning of witness Mr A. by the investigators. According to the defence, his oral submissions, audio-recorded by the investigator and also submitted to the court, differed significantly from what was set out in the written record. However, the court ruled that the law did not require word-for-word recording of the oral submissions, and that Mr A. had made no objections to the written record of his questioning and had later confirmed his testimony before the court. Thus, the record accurately reflected the essence of his depositions.

146. The defence sought the exclusion of allegedly unlawful intercepts of telephone conversations between Ms Bakhmina and Mr Gololobov, two Yukos lawyers, in order to check the veracity of the transcripts. The court initially granted that request and ordered the GPO to produce the relevant audio recordings, made in late 2004. However, on 29 September 2009 the court received a letter from the GPO whereby the latter refused to produce the recordings on the ground that it might jeopardise the interests of investigations in other cases, specifically case no. 18/41-03, which concerned 20 suspects. As a result, on 16 November 2009 the court rejected the motion to listen to the audio records.

147. The defence sought the exclusion of other allegedly unlawfully obtained evidence. In particular, they argued that the order to sever criminal case no. 18/432766-07 from case no. 18/41-03 had been unlawful, that copies of procedural documents related to other criminal cases could not be admitted in evidence, that there was no inventory of the materials contained in the original (“old”) case file, and that, as a result, the defence was unable to establish whether the “old” case file contained any potentially important exculpatory material.

148. The defence also claimed that the prosecution's method of collecting evidence within the "new" case largely consisted of inspecting the materials of the "old" case and regularly adding parts of the "old" case file to the new one. The defence claimed that this was not a proper way to collect evidence and that all the documents so added were inadmissible.

149. The defence also sought the removal of documents translated from foreign languages, since the translation was sub-standard and contained gross errors. However, the court concluded that the translations were appropriate.

150. The defence claimed that information from the Yukos website was obtained more than a year after the arrest of the two applicants and was therefore unreliable. The defence sought examination of the disc on which the investigator recorded the content of the website, but the court rejected that motion.

*(ii) Expert evidence for the prosecution*

151. The defence sought the exclusion of several expert reports obtained by the investigators at the pre-trial investigation stage and submitted to the court. According to the defence, all this prosecution evidence had been obtained before the applicants were formally charged; as a result, the applicants or their lawyers had not participated in the preparation of those reports, were unable to put questions to the experts, to include their experts in the expert team and to enjoy other rights granted to the defence by Article 198 of the CCrP.

152. The defence also alleged that the prosecution expert witnesses had had at their disposal certain materials which had not formed part of the case file subsequently submitted to the trial court for examination. The defence alleged that the prosecution did not verify what sort of "source materials" the experts had and did not include it in the case file – they only attached the expert reports as such. Accordingly, in the second trial it was impossible to compare those "source materials" with the experts' conclusions and to verify whether they had been adequately interpreted by the experts.

*(α) Expert report by Kvinto-Konsalting Ltd of October 2000*

153. The defence sought the exclusion of expert report no. 2601-12/2000, prepared by experts from the private evaluation agency Kvinto-Konsalting Ltd., which concerned the evaluation of the share price of several corporate entities which were to some extent affiliated with Yukos, with a view to establishing whether certain exchanges of these company's shares for Yukos' shares had occurred on an equivalent basis.

154. The court concluded that on 2 October 2000 investigator Shum. commissioned an expert examination and explained to the two experts – Mr Koz. and Mr Rus. – their rights and responsibilities. The expert report was prepared in accordance with the law and duly signed by the experts,



who had all necessary qualifications. The applicants received a copy of that expert report in 2007, when they became suspects in the second criminal case.

(β) Expert report of June 2004

155. The defence sought the removal of an expert report of 24 June 2004 (“evaluation report”), prepared on the basis of the investigator’s decision of 15 April 2004. It likewise concerned evaluation of the share price of several corporate entities where were to some extent affiliated with Yukos.

156. The defence stated that they had not been informed about the decision of 15 April 2004 to commission such a report; that the expert report did not contain certain elements which were mandatory under Article 204 of the CCrP; that in essence the examination was “repetitive” (*povtornaya*); that the experts were invited to answer legal questions falling outside their professional competency; that the experts were not given all necessary materials; and, at the same time, that some of the materials given to them had not been part of the case file in the applicants’ case.

157. However, the court ruled that when the investigator had ordered the examination, the applicants had had no status within the criminal proceedings. When they received a copy of the expert report, namely at the time they were given access to the materials of the case file under Article 217 of the CCrP, they had been able to ask the investigator for further examinations, but had failed to do so.

158. The court heard expert Mr Shk. and concluded that the examination had been conducted with all the necessary diligence and all formalities had been respected. The questions put to the experts were not “legal” but related to the regulations in the sphere of evaluation activity. The materials of the expert examination were severed from the “main case” (case-file no. 18/41-03) in accordance with the law. The law did not require that all the materials which served as a basis for the experts’ conclusions be severed at the same time as the expert report (page 645 of the judgment).

(γ) Expert report by Mr Yeloyan of February-March 2006

159. The applicants sought the exclusion of an expert report prepared by Mr Yeloyan between 8 February and 28 March 2006 (“informational and accounting assessment”). The expert had to establish whether there had been any discrepancies in the balance sheets of four Yukos subsidiaries, including Yukos-M and Y-Mordoviya, and the details of oil purchase transactions carried out by these companies in 2000. According to Mr Yeloyan’s findings, there were no discrepancies in the balance sheets of the Yukos subsidiaries. He also provided the requested information concerning the oil purchase transactions.

160. According to the judgment, the expert report had been prepared within case no. 18/325543-04 and was later joined to case no. 18/41-03 in

accordance with the law and on the basis of the investigator's decision of 8 February 2006. The court repeated that it had no doubt that Mr Yeloyan was competent to conduct the expert examination entrusted to him. The fact that Mr Yeloyan had participated in other examinations at the investigator's request was not indicative of any bias. The court also observed that the applicants had no procedural status as suspects or accused within case no. 18/325543-04 and therefore had no procedural rights in respect of materials and evidence obtained within that investigation.

(δ) Expert report by Mr Yeloyan and Mr Kupriyanov of January 2007

161. The applicants sought the exclusion of an expert report prepared by Mr Yeloyan and Mr Kupriyanov between 22 and 25 January 2007 ("economic and accounting assessment"). The experts had to establish (i) how Neftrade 2000, one of Yukos subsidiaries, distributed profit to foreign trading companies in 2001 and how the latter used it; and (ii) from which entities Neftrade 2000 received funds in order to pay profits to the foreign trading companies. In their report the expert stated the amounts that corresponded to the distributed profits. According to their findings, the funds for the payment of profits were received through the sale of promissory notes to Yukos-M and Alta-Trade.

162. The examination was ordered on 22 January 2007 on the basis of a decision by the investigator in the context of criminal case no. 18/41-03. All materials concerning this expert examination were severed from the "main case" and attached to case file no. 18/432766-07, which was later submitted to the Khamovnicheskiy District Court of Moscow. The experts were given access to the materials of case no. 18/41-03 and to the accounting databases of DIB bank and the Moscow branch of Menatep SPB bank for 2001.

163. The defence sought to obtain disclosure of the "source materials" which had served as a basis for the expert conclusions, as well as the questioning of Mr Yeloyan and Mr Kupriyanov. However, this was refused. The court concluded that the investigator's decision had been lawful, that the experts had been independent and qualified and had had access to all necessary source materials (without, however, reviewing those materials directly). The applicants had received a copy of their report and were able to ask the prosecution to conduct additional expert examinations.

(ε) Expert report of February 2007

164. The defence sought the removal from the file of expert report no. 8/17 of 2 February 2007, prepared by Mr Chernikov and Mr Migal, police experts from the Moscow Region police forensic centre. The experts were requested to establish the quantity of oil purchased by Yukos plc, Yukos-M and Y-Mordoviya from Yuganskneftegaz plc, Tomskneft plc and Samaraneftgaz plc between 1998 and 2000 and to determine the cost of the oil having regard to the world market price for the "Urals (Med)" and

“Urals (R’dam)” oil for the relevant period. The experts provided the requested figures in their conclusions. According to their findings, Yukos trading companies invariably purchased oil from oil-extracting Yukos subsidiaries at prices significantly lower than the world market price.

165. The court established that the applicants had been informed about the expert examination on 6 February 2007 (the first applicant) and 10 February 2007 (the second applicant). On those dates the applicants were handed a copy of the investigator’s decision ordering the examination and the expert report itself. Since at that point the pre-trial investigation was still pending, the applicants could have asked the investigator to put additional questions to the experts, to carry out the investigation in a specific expert institution or to appoint specific experts to the expert team. However, the defence did not file such a motion. The court concluded that the defence had failed to use their rights as provided by Article 198 of the CCrP.

166. The applicants also questioned the experts’ qualifications and competency to participate in such examinations, but the court dismissed that argument.

167. The defence’s next argument related to the questions which the investigator put to the experts. The court replied that those questions had been understood by the experts and they had not asked for any clarifications from the investigator.

168. The defence indicated that the investigator’s order did not specify which materials had been submitted by the prosecution to the experts for examination, and that the examination was started on the same day. However, the court held that the CCrP did not require the investigator to specify the materials which were handed to the experts for examination, and that the experts had been free to start working with the case file on the same day as the examination had been commissioned.

169. Finally, the court observed that any possible criticism by the defence as to the quality of the questions put to the experts, and to the quality of the answers received from the experts, would be analysed by the court when it examined the essence of the experts’ conclusions.

**(d) Motions by the defence to have prosecution expert witnesses examined at the trial**

170. The defence filed a number of motions seeking the appearance of a number of prosecution expert witnesses at the trial, which the trial court refused.

171. In particular, on 9 November 2009 the second applicant submitted a written motion requesting that the court summon expert witnesses Mr Ivanov, Mr Kuvaldin, Mr Melnikov and Mr Shepelev, included in the prosecution’s list of witnesses.

172. On 16 November 2009 the trial court refused the motion on the ground that it had been filed too early, as it was the prosecution's turn to present evidence.

173. On 28 June 2010 the defence filed a motion to summon experts Mr Yeloyan and Mr Kupriyanov (see paragraphs 159 and 161 above). In the motion the defence pointed out that the reports prepared by these experts, which substantiated the charges against the applicants, concerned a broad range of issues including Yukos cash flow, distribution of income, the range of suppliers and buyers, export supply volumes and the financial performance of particular companies. The defence further argued that it was particularly necessary to examine these experts at the hearing since the applicants had not been given the opportunity to study the order for an expert examination in the course of the preliminary investigation, to request the withdrawal of the experts, to request that the expert examination be conducted by different experts, to request that additional questions be put to the experts and to request that the investigative authorities allow them or their lawyers to be present during the examination in order to be able to provide explanations.

174. On 30 June 2010 the trial court refused the motion, stating that there were "no legal grounds for granting it having regard to the arguments of the defence".

175. On 16 August 2010 the second applicant requested that experts Mr Chernikov and Mr Migal be summoned before the court. He stated that he and the first applicant wished to question the experts so as to exercise their rights as guaranteed by Article 47 § 4 (4) and (11), and to corroborate their motion challenging the experts and their request that the expert report be declared inadmissible as evidence.

176. On 24 August 2010 the trial court refused the motion and simultaneously ruled on the defence's motion to declare expert report no. 8/17 of 2 February 2007, prepared by these experts, inadmissible as evidence (see paragraph 164 above). The court stated that it was able to rule on the defence's motion concerning inadmissibility of evidence without summoning the expert witnesses.

177. On 9 September 2010 the defence again filed a motion to summon experts Mr Chernikov and Mr Migal (see paragraph 164 above).

178. On 17 September 2010 the trial court refused the motion on the ground that "having heard the arguments of the participants... [it did] not see any legal grounds for [granting it]".

**(e) The case as presented by the defence**

179. The defence started to present their case on 5 April 2010 and concluded on 22 September 2010. The applicants pleaded not guilty. Their position can be summarised as follows.

180. On the merits, the defence insisted that the prosecution had failed to prove that the applicants and their accomplices had been “shadow bosses” of Yukos and that the official executive bodies of Yukos and its subsidiaries had played no important role in the decision-making process.

181. The oil allegedly “stolen” from the production entities had never been physically appropriated by the applicants. It would have been physically impossible for the applicants to steal 350 million tonnes of crude oil. It could easily have been ascertained from the data collected by the automatic system which registered oil in the pipelines how much oil was extracted, refined and shipped abroad by the production entities. The tax returns and other financial reports by the production entities never indicated that any amount of oil had been “stolen” or had otherwise disappeared. When the State-owned company Rosneft purchased shares in the production entity Yuganskneftegaz plc at an auction organised to cover Yukos’s tax arrears, it paid a significant sum of money for that company, which showed that the company had still been in very good shape after many years of the alleged “theft” of oil.

182. In 2000-2003 all of the production entities were profitable companies; during that period the production entities spent RUB 247.1 billion on extracting oil and received RUB 297.5 billion for its sale. Therefore, the net profits of the production entities were over RUB 50 billion. Those profits remained within the production entities and were reinvested in order to increase the extraction volumes. The production entities knowingly shipped the oil to the end-customers.

183. The use of transfer prices for internal sales – i.e. sales between affiliated entities belonging to the same group – was normal practice in many Russian and foreign companies, such as, for example, Lukoil or TNK. The fact that those sales were conducted through a chain of several trading companies, managed by directors with limited powers, was also common business practice. The system of transfer pricing within the group was perfectly lawful and did not violate the rights of any party.

184. The use of transfer pricing did not infringe on the interests of the minority shareholders in the production entities, since, in any event, Yukos plc as the main shareholder was entitled to receive profits from its subsidiaries in the form of dividends. Transfer pricing only changed the form of redistribution of profits within the group.

185. The “international market price” of oil, calculated on the basis of the prices applicable to oil in the sea ports of Amsterdam or Rotterdam, was much higher than the domestic price prevailing in Russia at the time. It was wrong to compare the “international market price” with the price of “oil well fluid” which was extracted by the production entities in the Siberian oilfields. In any event, the prosecution failed to indicate at what moment the oil was misappropriated: when it was extracted, transported, shipped to end-customers, etc.

186. The conclusion of management agreements with the production entities and, more generally, the application of transfer pricing within the group brought stability and was in the interests of the production entities, which received profits and sufficient investments, and led to increased capitalisation of their shares.

187. The financial results of the companies which were “within the perimeter of consolidation of Yukos” were included in the consolidated financial reporting and submitted to all interested parties: shareholders, auditors, tax inspectors, etc. The public and the authorities had access to all crucial information, in particular on the prices of oil, the group’s consolidated income, the sales chain, etc. All of the financial documentation and the reports by Yukos and its affiliates were submitted to PwC for audit. Yukos employees never misinformed the auditors and provided them with accurate information. The withdrawal by PwC of their audit report was, in the applicants’ view, the result of very serious pressure exerted by the investigative authorities on PwC employees, who had been threatened with criminal prosecution.

188. The applicants alleged that the profits of the Yukos group were fairly reinvested in Yukos itself and its main subsidiaries. Thus, the group spent USD 4.5 billion on field production, reconstruction of refineries, gas stations, etc. Yukos covered all costs related to the transportation of oil through the pipelines. USD 9.431 billion were spent on the acquisition of new assets: shares in Sibneft, Arcticgaz, Mažeikių Nafta, Rospan International, Angarskaya Neftekhimicheskaya Kompaniya, Transpetrol, Sakhaneftegaz, Vostochno-Sibirskaya Neftyanaya Kompaniya, Urengoy INK, as well as the acquisition of additional blocks of shares in Yukos subsidiaries such as Yuganskneftgaz plc, Samaraneftgaz plc and Tomskneft plc. USD 2.6 billion were paid in dividends to the Yukos shareholders. Certain amounts were paid as bonuses to the company’s management and to external consultants. By 2003 the gross income of the group for the previous years was fully reinvested within the group; the USD 2.7 billion in cash which were on its accounts represented a loan from a French bank, Société Generale.

189. In respect of the accusations concerning the buyback of the Yukos shares from Daiwa and West Merchant banks, the applicants explained that those two banks acted at their own risk and, in any event, received a bigger proportion of the debt compared to what international creditors received from the Russian Government for the latter’s obligations after the 1998 crisis.

190. The applicants maintained that the validity of the agreements between Yukos and the production entities had been examined in dozens of court proceedings, and that the courts had repeatedly confirmed the lawfulness of those agreements and the contracts for the sale of oil concluded on the basis thereof. Furthermore, all of those agreements had

been duly approved by the general meetings of shareholders, pursuant to the Public Companies Act.

191. The applicants explained the fact that the company's auditors, PwC, had withdrawn their audit reports by alleging that threats and pressure were exerted on the auditors by the Russian authorities.

192. Finally, the applicants maintained that in previous court proceedings before the commercial courts concerning the tax-minimisation schemes employed by Yukos, the courts had calculated taxes due by Yukos to the State on the basis of the assumption that all of the oil belonged to Yukos itself. By making the applicants criminally liable for misappropriation of the oil, the authorities were in essence seeking to punish them again for acts which had been characterised as "tax evasion" in the earlier proceedings. The State's position was self-contradictory: it had first recovered taxes due on the oil operations from Yukos itself, and then asserted that all of that oil had been misappropriated by the applicants. Under Russian law it was impossible to bring a person to criminal liability for the "laundering" of money acquired as a result of tax fraud.

**(f) Evidence proposed by the defence and examined by the court**

193. Several persons appeared at the trial and were examined as witnesses for the defence. Thus, the court examined Mr Kasyanov (a former Prime Minister, who described the practice of transfer prices in vertically integrated companies), Mr Mirlin (who explained the difference between oil prices on the international and domestic markets), Mr Vasiliadis (whose evidence concerned the positive effects of transfer pricing for the production entities), Mr Haun (a specialist who compared the structure and operating mode of Yukos and other Russian companies), Mr Gerashchenko (a former head of the Central Bank, who testified about the withdrawal of PwC's audit report) and Ms Dobrodeyeva (Mr Lebedev's personal assistant, who testified about his absence from Russia on certain dates).

194. Mr Gilmanov and Mr Anisimov were former directors of Yuganskneftegaz plc and Samaraneftegaz plc. They testified that, after the conclusion of management agreements with Yukos Explorations and Production Ltd, the production entities retained a sufficient degree of independence in all areas except financial matters, and that those agreements had made sense because they increased the companies' capitalisation. The production entities were not expected to maximise profits.

195. The court heard testimony from employees of Yukos companies, Mr F., Mr Kh., Mr Pr., Mr Pon., Mr S., Mr K., Mr Gar., Ms Gub., Ms Zh. and Mr Af. They testified that it would have been physically impossible to steal crude oil from the production entities in the amounts indicated in the bill of indictment. They also asserted that "general agreements" concluded between Yukos and the production entities were legal under Russian law,

and that their legality had been confirmed in numerous decisions by the domestic courts.

196. The court heard Mr Wilson, a former auditor with PwC and later an internal auditor for Yukos. He explained that all profits within the “perimeter of consolidation” remained within the group and that the applicants were unable to misappropriate them.

197. The court heard Jacques Kosciusko-Morizet, one of Yukos’s independent directors. He testified that all decisions in the company had been taken by collective executive bodies, that PwC had never complained that it had received incomplete information from the applicants and that PwC had withdrawn its audit reports under pressure.

198. The court heard Mr Khristenko, Deputy Minister of Industry and Trade. He testified that there had been very few independent buyers of oil in Russia in 1998-2003, and that all of them were under the control of vertically integrated companies which imposed transfer prices on them. By definition, transfer prices within a company did not correspond to the market price. Similar testimony was given by Mr Gref, a former Minister of Economic Development.

199. The court rejected all but one request by the defence to call expert witnesses for the defence to testify orally at the trial (see paragraphs 203-208 below). The one request to which the prosecution did not object was to call Mr Haun, a US specialist in the energy industry. Mr Haun stated at the hearing that Yukos’ business practices had been normal for a vertically integrated company and that the internal organisation of the sales within the group benefited minority shareholders and subsidiaries. The court nevertheless refused to add his written opinion to the materials of the case (see paragraph 202 below).

**(g) Questioning of the witnesses at the trial and reading out of their earlier statements**

200. At the hearing the prosecution asked the court for leave to read out the records of questioning at the preliminary investigation stage of 34 witnesses who were questioned at the trial, citing contradictions between their previous statements during the investigation and those before the court. The court granted leave.

201. The prosecution also asked the court for leave to read out the records of questioning during the preliminary investigation of a further 17 witnesses, stating that their statements before the court had been imprecise or incomplete due to the time that had elapsed since the events in question. The court granted leave.



**(h) Evidence produced by the defence but not admitted by the court for examination**

*(i) Refusal to accept Mr Haun's written opinion*

202. On 1 and 7 June 2010, having heard Mr Haun in his capacity as a “specialist”, the court simultaneously refused to admit his written opinion on the same issues, prepared earlier. The court noted that when the written opinion was drafted Mr Haun had not had the procedural status of “specialist” and his written opinion was therefore inadmissible.

*(ii) Refusal to accept written opinions and oral submissions by other expert witnesses*

203. Following objections by the prosecution, the court refused to hear all other expert witnesses whose testimony was offered by the defence. According to the applicants, they were all distinguished experts in the relevant fields and had extensive practical experience. Each one had prepared a report which was ready to be submitted to the court. The expert witnesses' qualifications and the reasons for the court's refusal to hear them are summarised below.

204. Mr Dages is an expert in finance and economic analysis. He has testified in the United States courts at both federal and state level. He analysed the charges against the applicants and the case materials, with particular reference to Yukos' activities and its accounting systems. In the applicants' view, Mr Dages' expertise in the US GAAP standards was particularly relevant, given that more than one volume of the bill of indictment concerned an analysis of Yukos' accounting methods in accordance with the US GAAP standards.

205. On 7 June 2010 court refused to hear Mr Dages for the following reasons. It stated that, as a certified accountant in the United States, Mr Dages had no knowledge of Russian corporate law, had only superficial knowledge of the Russian accounting system, was not familiar with Yukos' economic activity, had not provided Yukos with his services earlier, had not been involved in the proceedings as a “specialist” and had not studied the case materials.

206. Mr Delyagin is an expert in economics with expertise in price regulation issues for oil and oil products, pricing within oil companies and managing access to the main trunk pipeline system in Russia. He had commented publicly in the media on the case and had been present in the courtroom on a number of occasions before being called as an expert witness.

207. On 8 July 2010 the court refused to hear him, finding that the above comments disqualified him as an expert witness. In the court's view, he had developed a subjective opinion about the charges against the applicants and the partiality of the court, which, together with the fact that Mr Delyagin

had not studied the materials of the case, prevented the court from accepting him as an impartial and objective expert. The court further stated that it believed Mr Delyagin to have a stake, directly or indirectly, in the outcome of the case.

208. Professor Lopashenko is a legal expert in the area of criminal law, criminology and, in particular, organised and economic crimes. The defence asked for her to be summoned in order to hear her opinion on whether the classification of the activities underlying the charges against the applicants was consistent with criminal law.

209. On 8 July 2010 the court refused to call Professor Lopashenko, on the grounds that questions related to interpretation of criminal law fell within the exclusive competence of the court.

210. Professor Rossinskaya is a forensic scientist and director of the Forensic Expert Examination Institute of the Moscow State Law Academy. Associate Professor Savitskiy is an expert in accounting, credit and finance, and evaluation activities. The defence asked that they be summoned in relation to expert report no. 8/17 of 2 February 2007, prepared by Mr Chernikov and Mr Migal (see paragraph 164 above). According to the applicants, given that they had been denied the opportunity to question the prosecution experts Mr Chernikov and Mr Migal, it was particularly important that they be allowed to call their own experts to provide evidence in rebuttal.

211. On 9 and 10 August 2010 respectively the court refused to call Professor Rossinskaya and Associate Professor Savitskiy. It stated that, in its view, it was not within a “specialist’s” competence to assess an expert report. Where an expert report was incomplete or there existed any doubts as to its conclusion, that court could order additional expert examination. The court further stated that, since the defence did not refer to any other issues with regard to which the expert witnesses in question could be questioned as “specialists”, it concluded that they did not have the requisite special knowledge, hence their participation in the case as “specialists” should be ruled out.

212. Mr Romanelli is an expert in investment banking with over 30 years’ experience. The defence asked for him to be called in relation to the charges of money laundering.

213. On 17 August 2010 the court refused the motion on the grounds that Mr Romanelli had not been involved in the proceedings as a “specialist” and had not studied the case materials, leading the court to doubt his competence as a “specialist” capable of assisting with the examination of the criminal case against the applicants.

214. Ms Hardin is a forensic economic analyst whom the defence requested to hear in relation to the charges of money laundering. The court noted that she was an expert in the provision of consulting services and international corporate law, with extensive work experience in providing

litigation support and in working with Russian companies both in Russia and abroad and was well familiar with Russian corporate law and accounting.

215. On 18 August 2010 the court refused the defence's motion to call her as an expert witness, on the grounds that Ms Hardin had not been involved in the proceedings as a "specialist" and had not studied the case materials, leading the court to doubt her competence as a "specialist" capable of assisting with the examination of the criminal case against the applicants.

*(iii) Refusal to adduce exculpatory documentary evidence*

216. The defence produced documents which, in their view, proved the applicants' innocence. They included the following items:

- (i) RSBU financial reporting of Yukos subsidiaries, certified by PwC;
- (ii) Yukos's US GAAP financial statements;
- (iii) Yukos documentation describing production and sales processes and capital expenditure;
- (iv) legal explanations on Yukos's international corporate structure;
- (v) reports by the State-appointed bankruptcy receiver for Yukos;
- (vi) copies of materials from the bankruptcy case examined by the Commercial Court of Moscow in respect of Yukos (case no. A40-11836/06-88-35B).

217. On 23 March and 21 September 2010 the court refused to admit that evidence to the case file, in each instance merely stating that "there were no legal grounds" to grant the request.

**(i) Refusal of the court to obtain examination of witnesses or disclosure of documents sought by the defence**

*(i) Refusal to summon witnesses or obtain their enforced attendance*

218. In addition, the defence sought to have summoned other witnesses (as opposed to expert witnesses) whose testimony might have been useful.

219. On 31 March 2009 the defence submitted to the court a request to summon 246 witnesses, including many high-ranking State officials such as Mr Putin, Mr Rushailo, Mr Skuratov, Mr Stepashin, Mr Patrushev, Mr Ustinov, Mr Kulikov, Mr Kudrin, Mr Bukayev, Mr Zhukov, Mr Pochinok, Mr Karasev, Mr Sobyenin, Mr Titov, Mr Filipenko, Mr Zubchenko, Mr Bogdanchikov, Mr Kudryashov, Mr Nozhin, Mr Tregub, Mr Sapronov and Mr Yusufov.

220. On the same date the District Court dismissed the request as "premature" having adduced the enclosed list of witnesses to the materials of the case. It stated, at the same time, that the request would be examined separately in respect of each person on the list.

221. On 13 April 2010 the defence again requested that Mr Putin, the then Prime Minister and former President of Russia, be summoned. The first applicant submitted before the court on 31 March 2009 that he had personally reported to Mr Putin on where the oil had been supplied and how Yukos money had been spent.

222. On the same date the District Court again dismissed the request as “premature”.

223. On 19 May 2010 the defence requested that Mr Putin be summoned, as well as Mr Sechin and Mr Kudrin. The second applicant stated before the court that the President, the government, members of parliament, the courts and all Russian companies were aware that the prices for oil produced in the Russian regions could not be compared to the global exchange prices for oil. He further submitted that the witnesses the defence sought to have summoned needed to clarify what was the difference, and why the legislation and the government of the Russian Federation respectively imposed and collected export duties from Russian oil companies on oil exported to the global markets.

224. Mr Sechin was at the time Deputy Chairman of the Russian Government and Chairman of Rosneft’s Board of Director, the company which acquired some of Yukos’s production entities. The defence wished to question him concerning transfer pricing practices, their technological and economic reasons and their purposes and implications. Furthermore, the defence wished to question him with regard to the preparation of the first applicant’s meeting with Mr Putin in 2002, in the course of which Mr Sechin had reviewed all the circumstances related to the activities of the Yukos group of companies. The defence wished to question him with respect to the circumstances and conditions of acquisition of Yukos shares by Rosneft.

225. Mr Kudrin was at the time Minister of Finance and Deputy Chairman of the Russian Government. On 31 March 2009 the first applicant informed the court that he had personally received explanations from Mr Kudrin concerning taxation of oil companies and specifically concerning the level of taxes that Yukos had to pay on the oil that was not only produced but also sold by Yukos; in the applicants’ view, this proved that Mr Kudrin did not consider the oil to be stolen. According to the second applicant, Mr Kudrin would be able to explain the relevant financial-law provisions to the prosecutor and, in particular, to clarify that the prosecutor’s definition of “proceeds” did not correspond to that set out in the law.

226. On the same date the District Court dismissed the request, finding that the questions the defence wished to put to the above three witnesses were too general in nature and irrelevant.

227. On 27 May 2010 the District Court again dismissed the request on the same grounds.

228. On 15 June 2010 the applicants asked that Mr Bogdanchikov, the then president of Rosneft, and Mr Pyatikopov, a representative of Rosneft, be summoned.

229. On 17 June 2010 the trial court granted the motion to summon Mr Pyatikopov, but refused to summon Mr Bogdanchikov, noting that he could be questioned at the hearing were he to appear, as provided for in Article 271 § 4 of the CCrP.

230. Mr Pyatikopov was summoned to the hearing but failed to appear. A copy of the summons has been provided to the Court.

231. On 9 July 2010 the defence again requested that a number of witnesses be summoned. In section 1 of their written request the defence pointed out that the District Court had previously granted its request to summon 36 witnesses. However, only some of them had actually come to the court. The defence asked the court to summon again those witnesses who had failed to appear. In section 2 of the request the defence asked the court to summon 26 witnesses, listed in the bill of indictment, who had not been questioned before the court, the majority of whom were former Yukos employees. In section 3 of their request the defence asked the court to order that Mr Malakhovskiy and Mr Pereverzin, who were charged in a separate set of proceedings as the applicants' accessories, be transported to the hearing. In section 4 of their request the defence asked the court to summon ten witnesses who had been questioned during the investigation but were not listed in the bill of indictment. In section 5 of the request the defence again asked the court to summon a number of high-ranking State officials, including Mr Rushailo, Mr Skuratov, Mr Serdyukov, Mr Stepashin, Mr Patrushev, Mr Ustinov, Mr Kulikov, Mr Bukayev, Mr Zhukov, Mr Pochinok, Mr Karasev, Mr Sobyenin, Mr Titov, Mr Filipenko, Mr Zubchenko, Mr Bogdanchikov, Mr Kudryashov, Mr Nozhin, Mr Tregub, Mr Saprionov and Mr Yusufov, whose statements the defence considered relevant for the following reasons.

232. Mr Bogdanchikov, Mr Zubchenko, Mr Kudryashov, Mr Nozhin, Mr Tregub, Mr Saprionov and Mr Yusufov were senior executives of Rosneft at the relevant time; the defence wished to raise with them the same issues as with Mr Sechin.

233. Mr Bukayev was Tax Minister at the time. The defence wished to question him in relation to the tax authorities' claims against Yukos in the Moscow Commercial Court, and with regard to the PwC audit and the circumstances of the inclusion of Yukos Capital in the creditors' register for Yukos plc.

234. The defence also stated that, while the issues related to transfer prices and taxation fell within the competence of the Tax Ministry, the applicant had discussed them in depth with the relevant authorities, which were informed about the financial and business performance of the Yukos group of companies and had been able to verify that information. Given that

Mr Bukayev, Mr Zhukov and Mr Pochinok had headed the competent authorities during the relevant periods, they could provide significant evidence in the case.

235. The defence pointed out that the Federal Security Service, the Ministry of the Interior and the GPO had all purchased oil products from Yukos plc and its subsidiaries. Since, according to the charges against the applicants, the sale of oil had allegedly served to conceal theft and money laundering, the relevant circumstances could be clarified by questioning Mr Kulikov, Mr Patrushev, Mr Rushaylo, Mr Serdyukov, Mr Skuratov, Mr Stepashin and Mr Ustinov, who held executive positions at the specified government and administrative authorities during the periods covered by the charges.

236. At the relevant time Mr Karasev, Mr Sobyenin, Mr Titov and Mr Filipenko had been governors of the regions in which Yukos operated. The defence wished to question them with regard to Yukos activities in the respective regions.

237. On 12 July 2010 the District Court examined the request. At the hearing the prosecution did not object to summoning Mr Bogdanchikov, the then president of Rosneft, as the latter had the status of a victim in the proceedings. The prosecution asked the court to adjourn the examination of the defence's request in the part related to transporting Mr Malakhovskiy and Mr Pereverzin to the hearing. With these exceptions, the prosecution objected to the defence's request, arguing that the statements of all the witnesses they sought to question would be irrelevant.

238. The District Court granted the request with regard to section 1 of the request – repeat summons of previously called witnesses; and section 2 – the questioning of 26 witnesses listed in bill of indictment. It partially granted the request with regard to section 5 and that Mr Bogdanchikov be summoned. The court adjourned the examination of the request with regard to section 3 – transporting Mr Malakhovskiy and Mr Pereverzin to the hearing, and dismissed the remainder, finding “no legal grounds to grant” it. The court added that the witnesses whom it refused to summon could be questioned at the hearing were they to appear, as provided for in Article 271 § 4 of the CCrP.

239. It is not clear whether Mr Bogdanchikov was ultimately summoned to the hearing. Mr Malakhovskiy and Mr Pereverzin were eventually examined (see paragraph 293 below).

240. On an unspecified date the trial court granted the applicants' request to summon Ms Turchina, a PwC auditor who had participated in the audit of Yukos plc. The summons was sent to her but returned to the court as unclaimed on either 4 or 24 August 2010. The applicants asked the trial court to summon her again. On 22 September 2010 the trial court refused to repeatedly summon Ms Turchina, having stated that it had already duly summoned her, but the summons had been returned as unclaimed.

*(ii) Refusal to send letters rogatory in respect of foreign witnesses, to obtain their questioning via video-link, or to accept affidavits from them*

241. As regards those witnesses who lived abroad and did not want or were unable to come to Russia and testify directly, the defence sought their questioning via video-conference or using the mechanism of mutual legal assistance.

242. In particular, on 20 May 2010 the defence sought that Mr Rieger, Financial Controller and subsequently Chief Financial Officer of the Yukos group between 2003 and 2006, be summoned to the hearing. On the same date the court granted the motion. However, Mr Rieger, who lived in Germany, decided that it was not safe for him to travel to Russia, in view of: (i) problems he had previously experienced at passport control while leaving Russia, which he perceived as being linked to the case against the applicants; and (ii) lack of assurances on the part of the Russian Ambassador in Germany, who had been contacted twice by Mr Rieger's lawyers, that he would be allowed to give evidence at the applicants' trial without any hindrance and then freely return to Germany. In a letter of 23 July 2010 the International Criminal Law Department of the German Ministry of Foreign Affairs advised Mr Rieger's lawyers that it would be preferable for him to give evidence via video-conference. In a letter of 29 July 2010 to the trial court, Mr Rieger suggested that arrangements be made through his and the applicants' lawyers for a video-conference. He pointed out that the Khamovnicheskiy District Court had the necessary technical equipment and had previously conducted proceedings through video-conference. The court neither replied to that letter nor contacted the German authorities in order to organise a video-conference.

243. On 31 March 2009 the defence asked that the court request that the following witnesses, living abroad, be questioned in a foreign State: Mr Hunter, member of the Board of Directors of Tomskneft plc at the relevant time and head of the association of Yukos plc minority shareholders since 2004; Mr Kosciusko-Morizet (who was eventually questioned at the hearing, see paragraph 197 above); Mr Loze, member of the Board of Directors of Yukos plc in 2000-2004; and Mr Soublin, Chief Financial Officer of Yukos plc between 1999 and 2001. On the same date the court refused the motion, finding "no legal grounds for granting" it.

244. On 1 April 2010 the defence filed a similar motion with respect to Mr Misamore, Chief Financial Officer of Yukos plc between 2001-2005, Deputy Chairman of its Management Board and a member of the Executive Committee of its Board of Directors. On the same date the court refused the motion, finding "no legal grounds for granting" it.

245. On 19 May 2010 the defence filed a similar motion with respect to the following witnesses: Mr Misamore; Mr Soublin, Chief Financial Officer of Yukos plc between 1998 and 2001; Mr Ivlev, Managing Partner of ALM Feldmans Law Office at the relevant time; Mr Sakhnovskiy, a member of

Management Board of several Yukos companies at the relevant time; Mr Brudno and Mr Dubov, who had both held various posts at Rosprom Ltd., Menatep Bank, and Yukos companies at the relevant time. On the same date the court refused the motion, finding “no legal grounds for granting” it.

246. On 27 May 2010 the defence filed a similar motion with respect to Mr Leonovich, former head of Yukos plc’s treasury, and Mr Gololobov, the Head of the Legal Department of Yukos plc at the relevant time. It also renewed its motion in respect of Mr Brudno, Mr Dubov and Mr Sakhnovskiy. On the same date the court refused the motions, finding “no legal grounds for granting” them. It also stated that these witnesses could be questioned were they to appear before the court.

247. On 2 August 2010 the defence asked the court to add to the case file an affidavit by Mr Leonovich.

248. On 16 August 2010 the court refused the motion, finding no legal grounds either to consider the affidavit as “evidence” within the meaning of Article 74 of the CCrP or to adduce it to the criminal file under Articles 83 and 84 of CCrP.

249. On 20 September 2010 the defence sought admission to the case-file of affidavits from Mr Hunter, Mr Loze, Mr Soublin, Mr Misamore, Mr Leonovich and Ms Carey, members of the Board of Directors of Yukos plc.

250. On 22 September 2010 the court refused the motion, finding no legal grounds to consider the affidavits as “evidence” and adduce them to the criminal file under Articles 83 and 84 of CCrP.

251. The applicants sought to question the above witnesses, senior managers of the Yukos companies at the relevant time, or to adduce their affidavits, with a view to providing evidence on the following matters:

- the charges of misappropriation of oil and “legalisation” brought against the applicants;
- the relationship between Yukos and the production entities;
- centralisation of the management of the operating companies Yukos-EP, Yukos-RM and Yukos-Moskva;
- Yukos’ use of trading companies to buy all output from the production entities;
- the way in which Russian and non-Russian corporate entities fitted into the vertically integrated structure;
- the rationale for the use of offshore structures and the external audit of all offshore entities;
- the use of offshore accounts to benefit Yukos and the production entities;
- corporate governance structures within the Yukos group of companies;
- relations with minority shareholders;



- Yukos' pricing policies and compliance with the arm's-length principle;
- development and implementation of the budgeting process;
- Yukos' financial management in relation to capital expenditures, expenses, taxes, acquisitions, and payment of taxes and dividends;
- pricing policies in other Russian oil companies such as Sibneft, Rosneft and Lukoil;
- tax-optimisation methods;
- the measures taken to monitor the physical trading of oil and sales revenues, and how those functions related to the monetary controls developed within Yukos;
- Yukos' internal audit policies and other internal control systems;
- Yukos' external audit system;
- Consolidated Financial Reporting under the US GAAP principles and external audit of the company;
- the role of auditors and outside consultants, including PwC, and the work to prepare Yukos so that it could issue US GAAP consolidated statements;
- PwC's withdrawal of its audit report in June 2007;
- preparation for Yukos to be listed on the New York Stock Exchange and the reasons why it did not complete the listing;
- work performed by ALM Feldmans Law Office for Yukos plc.

*(iii) Requests for disclosure of evidence by the "injured parties" and third parties*

252. The defence filed a number of motions seeking to obtain court orders for the disclosure of documentary evidence in the possession of third parties.

253. On 15 June 2010 the defence sought a disclosure order against Transneft, a State-owned company which controlled the oil pipeline, in respect of documents containing information about the amounts of oil transferred by Yukos and its production entities Yuganskneftegaz plc, Tomskneft plc and Samaraneftegaz plc, into the State-controlled system of pipelines between 1998 and 2003, as well as invoices for the payment for Transneft services. The defence also sought a disclosure order against several refineries which subsequently received the oil from Transneft for processing. The defence sought to show that all the oil extracted by the production entities had been transferred directly into the Transneft oil pipeline, which had been duly registered, and subsequently to refineries, and that therefore there could have been no misappropriation or embezzlement of the oil by Yukos plc. On the same date the court refused the motion, finding "no legal grounds for granting" it.

254. On 17 June 2010 the defence sought a disclosure order against Rosneft (a State-owned company which had purchased Yuganskneftegaz

plc) and Tomskneft plc in respect of stocktaking reports on assets and liabilities since 1998, and copies of all stock sheets and collation statements (i.e. documents containing an inventory of the property of those companies). The defence sought to prove that neither of the two Yukos production entities had suffered any losses. On the same date the court refused the motion with respect to Rosneft, finding “no legal grounds for granting” it.

255. On 21 June 2010 the trial court refused the motion with respect to Tomskneft plc, without stating reasons for its refusal. It noted that the defence could resubmit its motion once Tomskneft plc’s representative had been questioned at the hearing .

256. On 29 June 2010 the defence sought a disclosure order against Samaraneftgaz plc in respect of stocktaking reports of assets and liabilities since 1998, and copies of all stock sheets and collation statements. The defence sought to prove that Samaraneftgaz plc had suffered no losses as a Yukos production entity.

257. On 30 June 2010 the court refused the motion, finding “no legal grounds for granting” it.

258. On 6 July 2010 the defence again filed a motion seeking a disclosure order against Samaraneftgaz plc.

259. On the same date the court refused the motion, stating that it had been examined and dismissed previously. At the same time, the court granted the defence’s motion of 1 July 2010 and ordered disclosure against Rosneft, Yuganskneftgaz plc, Tomskneft plc and Samaraneftgaz plc in respect of documents related to the net cost of crude oil and to the income received from the sale of the crude oil.

260. On 29 July 2010 the defence filed a motion seeking disclosure of information related to the oil prices applied in transactions by Sibneft and Rosneft subsidiaries in 1998-2003. Those documents were supposed to demonstrate that Yukos’s pricing practices were not significantly different from those of the other oil companies which also employed transfer pricing.

261. On 5 August 2010 the court refused the motion, finding “no legal grounds for granting it, in that the prices set by the said companies were not benchmark prices”.

262. On the same date the first applicant resubmitted the motion, pointing out that the concept of benchmark prices was not used in Russia and that it would be important for the court to know whether the prices Yukos had used to purchase oil from its subsidiary production entities had differed from other producers. He also asked the court to set out its reason should it refuse the motion again.

263. On 16 August 2010 the court refused the motion, stating that it had been examined on 5 August 2010.

264. The defence further sought disclosure orders against the investigating authorities. According to the defence, when the applicants’ second case had been severed from case no. 18/41-03 (see paragraph 53

above), the prosecution had failed to include an inventory of all the materials from the original case file and other cases that had been severed from it. The defence suspected that some of the materials obtained by the GPO, including those obtained in the course of the searches but not subsequently included in the case file for the “second” case, could in fact be “exculpatory” materials.

265. In particular, on 7 September 2010 the defence filed a motion seeking a disclosure order against the investigation authorities with respect to the file for criminal case no. 18-41/03 including material evidence, records of investigating actions and other documents containing information on the financing of the Yukos group of companies, and especially of its production units, with a view to maintaining their production capacity and creating conditions for the extraction and processing of larger quantities of oil with the proceeds from the sale of oil and oil products.

266. On 14 September 2010 the defence filed a motion seeking a disclosure order against the investigation authorities in respect of the file of criminal case no. 18-325543/04 (see paragraph 160 above), including material evidence, records of investigating actions and other documents containing information on the sale of oil by Yuganskneftegaz plc, Tomskneft plc and Samaraneftegaz plc to Yukos plc in 2000-2003 and the use of lower prices in order to reduce the production entities’ tax base.

267. On 17 September 2010 the court refused the above motions, finding “no legal grounds for granting” them.

268. The defence further argued that it had been unlawful to attach to the case file only the expert reports, without the source materials on which those reports had been based. The defence sought to obtain access to all those source materials.

269. Thus, on 9 September 2010 the defence filed a motion seeking a disclosure order against the investigation authorities with respect to source materials examined by experts Yeloyan and Kupriyanov between 22 and 25 January 2007 (see paragraph 161 above).

270. On 14 September 2010 the defence filed a motion seeking disclosure order against the investigation authorities with respect to source materials of the “informational and accounting assessment” (see paragraph 159 above).

271. On 17 September 2010 the court refused the above motions, finding “no legal grounds for granting” them.

*(iv) Requests to adduce other evidence*

272. On 27 August 2010 the defence asked the court to add to the case file a copy of the official record of the GPO’s questioning of Mr Aleksanyan in the latter’s criminal case. However, the court refused, stating that the copy of the record had not been officially certified.

### 3. *Statements by Mr Putin before and during the trial*

273. On 27 November 2009 Mr Putin, the then Prime Minister of Russia, and Mr Fillon, the then Prime Minister of France, gave a joint press conference following Russian-French talks. The relevant part was reported on the English-language version of the Russian Government's official webpage as follows:

“*Question:* Messrs prime ministers. You spoke about commerce and cooperation, but there is also an issue of human rights...

...Are you going to do something about this, Mr Putin?

Also, Mr Khodorkovsky spoke about the need not to forget about human rights. Have you talked to your Russian colleague about this, Mr Fillon?

*Vladimir Putin:* By virtue of our competence we have to deal with industry and the economy, although the issues you raised are very important and government bodies should always keep an eye on them...

... Now a few words about other cases you've mentioned. Mr Madoff was sentenced for life in the United States and nobody gave a damn. Everyone says: 'Good guy, it serves him right.' Now Britain is considering the extradition of a hacker who stole a million dollars. He may be turned over to the United States, where he may be sentenced to 60 years in prison. Why don't you ask about him?

Some of those who went on trial in Russia have stolen billions of dollars! They are also charged with attempts on the lives of specific people in the course of their commercial activities. And these episodes have been proved in court.

As you know, Al Capone was formally tried in the 1930s in the United States for tax evasion, and in fact he was suspected for a whole combination of crimes. Tax evasion was proven in court and he was sentenced under the legislation in force.”

274. At the 7<sup>th</sup> meeting of the Valdai Discussion Club, a Moscow-based think tank of political scientists, which ran from 31 August to 7 September 2010, Polish journalist Adam Michnik also asked Mr Putin about the first applicant. On 10 September 2010, in an interview to newspaper *Novaya Gazeta*, Mr Michnik gave the following account of his question and Mr Putin's answer:

“...[My] second question to Putin was as follows: if Khodorkovsky is released would that not be a sign that this 'legal nihilism' had been overcome? ...He started to say passionately: 'The head of his security department killed people! How could he not have known about that! He has blood on his hands!'”

275. In October 2010, during the “Russia Calling” Investment Forum at the VTB Capital investment group, Mr Putin referred to the Yukos case in response to a question from a foreign investor. On 5 October 2010 the news portal pravo.ru reported his statement as follows:

“Yukos is a special case, I have said this many times. You have a criminal case there, the problem is not just non-payment of taxes. There the people are convicted of murder, they have dead bodies linked to them...”

They (the heads of Yukos security service) do not give anybody away, but can you imagine that they arranged the murders on their own initiative? ...

This (the criminal offence) is proven by a court. Therefore let us take Yukos out of the picture.”

276. On 16 December 2010 Mr Putin had a question-and-answer session with the general public, which was broadcast live in Russia on television and radio. The relevant part was reported on the English-language version of the Russian Government’s official webpage as follows:

“*N. Simakova*: Good afternoon, Mr Putin.

I have a very simple question. Do you think it fair that Mikhail Khodorkovsky is still in prison? ...

*Vladimir Putin*: ... As for Khodorkovsky, I have expressed my opinion on this on many occasions. But if you want me to repeat myself again now, I will. It is my conviction that “a thief should be in jail” [a quotation from a famous Soviet film starring Vladimir Vysotsky]. Khodorkovsky has been convicted, by court, for embezzlement, pretty major embezzlement. We’re talking about tax evasion and fraud involving billions of roubles. Then, very importantly, there was also the matter of his personal tax evasion.

But the new embezzlement charges he now faces run to sums of 900 billion roubles in one case and 800 billion roubles in another.

If we look at other countries’ legal practices, in the United States Bernard Madoff got 150 years behind bars for a similar fraud scheme involving similar sums of money. Russia by comparison, I believe, seems a lot more liberal. Anyway, we must start from the fact that Khodorkovsky’s guilt has been proved in court.

In addition, as you are probably well aware, and now I am not talking about Khodorkovsky directly, but I note that the Yukos security chief is currently serving time for murder. The mayor of Nefteyugansk, Vladimir Petukhov, got in their way and so they killed him. One woman in Moscow refused to hand over her small property, and they killed her, too. And then killed the assassin they hired to carry out those killings. All they found was his brains, splattered all over his garage. Do you think the security chief decided to carry out these crimes all by himself?

So we have the court system, ours is, by the way, one of the most humane in the world, and this is their bread and butter. I start by accepting the court ruling.”

277. On the same date, after the question-and-answer session with the general public, Mr Putin had a meeting with journalists. One of the journalists asked about his earlier comments concerning the first applicant. The relevant part was reported on the English-language version of the Russian Government’s official webpage as follows:

“*Question*: ...And one more question, if you don’t mind: Don’t you think that you exert pressure on judges with your remarks about Mikhail Khodorkovsky?

*Vladimir Putin*: ...Regarding pressure on judges, well, you asked the question, so I need to answer it. I don’t really think this is pressure. I was referring to the verdict of the court, the verdict of guilty on previous charges. The court had already made its decision. How could I have influenced it? As for the current trial, the court will be unbiased, I’m sure. As you know, the sums in question are much bigger than last time.

In the first case it was about 25 or 30 billion worth of unpaid personal taxes, while now it is 800 or 900 billion. This is what will be put on trial.”

#### *4. Final phase of the trial*

278. On 2 November 2010 the parties made final submissions. Judge Danilkin announced that the judgment would be pronounced on 15 December 2010.

279. According to the defence, although the court secretaries were supposed to prepare the trial records on a daily basis, by 2 November 2011 they had finalised only a part of the record from the start of the trial until 17 January 2010. As a result, the judgment did not contain any reference to the trial record. The applicants inferred from this that the court must have relied in its conclusions overwhelmingly on the written materials which had been presented by the prosecution at the start of the trial.

280. On 15 December 2010 Judge Danilkin informed the parties and the public that pronouncement of the judgment was postponed until 27 December 2010.

### **D. The judgment of 27 December 2010**

281. Judge Danilkin started reading out the judgment of the Khamovnicheskiy District Court of Moscow on 27 December 2010 and continued until 30 December 2010. The applicants were found guilty under Article 160 § 3 (a) and (b) of the Criminal Code of misappropriation or embezzlement of oil extracted by the three production entities, and under Article 174.1 § 3 of the Criminal Code of laundering illicitly acquired profits. The value of the property so embezzled was calculated on the basis of six years’ output of the Yukos oilfields, multiplied by the price of Russian oil (URALS) at the ports of Rotterdam and Amsterdam.

282. The judgment ran to 689 pages of compact text. It contained no headings, no paragraph numbers, and no references to the trial record.

283. According to the applicants, the text of the judgment read out by Judge Danilkin on 27 and 30 December 2010 differed from the written text subsequently received by the parties. They referred to the parts of the judgment which did not appear in the text which was read out by the judge or which appeared in different parts of that judgment (see also paragraph 316 below). The judgment is summarised below.

#### *1. Evidence supporting the prosecution case*

284. As follows from the written judgment, the court’s conclusions relied on a large number of documents. First, the District Court examined official documents related to companies which were part of the Yukos group: charters of incorporation, minutes of the board meetings, staff

service records, payroll lists of various companies, formal orders and directives issued by the applicants within the group, etc.

285. Second, the trial court relied on a large number of unofficial documents and memos which were prepared within the Yukos group for internal use. Those internal documents described the responsibilities of the leading executives in various fields, the legal issues and risks related to particular modes of operation by the trading companies within the group and the structure of oil sales, and summarised the ownership structure within the group, tax issues, etc. Some of those documents specified the roles of the first and second applicants in the group's management. The court examined e-mail correspondence between key employees who administered the system of sales; that correspondence described their functions, the projects they were in charge of, their bonuses, their subordination to a particular Yukos senior executive, etc. The court also had at its disposal correspondence by the lawyers who prepared Yukos for listing on the American stock exchange and described the plans for the sale and the risks related to affiliation. The lawyers also evaluated the potential growth of the tax burden in the event of the disclosure of affiliations, with a view to the company's possible listing in the US. Some of the memorandums of the lawyers working for Yukos concerned the "promissory notes scheme" and indicated that the transactions with the promissory notes were likely to be declared "sham" and that those responsible for such transactions risked criminal liability under Articles 160, 174 and 201 of the Criminal Code (page 471 of the judgment). Some of those documents were available in paper form and had been countersigned by one of the applicants. A large proportion of those documents, plans, memos and internal correspondence existed only in electronic format and had been obtained from the hard drives of a server seized in the Yukos headquarters (88a, Zhukovka village) by the investigative team during the searches. Some of the servers, according to the judgment, were located in the premises of the law firm ALM Feldmans (pages 550 and 595 of the judgment).

286. Third, the court examined sales contracts and shipment orders concerning the oil extracted by the production entities and sold through the trading companies. In particular, the court examined the contracts between Yukos and Transneft, a State company which controlled the oil pipeline, to track the oil's routes of transportation from the oil wells to the refineries of end-customers.

287. The trial court compared the internal prices of oil within the group (transfer prices) with the "world market prices", based on the data provided by an international assessment agency, Platts, and by the Russian assessment agency Kortes. The court also examined the forensic audit report which assessed the "market price of oil".

288. The court examined official reports, tax audits and other documents issued by the governmental bodies which were supposed to oversee Yukos's business operations. It also scrutinised audit reports prepared by PwC and other audit firms in respect of Yukos plc and the trading companies, and information about customs clearance of Yukos oil provided by the Customs Committee.

289. The trial court relied on the official correspondence between Yukos and its partners, including minority shareholders. In particular, it examined correspondence related to the investigations conducted in the past by foreign minority shareholders with a view to ascertaining the trading companies' affiliation with the applicants and proving the latter's abusive conduct.

290. The court relied on a number of expert reports, including those on evaluation of the share price of entities affiliated with Yukos, on the consistency of the balance sheets of the Yukos subsidiaries, on the distribution of profits by certain Yukos subsidiaries to foreign trading companies and on the quantity of oil purchased by Yukos and its trading companies from the production entities (see paragraphs 153-169 above).

291. The court relied on other judgments related to the business activities of the Yukos group. In particular, the court relied on:

- the judgment of the Meshchanskiy District Court of 16 May 2005 in respect of the two applicants;
- the judgment of the Basmanniy District Court of 13 March 2006 in respect of Mr Velichko (who participated in the liquidation or reorganisation of several trading companies registered in low-tax zones);
- the judgment of the Basmanniy District Court of 1 March 2007 in respect of Mr Malakhovskiy and Mr Pereverzin, stating as follows in this respect:

“[the applicants' guilt is proved] by the judgment of the Basmanniy District Court of Moscow of 1 March 2007 in respect of [Mr] Malakhovskiy and [Mr] Pereverzin, according to which:

- the activities of Ratibor and Fargoil were of a sham character... aimed exclusively at the realisation of the criminal intent of **all the members** [*emphasis added*] of the organized group to steal the property of others, that is, of the oil that belonged to Yuganskneftegaz plc, Samaraneftgaz plc and Tomskneft plc, and subsequently sell it on the foreign and domestic markets;

- [Mr] Malakhovskiy, who during the period between 2001 and 2003 was the head of the sham companies Ratibor, Energotrade and Alta-Trade, and [Mr] Pereverzin, who between 1 April 2000 and 31 December 2002 was the head of Routhenhold Holdings Ltd and Pronet Holdings Ltd registered in Cyprus, were members of a criminal group which forged documents on the turnover through these companies of oil products stolen from the production entities and then, by means of financial and other transactions, ensured the legalisation of illegally obtained assets, having transferred them as dividends to the foreign companies that were shareholders of the sham companies[.]”;



- the judgment of 7 February 2007 by the Kuvshinovskiy Town Court of the Sverdlovsk Region in respect of Mr Ivannikov (former head of the administration of the Lesnoy ZATO);
- the judgment of the Miass Town Court of the Chelyabinsk Region of 16 July 2007 in respect of Mr Lubenets (former head of the administration of the Trekhgorniy ZATO);
- the judgment of the Basmani District Court of 4 April 2008 in respect of Ms Karaseva (director of Forest-Oil, one of the Yukos trading companies);
- the judgment of the Commercial Court of Moscow of 28 April 2005 in the corporate case of Yukos plc;
- three judgments of the Arbitral Tribunal of the Moscow Chamber of Commerce of 19 September 2006, in the proceedings of Yukos Capital against Yuganskneftegaz plc, whereby the latter was obliged to repay to the former the amounts of loans received from Yukos Capital in 2004 (those judgments were later quashed by a decision of the Commercial Court of Moscow of 18 May 2007, confirmed on appeal; the decision of the Commercial Court of Moscow was, in turn, quashed by the Dutch courts in a final decision of 25 June 2010 by the Supreme Court of the Netherlands).

292. The court also relied on the contents of the trial record in the criminal case against Mr Malakhovskiy and Mr Pereverzin (see paragraphs 14 and 17 above). In particular, the court stated that the applicants' guilt was corroborated by:

“- the statement of... [Mr] Valdez-Garcia in the course of the court hearing at the Basmani District Court of Moscow in the criminal case against [Mr] Malakhovskiy and [Mr] Pereverzin, reflected in the trial record of 18 December 2006 and studied by [this] court, according to which Fargoil was selling oil for export under commission agency contracts with Yukos plc and Yukos Export Trade...

- the statement of... [Ms V.] in the course of the court hearing at the Basmani District Court of Moscow in the criminal case against [Mr] Malakhovskiy and [Mr] Pereverzin, reflected in the trial record of 30 September 2006 and studied by [this] court, according to which... she had never been involved in commercial activity, had not set up any legal entities... and did not know [Mr] Malakhovskiy...

- the statement of... [Ms A.] in the course of the court hearing at the Basmani District Court of Moscow in the criminal case against [Mr] Malakhovskiy and [Mr] Pereverzin, reflected in the trial record of 22 September 2006 and studied by [this] court, according to which... since she had been working in the law firm ALM Feldmans and in 2003 became its managing partner. [She stated that] a contract on legal services was concluded between ALM Feldmans and Yukos plc. All the services under the contract were performed by [Mr] Ivlev who was able to involve other lawyers in the work...

- the statement of... [Mr Sh.] in the course of the court hearing at the Basmani District Court of Moscow in the criminal case against [Mr] Malakhovskiy and [Mr] Pereverzin, reflected in the trial record of 14 September 2006 and studied by [this] court, according to which he had been a lawyer at the law firm ALM Feldmans

since 2001. [As such] under [Mr] Ivlev's instructions he performed certain tasks related to legal services provided to Yukos plc...

- the statement of... [Mr E.] in the course of the court hearing at the Basmani District Court of Moscow in the criminal case against [Mr] Malakhovskiy and [Mr] Pereverzin, reflected in the trial record of 14 September 2006 and studied by [this] court, according to which since 2001, under [Mr] Ivlev's instructions, she represented Dansley Ltd...

- the statement of... [Mr] Valdez-Garcia in the course of the court hearing at the Basmani District Court of Moscow in the criminal case against [Mr] Malakhovskiy and [Mr] Pereverzin, reflected in the trial record of 18 December 2006 and studied by [this] court, according to which Nassaubridge Management Ltd, registered in Cyprus was the sole shareholder of Fargoil... Given that Fargoil belonged *de facto* to Yukos plc, he believed that all the profit of Fargoil, through Nassaubridge Management Ltd, went to the main shareholders in Yukos plc [including the applicants and three other people]..."

293. The trial court heard a large number of witnesses. In particular, it examined persons who had been directors of the trading companies or provided accounting services to them, and former managers of Yukos and its subsidiaries, etc. The former employees of Yukos's tax and financial departments explained certain principles underlying the functioning of the system of sales, and described money flows within the group. The court heard Mr Pereverzin and Mr Malakhosvkiy on their role in the management of the network of Russian and foreign trading companies. The court heard, as a witness, Mr Khristenko, the Minister of Trade and Industry, and Mr Gref, a former minister, who outlined the situation on the internal oil market at the relevant time and the transfer pricing methods used by many oil companies at that time. The court heard the Yukos auditors, who explained that they had not been given full information about the affiliation links between Yukos and certain of the trading companies. Mr Rebgun, the receiver of the company's assets in the bankruptcy proceedings, described the situation with the Yukos-affiliated companies from 2004. Several lawyers from ALM Feldmans described their role in the registration and maintenance of off-shore companies at the request of employees of the Yukos group.

294. The judgment mentioned Mr P-n as one of the witnesses heard by the trial court. However, according to the applicants, that person had never testified orally before the court. The judgment also referred to witness testimony by Mr R-y, who had not appeared in person and whose written testimony had not been read out. According to the applicants, the judgment referred to the testimony of Mr Valdez-Garcia, whereas that evidence had not been examined directly but was only referred to by the prosecutor in his closing statement.

295. The trial court examined transcripts from the tapping of telephones used by Yukos employees in October-November 2004, namely the exchanges between Mr Gololobov and Ms Bakhmina. From the content of

the exchanges the court concluded that, while in prison, the applicants, acting through their lawyers, continued to give orders aimed at the laundering of profits from the sale of oil.

296. Finally, the trial court relied on a number of records from the questioning of witnesses by the prosecution in the course of the investigation, or by other courts in other Yukos-related proceedings. In particular, the court examined records of the questioning of Mr Valdez-Garcia, Mr Log. and Mr Yu.

*2. Evidence supporting the case for the defence, dismissed as irrelevant or unreliable*

297. In the judgment the trial court analysed evidence which supported the case for the defence. Thus, the court analysed witness testimony by Mr Kasyanov, Mr Mirlin, Mr Gilmanov, Mr Anisimov, Ms Lysova, Mr Gerashchenko and Mr Kosciusko-Morizet. The court discarded their testimony as unreliable, self-contradictory, irrelevant, or not based on first-hand experience. In particular, the court decided that some of the witnesses had financial ties with the applicants, were indebted to them otherwise and therefore could not be trusted (Mr Gilmanov, Mr Anisimov, Mr Kosciusko-Morizet). As to the submissions by Mr Haun, the court dismissed them on the grounds that (a) Mr Haun was not a specialist in Russian law; (b) he had not worked in Yukos; (c) he could not have assessed the compliance of the transfer pricing arrangements with Russian law; and (d) his attempt to compare transfer pricing in Yukos and other companies (Lukoil, TNK) was misplaced, since he was not aware of the details of the functioning of those companies. Certain elements in the submissions of witnesses for the defence (Mr Kasyanov, Mr Haun and others) were interpreted by the court as supporting the case for the prosecution.

*3. Legal analysis by the trial court; characterisation of the crimes imputed to the applicants; the sentence*

298. The trial court dismissed the applicants' objection concerning a lack of territorial jurisdiction. The court noted that the crimes imputed to the applicants were committed in concert with Mr Ivlev and other lawyers from the ALM Feldmans law office, located in Sechenovskiy Lane in Moscow. In particular, lawyers from ALM Feldmans created and maintained companies in Cyprus which were used for laundering the profits from misappropriated oil. The Sechenovskiy Lane address was within the territorial jurisdiction of the Khamovnicheskiy District Court which, under Article 32 of the CCrP, was therefore competent to hear the entire case.

299. The acts imputed to the applicants were characterised by the court under Article 160 part 3 of the Criminal Code (large-scale misappropriation or embezzlement with abuse of position) and Article 174.1 part 3 of the

Criminal Code (large-scale laundering of money or of other assets acquired as a result of commission of a crime, with abuse of position and committed by a group acting in concert). The episode related to the alleged misappropriation of Tomskneft plc shares was excluded, due to the expiry of the statutory time-limits. The judgment specified that since the value of the property misappropriated by the applicants exceeded RUB 250,000 they were guilty of “large-scale misappropriation”, pursuant to the footnote to Article 158 of the Code. Similarly, since the sums laundered by the applicants exceeded RUB 6 million, the money laundering was also qualified as “large-scale money laundering”. The court found that the applicants had committed the crimes by abusing their positions within the companies they had controlled.

300. The judgment stressed that the applicants were not charged with physical theft of the oil extracted and refined by the production entities. The acts incriminated to them consisted in misappropriation of that oil through a chain of fraudulent deals involving it (page 647 of the judgment). Thus, there was no need to conduct a stocktaking of the oil which the production entities had allegedly “lost”: that loss was not physical but consisted of the loss of profit as a result of the misappropriation of oil profits in the applicants’ interests (page 655 of the judgment). Thus, in 2002 the trading companies generated profits of USD 3.932 billion, whereas the production entities generated only RUB 4.154 billion during the same period.

301. The trial court decided that the applicants were the leaders of an organised criminal group (Article 35 part 3 of the Criminal Code) which designed and implemented the scheme to misappropriate the oil. The court found that, *de facto*, all important decisions within Yukos were taken by the first applicant, whereas other persons and bodies who had the power to take decisions under the law and in accordance with the charter of incorporation of Yukos and its subsidiaries held those powers only nominally, and retained independence only in respect of relatively small operations. The fact that both applicants ceased to be senior executives of Yukos in 1999-2001 did not mean that they had lost control of the group. Although agreements between Yukos and the production entities were approved by the general meetings of shareholders, those approvals were obtained through deceit and manipulation. The Public Companies Act required approval of large transactions by a majority of “disinterested shareholders”; however, the applicants obtained approval only through the votes of shareholders who were controlled by them and were thus “interested” in the outcome of the transactions.

302. The trial court noted as established that where the parties to a commercial transaction had no free will, where they did not act independently but in the interests of a third party, and where they did not derive benefits from the transaction, those factors were indicative of the sham nature of such a transaction.

303. The court considered that the applicants did not employ the system of transfer pricing, but that they simply forced the production entities to sell their oil for artificially low prices, which resulted in a reduction of the profits of the production entities and, in turn, deprived the minority shareholders, including the State itself, of their dividends. The fact that the production entities received payments for the oil did not mean that there had been no misappropriation; this legal concept also covered situations where misappropriation of property is followed by inadequate compensation for that property (page 652 of the judgment).

304. The court held that it was correct to calculate the cost of the oil misappropriated by the applicants on the basis of the “world market prices”. The “domestic price” of the oil in the regions where the oil was extracted did not reflect the real price, since it was calculated on the basis of the prices of other Russian oil companies which also employed transfer pricing mechanisms (page 675 of the judgment). When calculating the value of the oil misappropriated by the applicants, the court used the overall price of the oil, and not the margin which remained in the applicants’ hands: according to Ruling no. 51 of the Plenary Supreme Court of Russia of 27 December 2007, where misappropriated property is replaced with another asset of a lower value, the “scale” of misappropriation is calculated on the basis of the value of property.

305. The court further found that, having misappropriated the oil that belonged to Yukos production entities, the applicants had put in place a scheme whereby the stolen oil had been either sold or converted into oil products which were also subsequently sold, and that the applicants had derived profit from such sales. The court qualified this activity as laundering of money or of other assets acquired as a result of commission of a crime.

306. The court dismissed the applicants’ arguments that, in the tax proceedings in which the State had recovered unpaid taxes of Yukos, those taxes had been calculated as if all of the oil belonged to Yukos itself. The court decided that previous judgments by the commercial courts concerned only tax matters and did not define the legal title to the oil. The commercial courts in the tax proceedings (which ended with the judgment by the Moscow City Commercial Court of 26 May 2004) took as their starting point the assumption that Yukos was the *de facto* owner of the oil at issue. In its judgment of 21-28 April 2005 the Moscow City Commercial Court defined the owner of an asset as a person who *de facto* exercised all powers of the legal owner in respect of that asset (page 659 of the judgment). In accordance with the position of the Constitutional Court of Russia as expressed in Ruling no. 139-O of 25 July 2001, the tax authorities were entitled to establish the real owner of property which was the object of a transaction on the basis of the *de facto* relations between the parties and irrespective of what was written in the contracts between them (page 660 of the judgment). While the commercial courts had established that Yukos was

a *de facto* owner of the oil and benefited from its sales through the trading companies, the commercial courts did not find that Yukos was a *de jure* owner of that oil. Thus, the commercial courts' conclusions in the previous proceedings did not contradict the court's conclusions in the current proceedings as to the applicants' guilt with regard to "misappropriation" of the oil which belonged to the production entities.

307. The court took note of over sixty judgments by the commercial courts confirming the validity of the general agreements between Yukos and the production entities. However, the commercial courts at the relevant time had based their findings on the presumption that the parties to those agreements were independent and had acted in good faith. The "sham" character of those agreements became evident only as a result of an investigation which discovered the links of affiliation and the lack of independence of the parties involved.

308. In the opinion of the court, there was no overlap between the charges the applicants faced in the first and second trials. In 2005 the applicants were convicted for tax evasion related to the operation of trading companies in the low-tax zones in 1999-2000. In the second trial the applicants stood accused of misappropriation of the oil belonging to the production entities in the period 1998-2003. The objects of the crime of "tax evasion" and of the crime of "misappropriation" were distinct, as were the periods concerned. The court noted that Article 174.1 of the Criminal Code provided that the crime of money laundering could not be committed in respect of money acquired as a result of tax evasion – a crime punishable under Articles 198, 199.1 and 199.2 of the Criminal Code. However, in the applicants' case the "money laundering" concerned not the sums of unpaid taxes but the "misappropriated" assets. Thus, the applicants first "misappropriated" the oil by concentrating profits from its sale on the trading companies' accounts, and then committed the crime of "tax evasion", since the trading companies located in Lesnoy ZATO (the low-tax zone) claimed and obtained tax cuts unlawfully. "Tax evasion" was therefore a form of maximising the profits from "misappropriation". Consequently, the "laundering" of money accumulated on the accounts of the trading companies concerned not the proceeds of the crime of "tax evasion" but the proceeds of "misappropriation".

309. The court disagreed with the applicants' claim that the group's inner structure had been transparent to the public and the authorities. The court established that in previous court proceedings the applicants never acknowledged their affiliation with the trading companies, such as Fargoil, Mitra and others, and that they did not disclose those facts in their relations with the Russian authorities. As to the consolidated financial reporting for foreign investors, such reports did not contain an exhaustive and clear list of affiliated companies, their operations and the profits accumulated by them. All publications or statements by the company concerning Yukos's

affiliation links with the trading companies were half-hearted and evasive, and at no point did Yukos disclose a complete and detailed breakdown of internal organisation within the group. That information was not given to the shareholders; consolidated reports prepared under the GAAP rules were always published in English, while the shareholders had no access to a Russian-language version of the reports. Even the auditors from PwC did not have a full picture of what was happening within the group, let alone individual Russian shareholders.

310. The court accepted the applicants' contention that part of the profits from the sale of oil was returned to Yukos. However, even though the applicants maintained the operations of the production entities, reinvested in equipment and even increased the production entities' output, they did so only to maximise their own profits and the capitalisation of Yukos. The applicants decided what to do with the profits and where to invest them at their own will, without taking into account the opinions and interests of other shareholders in the production entities. Similarly, the buyback of the shares in the production entities and in Yukos itself was decided by the applicants themselves, without any involvement by the minority shareholders. Those deals served the applicants' interests alone. The reinvestment of USD 2.6 billion in the production entities in 2003, in the form of loans by Yukos Capital, served only the purpose of securing control over the production entities in the capacity of their largest creditor. Although certain sums were reinvested in the production entities, this was not done on a gratuitous basis but on a reciprocal basis in the form of buying promissory notes or providing loans.

311. Both applicants were sentenced to 14 years' imprisonment, which included the remaining part of the sentence the applicants were serving under the judgment of 16 May 2005.

#### *4. Determination of the civil claims against the applicants*

312. Within the criminal cases several private persons, companies and a State agency introduced civil claims against the applicants. They included Mr Belokrylov and Mr Demchenko, Rosneft, Tomskneft plc, Samaraneftgaz plc, Sandheights Ltd. and the Federal Property Agency.

313. The court decided that the question of civil damages was not ready for decision and relinquished jurisdiction in favour of a civil court in this respect.

**E. Statements to the media concerning the alleged lack of independence and impartiality of the trial court judge and the applicants' attempt to institute criminal proceedings**

*1. Statements in the media*

314. On 26 December 2010 the web-magazine Gazeta.ru published information to the effect that in the morning of 25 December 2010 plain-clothes security officers had escorted Judge Danilkin from his home to the Moscow City Court. He had allegedly been warned not to leave his house.

315. On 14 February 2011 Ms Vassilyeva, assistant to Judge Danilkin and later press officer of the Khamovnicheskiy District Court, gave an interview to Novaya Gazeta, an opposition newspaper. In the interview she stated that the judgment in the second applicants' case had not been drafted by Judge Danilkin himself, but by judges of the Moscow City Court. She confirmed that on 25 December 2010 Judge Danilkin had been taken to the Moscow City Court and later arrived at the Khamovnicheskiy District Court, where he had been seen by other employees. She also said:

“... [The] entire judicial community understands very well that there has been an ‘order’ for this case, for this trial ... I know for a fact that the [text of the] judgment was brought [to the Khamovnicheskiy District Court] from the Moscow City Court, of this I am sure...”

316. She stated that throughout the trial Judge Danilkin was constantly receiving instructions from the Moscow City Court. According to her, the delay in the announcement of the verdict was in part due to Mr Putin's comments of 16 December 2010. She implied that Judge Danilkin had first prepared his own judgment, but had later been forced to read out another text, which had been prepared elsewhere, and that some parts of that other judgment had been delivered to the Khamovnicheskiy District Court while he was reading out the beginning of his judgment.

317. In April 2011 Mr Kravchenko, another former employee of the Khamovnicheskiy District Court, confirmed Ms Vassilyeva's words in his interview to Novaya Gazeta. In particular, he said that Judge Danilkin, referring to the judges from the upper court, said:

“Whatever they say, that's how it will be. It isn't really my decision.”

Mr Kravchenko stated that Judge Danilkin had consulted with the Moscow City Court whenever he faced difficulties in handling the trial.

318. According to the applicants, a visitor to the court, Ms S.D., overheard a telephone conversation involving one of the prosecutors, who had allegedly stated:

“Now the lawyers will rattle on [to justify] their fees, Khodorkovskiy will blabber [his part], but the judgment is not yet ready, it has not been brought from the Moscow City Court yet”.



319. The applicants' lawyers raised the allegations concerning Judge Danilkin's lack of impartiality on appeal (see paragraph 353 below).

*2. The applicants' attempt to institute an investigation*

320. In May 2011 the applicants' lawyers also lodged a formal request for a criminal investigation into the allegations by Ms Vassilyeva, Mr Kravchenko and others. In the opinion of the defence lawyers, if the facts disclosed by the two former employees of the District Court were true, the situation amounted to a crime. They supported their request with a detailed analysis of the relevant parts of the judgment which were mutually exclusive, used different terminology, were incoherent with Judge Danilkin's other procedural decisions, etc. In their opinion, all of these factors suggested that Judge Danilkin was not the author of the judgment or at least that he was not the only author thereof.

321. On 20 June 2011 the Investigative Committee refused to institute criminal proceedings into the applicants' allegations. It first noted that, in so far as the applicants' complaint concerned their disagreement with the first-instance judgment, these issues could only be examined by the court of appeal and not by the investigating authorities. It further questioned a number of witnesses with a view to establish whether there were grounds for instituting criminal proceedings.

322. Judge Danilkin submitted that he had prepared the judgment independently and that there had been no procedural beaches. He also stated that during the applicants' trial he had had to visit the Moscow City Court on a number of occasions related to a meeting of the Qualification Board and other matters, but he had never discussed the applicants' case with anybody and had not received any instructions in this regard. At the same time, he did not even visit the Moscow City Court between 2 November and 27 December 2010. Judge Danilkin's statement was confirmed by Ms M., who was a court secretary during the trial.

323. Ms Vassilyeva submitted that Judge Danilkin had not discussed the applicants' trial with her; she had not accompanied him during his visits to the Moscow City Court; she did not know with whom Judge Danilkin had talked on the phone; she did not know any details concerning the drafting of the judgment in the applicants' case and had not seen anybody bring the judgment from the Moscow City Court. The Investigative Committee examined an audio recording of the interview that Ms Vassilyeva had given to the media and concluded that the information provided therein was based on suppositions and was not substantiated by any evidence. At the same time, Ms Vassilyeva produced several fragments of text on A4 paper, alleging that they had been handed over to her by Judge Danilkin in January 2011 and contained the operative part of the judgment in the applicants' case. Judge Danilkin submitted that he had never seen these fragments. The Investigative Committee concluded that the text fragments

contained no handwriting that belonged to Judge Danilkin or anybody else, and that therefore it was impossible to establish their origin. It did not rule out the possibility that they had been prepared as part of a set-up.

324. Mr Kravchenko submitted that his statement had been misrepresented by the journalist who interviewed him. According to Mr Kravchenko, he had stated that Judge Danilkin was in the habit of discussing the issues of the court's everyday activities with the Moscow City Court. However, he knew nothing about the way in which the procedural decisions had been taken in the applicants' case. The Investigative Committee examined the audio recording of the interview that he had given to the media and found it to corroborate those submissions.

325. Ms S.D. submitted that she had been at the Khamovnicheskiy District Court on a certain day between 15 October and early November 2010 and happened to have overheard a telephone conversation by a woman in a prosecutor's uniform. The woman allegedly said to her interlocutor: "Now Khodorkovskiy will blabber [his part], the lawyers will rattle on [to justify] their fees...But the judgment has not been brought from the Moscow City Court yet". The Investigative Committee dismissed Ms S.D.'s submission as unreliable, since it was inconsistent with the other evidence.

326. The Investigative Committee concluded that there were no constituent elements of a criminal offence and refused to institute criminal proceedings.

327. The applicants did not appeal against that decision.

## **F. Appeal proceedings**

### *1. Preparation for the appeal hearing*

328. On 31 December 2010 the applicants' lawyers appealed against the judgment. They first submitted a short appeal statement which was supplemented by a detailed appeal statement over the following months.

329. According to the defence, by the end of the trial the case materials were contained in 275 volumes, of which 188 volumes were materials from the pre-trial investigation and the remainder was the materials that had been added during the trial (trial record, motions, procedural rulings, etc.).

330. The complete final version of the trial record was made available to the parties several months after the pronouncement of the judgment, on 16 March 2011. The defence also introduced a 1,060-page memo which contained corrections to the trial record. Judge Danilkin dismissed most of the objections by the defence as unsubstantiated.

331. Together with his statement of appeal, the second applicant tried to introduce new evidence before the court of appeal, namely an affidavit from an American lawyer who, at request of the applicants, had investigated the

question of PwC's withdrawal of the audit report. However, the court of appeal refused to consider this evidence.

*2. Appeal hearing and the findings of the court of appeal*

332. The judicial bench of the Moscow City Court was composed of three judges: Mr Usov (the President), Ms Arychkina and Mr Monekin (judges). Both applicants, as well as their defence lawyers, appeared before the court of appeal. The appeal hearing lasted one day.

333. On 24 May 2011 the Moscow City Court upheld the judgment of 27 December 2010, while reducing the sentence to 13 years' imprisonment.

334. The decision of the court of appeal ran to 70 pages and contained a brief description of the factual findings of the trial court. The court of appeal confirmed the account of the events given by the lower court and addressed the main arguments of the defence. In the light of the amendments introduced to the Criminal Code by Federal Law of 7 March 2011, the Moscow City Court requalified the applicants' conviction from Article 160 § 3 (a) and (b) (large-scale misappropriation or embezzlement with abuse of position committed by a group acting in concert) to Article 160 § 4 (large-scale misappropriation or embezzlement with abuse of position committed by an organised group) and applied amended Article 174.1 § 3 (large-scale laundering of money or of other assets acquired as a result of commission of a crime with abuse of position and committed by a group acting in concert).

**(a) Conclusions of the court of appeal on the substance of the case**

335. According to the Moscow City Court, although the production entities had been receiving payments for their oil, those payments were much lower than the prices which they would otherwise have received had they sold the oil independently. Although on the face of it the general agreements and the auctions appeared valid, and although the trading companies shipped the oil to the end-customers, their will was distorted by unlawful and deceitful acts of the applicants, who coerced them into concluding those agreements and accepting the results of the auctions. The fact that the production entities, who were the civil plaintiffs in those proceedings, only sought compensation for their lost profits and not for all of the oil which was channelled through the trading companies was not mutually incompatible with the fact that all of the oil was misappropriated by the applicants.

336. The court of appeal dismissed the applicants' argument that the oil had never left the production companies' possession against the latter's will. It found that the will of the production companies had been distorted since, under the management agreements, their management bodies had been effectively appointed by the applicants and had acted in the latter's interests.

337. It further dismissed the applicants' argument that the transactions in question could not be considered uncompensated since not only had the

production companies suffered no damage, but they had received compensation for the cost of oil and had made a profit. The court of appeal stated that the oil had been sold by the production entities at prices that were four to five times lower than market prices. Thus, compensation for the oil's cost at an amount that was below its market price entailed damage to the oil's owner.

338. At the same time, the court of appeal found that it had been impossible to establish a domestic market price for oil in the respective Russian regions because at the relevant period almost all of the oil had been extracted by entities which were part of vertically integrated companies. Such companies applied transfer pricing and thus fixed the price of oil at their discretion. Such a practice ran counter to the interests of the State and the minority shareholders.

339. The Moscow City Court acknowledged that the validity of the general agreements had been confirmed by final judgments of the commercial courts. It dismissed them, however, stating that the commercial courts had acted on the assumption that the parties to those agreements had been acting freely and independently, which had not been the case. In addition, in those proceedings the production entities' interests had been represented by lawyers from Yukos-Moskva, who misinformed the commercial courts about the real nature of the relationships between Yukos and its production entities.

340. The court of appeal held that earlier judgments by the commercial courts in the tax proceedings involving Yukos did not contradict the findings of the Meshchanskiy District Court in the first set of criminal proceedings against the applicants. The commercial courts imputed taxes to Yukos on the assumption that Yukos was a *de facto* owner of the oil, derived profits from selling that oil and was therefore obliged to pay taxes. However, the commercial courts never stated that Yukos was the *de jure* owner of the oil. The oil was the property of the production entities and was misappropriated by the applicants.

341. The court of appeal disagreed with the applicants that they had been convicted twice for the same act. It stated that within the first case the applicants had been convicted of tax evasion, whereas in the second case they stood trial for misappropriation.

342. It further upheld the findings of the trial court as to the applicants' role in the "organised group" which participated in the misappropriation of oil.

343. The Moscow City Court dismissed the applicants' allegations that the charges of stealing the oil and money laundering had already been examined by the Meshchanskiy District Court of Moscow within the first set of criminal proceedings which had ended with the applicants' conviction on 16 May 2005. The court stated that while the applicants had been convicted in the first trial of tax evasion for the years 1999-2000 in the low-

tax zone in Lesnoy ZATO by using the companies Business Oil, Mitra, Vald Oil and Forest Oil, the present criminal proceedings concerned stealing, by means of appropriation, oil belonging to Yukos production entities such as Samaraneftegaz plc Yuganskneftegaz plc and Tomskneft plc in 1998-2003. Thus the objects of the offences were different and, therefore, the applicants could not be considered to have been tried twice for the same offence.

344. The court of appeal also dismissed the applicants' allegations of political motivation behind the prosecution. It found that the trial in the applicants' case had been open and based on the principles of adversarial proceedings and equality of arms. The defence had enjoyed procedural rights and had been able to file motions and examine witnesses. The statements by the applicants' lawyers alleging a political underpinning to the prosecution were unfounded. The charges against the applicants were related to their business activities and did not concern any political party. In any event, an individual's political status did not grant him or her immunity from criminal charges.

**(b) Conclusions of the court of appeal on procedural matters**

345. The Moscow City Court also examined procedural objections raised by the defence. It held that in bringing the second criminal case against the applicants the GPO had respected all necessary procedural requirements, and that that issue had been sufficiently addressed by the trial court. The applicants had been sufficiently informed about the accusations against them and, as followed from their own submissions, they were well aware of all the necessary details of the case. The bill of indictment contained the information necessary to understand the factual grounds of the accusations. The trial court had examined the case within the scope outlined in the bill of indictment.

346. The territorial jurisdiction of the Khamovnicheskiy District Court had been defined in accordance with Articles 31-33 of the CCrP. In particular, the District Court had accepted jurisdiction to try the applicants' case with reference to the "most serious crime" imputed to the applicants, namely that provided by Article 174-1 p. 4 of the Criminal Code. The bill of indictment referred to acts which were imputed to the applicants and had been committed on the territory under the jurisdiction of the Khamovnicheskiy District Court.

347. When the second case was severed from the first criminal investigation, the investigator attached to the new case file certain documents from the first case, either original documents or duly certified photocopies. With regard to the expert examinations conducted at the request of the GPO, the defence had had access to the relevant decisions of the investigator and to the reports themselves, and had been able to file motions.

348. The defence had full access to the materials of the case; the case file contained their written statements to that end. As to the applicants' allegations that they had not received access to some of the materials on which the prosecution and the court had relied, the court of appeal found that allegation unfounded.

349. The court of appeal rejected the applicants' allegation that the trial court's approach to taking and examining evidence had been one-sided. The trial court had provided sufficient grounds in explaining why it considered some evidence reliable and some not. The essence of the evidence examined at the trial was reflected accurately in the judgment. The first-instance court had properly examined the applicants' arguments concerning the inadmissibility of certain prosecution evidence, namely the documents obtained from searches in the premises of ALM Feldmans and PwC, translations of documents, and reports on the examination and extraction of information from the electronic disks. Evidence relied on by the GPO was properly obtained, recorded and produced to the court. Expert reports were commissioned in accordance with the procedural rules, the qualification of the experts was beyond any doubt, and their objectivity was not questioned.

350. The Moscow City Court found that the trial court had read out written testimony by several witnesses (Mr R-y, Ms Kol., Mr Yu., Mr P-n and Mr Valdez-Garcia) but that this had been in accordance with the law. In particular, the written testimony of Mr P-n, who lived abroad, was read out at his own request under Article 281 part 4 (2) of the CCrP (see paragraph 294 above). Occasionally the judgments referred to "oral submissions" by some of those witnesses, whereas the court relied only on their written testimony, but that was a minor mistake. The essential fact was that the testimony of those persons had been examined at the trial, in one form or another.

351. The Moscow City Court found that the trial court had examined and assessed the evidence produced by the defence. The court of appeal dismissed the arguments that the trial court had misinterpreted the testimony of Mr Kasyanov, Mr Gref and Mr Khristenko.

352. The court of appeal held that in the proceedings before the trial court the defence had enjoyed equality of arms with the prosecution and that the judge was impartial and had ensured that the defence was able to fully realise their procedural rights. The trial court had accepted reasonable and lawful requests by the defence and dismissed, after careful examination, all those which were unjustified or not based in law. The court of appeal further dismissed, in a summary manner, all the complaints by the defence concerning the defence motions rejected by Judge Danilkin during the trial, finding that Judge Danilkin's decisions in this respect were "convincing and supported by the materials of the case", and that the applicants' defence rights had not been hindered in any way (page 65 of the decision of the court of appeal). The defence had been given sufficient time to study the

trial record and to formulate their objections. The parties had been given an opportunity to make their final pleadings, and the judgment had been rendered in accordance with the procedure provided by law. The law did not prevent the trial court from starting to prepare the judgment before the trial record was finalised. The trial court's reliance on the previous judgments in connected cases was legitimate; as to the existence of several parallel investigations, the court of appeal noted that severing cases was within the competence of the prosecution bodies and not the court.

353. It further held that there had been no procedural breaches in the drafting of the judgment by the trial court, and that the applicants' allegations in this part were based on suppositions.

354. Finally, the Moscow City Court examined matters related to the detention of the applicants on remand and the legal classification of the acts imputed to them. In particular, the court of appeal noted that during the pleadings the prosecution had dropped charges related to several individual episodes of embezzlement of oil; it appeared that the prosecution had wished to exclude episodes where there had been uncertainty about the amounts of oil embezzled or where the method of calculation of the price of oil had differed from the usual method proposed for other episodes. The court of appeal also stated that the indication in the first-instance judgment that the applicants had acted "through their lawyers" was to be excluded, since the judgment was supposed to deal only with the applicants' crimes and not those of anyone else. The court of appeal also applied the new law amending sentencing principles to the benefit of the accused, changed the legal classification of the crimes imputed to the applicants and reduced the overall sentence to 13 years of imprisonment in respect of each applicant.

355. In June 2011 the applicants were transferred from the remand prison in Moscow to serve their sentence in penal colonies.

### **G. Supervisory review proceedings and the applicants' release**

356. On 20 December 2012 the Presidium of the Moscow City Court reviewed the first-instance and appeal judgments in the applicants' case following their application for supervisory review. The Presidium stated, *inter alia*, that the applicants' allegations that they had been tried twice for the same offences were unfounded. In particular, not only were the offences of tax evasion (for which the applicants were convicted as a result of the first trial) and the offences of misappropriation and money laundering (for which they were convicted in the second trial) substantially different, but the factual basis for their conviction in each set of proceedings was also different. In the first trial the courts examined the fact that the applicants had submitted tax declarations containing false information indicating that the companies Business Oil, Mitra, Vald Oil and Forest Oil were entitled to preferential taxation. In the second trial the applicants were convicted of

misappropriating oil from Yukos production entities and the subsequent laundering of the profits thus gained. Whereas the applicants had used the companies Business Oil, Mitra, Vald Oil and Forest Oil for the purposes of money laundering, the source of their income was not under examination in the first criminal proceedings, as it had no bearing on the charge of tax evasion. Thus, the charges against the applicants in the first and second sets of criminal proceedings were based on different acts. The Presidium consequently dismissed the applicants' allegations of double jeopardy.

357. At the same time, the Presidium of the Moscow City Court reviewed the applicants' sentences in respect of both the first and the second conviction so as to bring them into conformity with the recent legislative changes. It reduced the sentence in respect of the second conviction to 11 years of imprisonment.

358. On 6 August 2013 the Supreme Court examined another application for supervisory review lodged by the applicants. Having upheld their conviction, the Presidium recalculated the sentence and reduced it to 10 years and 10 months' imprisonment.

359. On 23 January 2014 the Presidium of the Supreme Court again reviewed the judgments in the applicants' two cases under supervisory review. Having regard to the Court's finding of a violation of Article 5 § 3 of the Convention in the *Khodorkovskiy and Lebedev* judgment, cited above, the Presidium quashed the decisions concerning the applicants' pre-trial detention in the first set of criminal proceedings against them. However, it did not alter the applicants' conviction, despite the Court's finding of a violation of Article 6 §§ 1 and 3 (c) and (d).

360. The Presidium upheld the applicants' second conviction. It also dismissed their allegations of having been tried twice for the same offence, stating that the applicants had been convicted in the two sets of criminal proceedings of different offences and on the basis of different acts.

361. The Presidium of the Supreme Court reduced the applicants' sentence to 10 years and 7 months in respect of the first applicant and 10 years, 6 months and 22 days in respect of the second applicant. The Presidium also ordered that the second applicant be released as he had served his sentence. It further ordered that the remainder of the first applicant's outstanding prison sentence was not to be executed, having regard to the Presidential Decree of 20 December 2013 pardoning him.

## **H. International and domestic reactions to the judgment**

362. According to the applicants, a large number of foreign political leaders and high-placed State officials expressed their concern about the fairness of the second trial and improper motivation behind the applicants' prosecution. Those included Ms Clinton, the US Secretary of State; Mr Hague, the UK Foreign Secretary; a French Foreign Ministry official;



Ms Merkel, the German Chancellor; Mr Westerwelle, the German Foreign Minister; the EU High Representative Catherine Ashton, and others. On 24 May 2011 Amnesty International, an international human-rights NGO, declared the applicants “prisoners of conscience”.

363. The applicants produced a large number of documents, official statements, press publications, declarations by foreign governments, intergovernmental bodies and NGOs in which their case was labelled as an instance of “political prosecution”.

364. In 2011 the Presidential Council of the Russian Federation for Civil Society and Human Rights, consisting of a number of legal experts, produced a Report on Results of the Public Scholarly Analysis of the Court Materials of the Criminal Case against M.B. Khodorkovskiy and P.L. Lebedev. The report concluded that there had been numerous breaches of the applicants’ rights in the course of the second criminal case against them.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Constitution

365. Article 19 of the Russian Constitution provides as follows:

“1. All people shall be equal before the law and courts.

2. The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances. All forms of limitations of human rights on social, racial, national, linguistic or religious grounds shall be banned.”

366. Article 45 § 2 provides that “[e]veryone shall be free to protect his rights and freedoms by all means not prohibited by law”.

367. Under Article 46 § 1 “[e]veryone shall be guaranteed judicial protection of his rights and freedoms”.

368. Article 50 § 3 prohibits using evidence obtained in breach of federal law when administering justice.

369. Article 123 established the principle of adversarial judicial proceedings based on equality of the parties.

### B. Criminal Proceedings

#### 1. General overview

370. For a general overview of criminal proceedings in Russia at the time of the events see *Khodorkovskiy and Lebedev*, cited above, §§ 377-85.

## 2. *Specific provisions*

### (a) **Territorial jurisdiction**

371. Under Article 32 § 3 of the CCrP, if offences were committed in different geographical locations, the criminal case is to be tried by a court which has territorial jurisdiction either over the place where most of the offences under the criminal investigation were committed, or where the most serious offence was committed.

### (b) **Documentary and expert evidence**

372. Article 74 § 2 of the CCrP contains an exhaustive list of the sources of information which can be used as evidence in criminal trial:

- “(1) statements of the suspect [and] of the accused;
- (2) statements of the victim [and] of the witness;
- (3) opinion and statements of the expert;
- (3.1) opinion and statements of the specialist;
- (4) material evidence;
- (5) records of investigative and judicial actions;
- (6) other documents.”

373. Article 84 § 1 of the CCrP provides that “other documents” can be admitted as evidence if they contain information which may be important for establishing the necessary facts within the given criminal proceedings.

374. Article 86 lays down the rules on collecting evidence as follows:

“1 In the course of the criminal proceedings evidence shall be collected by ... the investigator, the prosecutor and the court by means of investigative measures and other procedural actions provided by the present Code.

2. [An accused] ... and his representatives may collect and produce written documents and objects to be added to the case file as evidence.

3. The defence lawyer may collect evidence by:

- (1) obtaining objects, documents and other information;
- (2) questioning people, with their consent;
- (3) requesting certificates, letters of reference and other documents from agencies of State authorities, agencies of local self-government [and] public associations and organisation, which are under an obligation to provide the requested documents or copies thereof.”

375. The CCrP (Articles 57 and 58) distinguishes between two types of expert witnesses: “experts” *proprio sensu* [*experty*] and “specialists” [*spetsialisty*]. Their role in the proceedings is sometimes similar, albeit not absolutely identical. Whereas the “experts” are often engaged in making complex forensic examinations prior to the trial (for example, dactyloscopic

examinations, or post-mortem examinations of corpses), a “specialist” is summoned to help the prosecution or court in handling technical equipment, examining an item of material evidence, understanding the results of “expert examinations”, assessing the methods employed by the “experts”, their qualifications, etc. Both can submit their reports to the court and/or testify in person. Under Article 57 of the CCrP, with further references, the right to commission an expert examination belongs to the investigator or to the trial court. The court may commission an expert examination on its own initiative or at the request of the parties. Under Article 47 § 4 (11) of the CCrP the accused has the right to study the order commissioning an expert examination, to put questions to the expert and to study the expert’s report.

376. Article 58 § 1 of the CCrP defines the functions of a “specialist” (in so far as relevant to the present case) as follows:

“A specialist is a person possessing special knowledge who is brought in to take part in the procedural actions ..., to assist in the discovery, securing and seizure of objects and documents ..., in the use of technical equipment ..., to put questions to the expert and also to explain to the parties and to the court matters which come within his or her professional competence”.

377. Article 58 § 2 of the CCrP sets out the rights enjoyed by the specialist in the proceedings, as well as his or her obligations. It refers to Articles 168 and 270 of the CCrP, which deal with summoning the specialist and the procedure for his or her participation in the criminal proceedings. Article 168, which refers to Article 164 § 5, deals with the specialist’s participation in investigative actions at the pre-trial investigation stage at the investigator’s request. Article 270 provides that the presiding judge at the trial should explain to the specialist his or her rights and responsibilities before questioning.

378. On 17 April 2017 Article 58 of the CCrP was supplemented by paragraph 2.1, which provides that the defence’s request to call a specialist for clarifications of issues that fall within his or her professional competence may not be refused, except for instances provided for in Article 71.

379. Article 71 of the CCrP states that a specialist, like an expert, may not take part in the proceedings if it is established that he or she is either incompetent or not impartial.

380. Article 47 § 4 (4) of the CCrP provides that the accused has the right to present evidence.

381. The CCrP recognises the defence’s right to collect evidence, albeit with certain limitations. Thus, Article 53 § 1 (2) of the Code provides that the defence lawyer has a right “to collect and submit evidence necessary for providing legal assistance, in accordance with Article 86 § 3 of the Code”. Amongst other powers of the defence lawyer, Article 53 § 1 (3) mentions “engaging a specialist in accordance with Article 58 of the Code”. However, it does not allow the defence to commission and produce “expert reports”.

382. The defence lawyer's right to obtain expert evidence is defined in section 6 § 3 (4) of Federal Law no. 63-FZ On Advocacy (2002):

“... 3. The advocate can ... (4) engage specialists on a freelance basis in order to obtain explanations on issues that are relevant for legal assistance”.

383. Article 271 § 4 of the CCrP stipulates that the court cannot refuse to hear a witness or a “specialist” who arrives at the court at the request of the parties.

384. Article 286 of the CCrP provides that the court may attach documents produced by the parties to the materials of the case-file.

**(c) Inadmissible evidence**

385. Under Article 75 of the CCrP, evidence obtained in breach of the provisions of the Code is inadmissible.

**(d) *Res judicata***

386. Under Article 90 of the CCrP, as in force at the material time, facts established in a final judgment in a criminal case or in a final judgment in a civil, commercial or administrative case, should be accepted by a court without further verification. However, such a judgment may not predetermine the guilt of persons who were not defendants in the previous criminal proceedings.

**C. Criminal Code**

387. Article 8 of the Criminal Code provides that the commission of a deed containing all the elements of a crime provided for by the Code constitutes a ground for criminal responsibility.

388. Article 158 of the Criminal Code provides that theft is the secret stealing of another's property. Footnote 1 to Article 158, as in force at the material time, provided that stealing meant the unlawful and uncompensated taking and/or appropriation of another's property to the benefit of the culprit or of other parties, thereby causing damage to the owner or to any other possessor of the property.

389. Article 160 § 4 of the Criminal Code, amended by Federal Law of 7 March 2011, as in force of the material time, provided that “misappropriation or embezzlement, that is, the stealing of other people's property entrusted to the culprit”, committed by an organised group and on a particularly large scale, was punishable by deprivation of liberty for a term of up to ten years with a fine of up to one million roubles or amounting to the culprit's wages or other income for a period of up to three years, or without such, and with restriction of liberty for a term of up to two years, or without such.

390. Article 174.1 § 3 of the Criminal Code, amended by Federal Law of 7 March 2011, as in force of the material time, provided that money laundering or laundering of other assets acquired by the culprit as a result of having committed an offence with a view to creating an appearance of lawful possession, usage and disposal of the said money or other assets, committed: (a) by a group acting in collusion; or (b) with abuse of office, was punishable by compulsory labour for a term of up to three years with restriction of liberty for a term of up to two years, or without such, and with a prohibition on holding particular posts or exercising a particular activity for a term of up to three years, or without such; or by deprivation of liberty for a term of up to five years with a fine of up to five hundred thousand roubles or amount to the culprit's wages or other income for a period of up to three years, or without such, and with a prohibition on holding particular posts or exercising a particular activity for a term of up to three years, or without such.

#### **D. Civil Code and Corporate Laws**

391. Articles 87-94 of the Civil Code constitute *lex generalis* and Federal Law no. 208-FZ on Joint-Stock Societies of 26 December 1995 constitutes *lex specialis* with regard to joint-stock companies.

392. Articles 96-104 of the Civil Code constitute *lex generalis* and Federal Law no. 14-FZ on Limited Liability Societies of 8 February 1998 constitutes *lex specialis* with regard to limited liability companies.

393. Article 103 of the Civil Code, as in force at the material time, governed the management of a joint-stock company. It provided, in particular, that the general meeting of shareholders was the highest management body of a joint-stock company, and its powers included the election of the members of the board of directors and the establishment of the company's executive bodies.

394. Under Article 153 of the Civil Code, transactions are defined as activities of natural and legal persons creating, altering and terminating their civil rights and obligations.

395. Under Article 166 § 1 a transaction may either be invalidated by a court (voidable transaction) or be null *ab initio* irrespective of a court decision (void transaction). Article 166 § 2, as in force at the material time, provided that the persons specified in the Civil Code could apply to a court in order to invalidate a voidable transaction. At the same time, any interested person could petition a court requesting that the consequences of declaring a transaction void be applied. The court could also apply such consequences on its own initiative.

396. Under Article 167 of the Civil Code, void transactions entail no legal consequences, apart from those relating to their invalidity, and are invalid from the moment they are conducted.

397. Article 179 § 1 of the Civil Code, as in force at the material time, provided that a transaction entered into under the effect of deceit, violence, threat or malicious concord of the representative of one party with the other party, as well as a transaction which the person has been forced to make on extremely unfavourable terms due to particular circumstances of which the other party has taken advantage, may be invalidated by a court upon a claim by the victim.

398. Under Article 209 § 1 of the Civil Code the owner has the rights of possession, use and disposal of his property. Under Article 209 § 2 the owner has the right to perform at his discretion with respect to his property any actions that do not contradict the law and do not violate the rights and lawful interests of other persons. This includes the transfer of his property into the ownership of other persons; transfer to them of the rights of possession, use and disposal of the property while remaining its owner; pledge of the property and imposing other encumbrances upon it, as well as disposal of the property in a different manner.

#### **E. Constitutional Court**

399. In Ruling no. 2-P of 14 February 2000 and Ruling no. 18-P of 8 December 2003 the Constitutional Court stated that each party must have an opportunity to present to the court its arguments in the case.

400. Ruling no. 135-O of the Constitutional Court of 24 March 2005 held as follows:

“The law on criminal procedure excludes the possibility of an arbitrary refusal by the official or the authority which conducts the preliminary investigation either to receive evidence requested by the defence or to adduce to the case file evidence presented by the defence. Within the meaning of the provisions of the law on criminal procedure, read in conjunction with Articles 45, 46 § 1, 50 § 2 and 123 § 3 of the Constitution, such a refusal is only possible when the item of evidence is not relevant to the criminal case under investigation and is not capable of corroborating whether the crime took place, the guilt or innocence of the accused, [or] other circumstances which must be established within the criminal proceedings; or when the item of evidence is inadmissible as not being in conformity with the law; or when the circumstances which, according to the parties’ motion, are to be corroborated by the evidence in question have already been established on the basis of a sufficient body of evidence, due to which examination of one further item of evidence would be excessive having regard to the principle of reasonableness. The decision taken in this regard must be reasoned by reference to particular arguments which corroborate the inadmissibility of the item of evidence that the defence has requested be obtained and examined.”

401. In Ruling no. 525-O-O of 21 October 2008 the Constitutional Court stated that a party which filed a motion to a State authority or a State official has the right to receive an adequate response to the motion. Should the motion be refused, such a decision must be lawful, well-founded and reasoned, in order to avoid arbitrariness... [This] applies equally to the

court's obligation to examine a request to summon for examination an expert who had provided a report at the preliminary examination stage.

402. In Ruling no. 576-O-P of 19 May 2009 the Constitutional Court held that, in accordance with Article 19 §§ 1 and 2 and Article 123 § 3 of the Constitution, court proceedings in the Russian Federation are adversarial in nature and are based on the principle of equality of the parties. This implies that parties to the proceedings are provided with equal procedural opportunities to defend their rights and lawful interests, including the possibility to file motions and appeal against the court's actions and decisions without any limitations or discrimination.

403. In Ruling no. 1037-O-O of 2 July 2009 the Constitutional Court pronounced on the complaint brought by the first applicant, who argued that Article 160 of the Criminal Code and footnote 1 to Article 158 of the Criminal Code enable the law-enforcement agencies to interpret "uncompensated" in a way that allows criminal charges to be brought in respect of the disposal of property by virtue of reciprocal civil-law transactions, in breach of constitutional rights, including the right to dispose of one's property as guaranteed by Article 35. The Constitutional Court stated that the contested provisions of the Criminal Code only provided for criminal responsibility in respect of a deed committed with intent and aimed at the theft of property. At the same time, the possibility of bringing criminal charges in respect of lawful civil-law transactions was excluded. It further noted that, insofar as the complainant sought to challenge the classification of the charges brought against him, this was to be examined within the criminal proceedings against him and fell outside the Constitutional Court's competence.

404. In his separate opinion to the above Ruling of 2 July 2009, Judge Kononov stated that the broad interpretation of "uncompensated" given by the Plenum of the Supreme Court in § 20 of Resolution no. 51 of 27 December 2007 (see paragraph 408 below), which extends to "partial compensation", corresponds neither to the meaning of the word "uncompensated", nor to the general principles of law prohibiting extensive interpretation of the provisions of criminal law. He further stated that freedom of contract does not presuppose any particular requirements with respect to the prices set by participants in civil-law transactions. Unequal exchange does not affect the validity of a transaction. Furthermore, "market price" is a relative concept, as corroborated by the fact that section 3 of the Federal Law on Valuation Activity provides for at least eight probabilistic and variable factors for assessing the market value of an object. Judge Kononov concluded that there was a real danger that the provisions of the Criminal Code contested by the first applicant would be applied in an arbitrary manner, due to their imprecise wording.

405. In Ruling no. 851-O-O of 21 June 2011 the Constitutional Court found that the provisions of Articles 160 and 174 § 1 of the Criminal Code

were not unforeseeable in such a way as to deprive a person of the possibility to realise that his actions were wrongful and to foresee potential liability for the commission thereof. The Constitutional Court noted, also, that the assessment as to whether the offences with which the complainant had been charged had been correctly qualified did not fall within its competence.

406. In Ruling no. 30-P of 21 December 2011 the Constitutional Court noted that the aim of a judicial decision having *res judicata* effect is to ensure its stability and to rule out possible conflicts between judicial decisions; it means that the facts established by a court in a particular case should be accepted by a different court in a different case, unless they are rebutted. It pointed out that, at the same time, the *res judicata* effect of an earlier decision does not predetermine the outcome in a given criminal case. Under Article 90 of the CCrP, the facts established by an earlier judicial decision are only binding on the court in respect of the individual against whom criminal charges were substantiated in the earlier decision.

#### **F. Supreme Court**

407. In Resolution no. 23 of 18 November 2004 on Judicial Practice in Cases on Unlawful Entrepreneurship and Legalisation (Laundering) of Monetary Assets or Other Property Acquired through Criminal Means, the Plenum of the Supreme Court stated, in particular:

“21. When delivering a guilty verdict under Article 174... or Article 174 § 1 of the Criminal Code... the court must establish that the person knowingly acquired the monetary assets or other property by criminal means or as a result of committing a crime.”

408. In Resolution no. 51 of 27 December 2007 on Judicial Practice in Cases on Swindling, Misappropriation and Embezzlement, the Plenum of the Supreme Court stated, in particular:

“18. Unlawful uncompensated appropriation of property, entrusted to a person, for his benefit or for the benefit of other persons, which caused damage to the owner or to another lawful possessor of the property, should be qualified by the courts as misappropriation or embezzlement, provided that the stolen property was in the lawful possession or under the lawful disposal of this person who, by virtue of his official position or office, agreement or special commission exercised functions related to the disposal, management, delivery, use or storage of another’s property.

In order to distinguish the offences of misappropriation or embezzlement from that of theft the courts must establish that the person actually held the above-mentioned powers...

19. When examining cases involving the offences set out in Article 160 of the Criminal Code the courts should take into account that misappropriation consists of uncompensated unlawful appropriation by a person of property entrusted to him, against the will of the owner and for the purpose of pecuniary gain.



Misappropriation is deemed to have been committed from the moment when the lawful possession of the property by that person became wrongful and the person began carrying out actions aimed at appropriation of the said property to his benefit (for example, from the moment when a person, by way of deceit, conceals that he has the property entrusted to him, or from the moment of failure to perform his duty to deposit the owner's monetary assets entrusted to him into a bank account).

[The courts should] qualify as embezzlement wrongful actions of a person who, for pecuniary gain, spent the assets entrusted to him by way of depletion thereof, expenditure or transfer to other parties against the owner's will.

Embezzlement is deemed to have been committed from the moment of wrongful spending of the entrusted property...

20. When examining the question whether the impugned act has the elements of the offence of misappropriation or embezzlement, the court should establish the circumstances which would corroborate that the person's intent included wrongful and uncompensated nature of the actions performed with the aim of appropriating the property to the person's benefit or to the benefit of other parties...

At the same time, the courts must take into account that partial compensation of the damage caused to the victim does not in itself constitute proof of the a of intent to misappropriate or embezzle the entrusted property.

...

22. The perpetrator of misappropriation or embezzlement can only be a person to whom the property was entrusted by a legal entity or a natural person on a lawful basis for a particular purpose or for a particular activity...

25. The evaluation of the property stolen as a result of swindling, misappropriation or embezzlement should be based on its actual value at the moment when the offence was committed. In the absence of information on the price of the stolen property its value may be established on the basis of expert reports.

When evaluating [the property stolen as a result of] swindling, misappropriation or embezzlement the courts should take into account that stealing with simultaneous replacement of the property by property of a lesser value should be qualified as stealing in the amount equal to the value of the [stolen] property.

...

28. ...When deciding on the person's guilt in committing swindling, misappropriation or embezzlement, the courts should take into account that the essential element of stealing is the person's pecuniary aim, that is, the will to take away and appropriate another's property to his own benefit or to dispose of it as if it were his own, including transfer thereof into the possession of third parties."

## **G. Visiting rights**

409. Under Article 89 § 1 of the Code of Execution of Sentences of 8 January 1997, as amended on 8 December 2003, convicted prisoners are entitled to short-term visits lasting for up to four hours and to long-term visits of up to three days, in the prison premises. A long-term visit takes place in a room in which privacy can be respected. In certain limited circumstances convicted prisoners may be authorised to have a long-term

visit of up to five days outside the prison premises. Long-term visits are provided for meeting a spouse, parents, children, parents- and children-in-law, siblings, grandparents, grandchildren and, with the authorisation of the prison governor, other persons.

410. Article 121 § 1(b) of the Code of Execution of Sentences, as amended on 8 December 2003, provides that prisoners who serve their sentence in correctional facilities operating under the general regime can have up to six short and four long visits per year.

411. Article 77.1 of the Code of Execution of Sentences, as amended on 8 December 2003, regulates the manner in which convicted prisoners may be involved in further investigative actions. Paragraph 1 establishes that they may be transferred to a remand prison for that purpose. Paragraph 3 specifies that they exercise their right to family visits in accordance with the provisions of the Pre-trial Detention Act. Section 18 of the Pre-trial Detention Act (Federal Law no. 103-FZ of 15 July 1995) provides as follows:

“Subject to written authorisation from the official or authority in charge of the criminal case, suspects and defendants may have no more than two visits per month from their family members and other persons, each visit lasting for up to three hours.

Visits from family members and other persons shall be supervised by an officer of the custodial facility; should there be an attempt to pass prohibited objects, substances or food, or to communicate information capable of preventing the truth from being established in the criminal proceedings or contributing to the commission of an offence, the visit will be cut short.”

## THE LAW

### I. JOINDER OF THE APPLICATIONS

412. The Court considers that, pursuant to Rule 42 § 1 of the Rules of Court, the applications should be joined, given their common factual and legal background.

### II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION (INDEPENDENT AND IMPARTIAL TRIBUNAL ESTABLISHED BY LAW)

413. The applicants complained under Article 6 § 1 of the Convention that the trial court was not independent and impartial, as demonstrated, in particular, by the statements of Ms Vassilyeva and others, and that it did not have territorial jurisdiction to hear the case. Article 6 § 1 of the Convention reads, insofar as relevant:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

## A. The parties' submissions

### 1. *Alleged lack of independence and impartiality of the trial court judge*

414. The Government raised the plea of non-exhaustion, pointing out that the applicants had not appealed against the Investigative Committee's decision of 20 June 2011 not to institute criminal proceedings. The Government further submitted that the trial court judgment in the applicants' case was drafted in accordance with the law, which was confirmed by the findings of the court examining the case on appeal (see paragraph 353 above). Furthermore, the Investigative Committee conducted a check into the applicant's allegations and found them to be unsubstantiated (see paragraphs 321-326 above). The Government also argued that in the absence of any proof that the trial court judgment had not been prepared by Judge Danilkin, the applicants' complaint was incompatible *ratione materiae* with the provisions of the Convention.

415. The applicants conceded that the domestic authorities had to a certain extent examined their allegations. They noted, however, that their allegations of Judge Danilkin's lack of impartiality were based not only on the statements made by Ms Vassilyeva and others, but also on his procedural decisions concerning the admissibility of evidence and examination of witnesses which, in the applicants' view, favoured the prosecution.

### 2. *Territorial jurisdiction*

416. The Government pointed out that both the first-instance court and the court of appeal had examined the issue of the trial court's territorial jurisdiction and found that the Khamovnicheskiy District Court had jurisdiction to hear the case. They also argued that the Court's findings in *Lebedev v. Russia (no. 2)* (dec.), § 229, no. 13772/05, 27 May 2010, and *Khodorkovskiy v. Russia (no. 2)* (dec.), no. 11082/06, 8 November 2011, should be likewise applicable in the present case. The Government further argued that the applicants' complaint was incompatible *ratione materiae* with the provisions of the Convention as the requirement of a “tribunal established by law” within the meaning of Article 6 § 1 only implies that it is independent from the executive and is regulated by law emanating from Parliament (see *Zand v. Austria*, no. 7360/76, Commission's report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80)

417. The applicants maintained that both the domestic courts and the Government had failed to address properly the argument raised by them in

challenging the territorial jurisdiction of the Khamovnicheskiy District Court, that is, the fact that the people mentioned in the charges brought against the applicants as their “accomplices” had been tried by different courts. They further averred that, should it be established that their case had not been tried by a court having territorial jurisdiction, this would amount to the court not being a “tribunal established by law”, in breach of Article 6 § 1 of the Convention.

## **B. Admissibility**

### *1. Alleged lack of independence and impartiality of the trial court judge*

418. The Court takes note of the plea of non-exhaustion raised by the Government. It notes, however, that in its decision of 20 June 2011 not to institute criminal proceedings the Investigative Committee explicitly stated that, in so far as the applicants’ complaint concerned their disagreement with the first-instance judgment, these issues could only be examined by the court of appeal and not by the investigating authorities (see paragraph 321 above). The Court observes that the present complaint is brought before it with regard to the independence and impartiality of the court which delivered the first-instance judgment in the applicants’ case. It further notes that the applicants raised the complaint before the court of appeal (see paragraph 319 above). Accordingly, it finds that the applicants had recourse to the effective domestic remedy and dismisses the Government’s objection.

419. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### *2. Territorial jurisdiction*

420. The Court reiterates that the expression “tribunal established by law”, contained in Article 6 § 1, reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols. “Law”, within the meaning of Article 6 § 1, comprises in particular the legislation on the establishment and competence of judicial organs (see, *inter alia*, *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002). Accordingly, if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not “established by law” within the meaning of Article 6 § 1 (see *Jorgic v. Germany*, no. 74613/01, § 64, ECHR 2007-III).

421. The Court further reiterates that, in principle, a violation of the said domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6 § 1. The Court is

therefore competent to examine whether the national law has been complied with in this respect. However, having regard to the general principle according to which it is in the first place for the national courts themselves to interpret the provisions of domestic law, the Court finds that it may not question their interpretation unless there has been a flagrant violation of domestic law (see, *mutatis mutandis*, *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 98 *in fine*, and *Lavents*, cited above, § 114). In this respect the Court also reiterates that Article 6 does not grant the defendant a right to choose the jurisdiction of a court. The Court's task is therefore limited to examining whether reasonable grounds existed for the authorities to establish jurisdiction (see *Jorgic*, cited above, § 65 with further references).

422. Turning to the present case, the Court considers that, given the specific character and complexity of the charges against the applicants, the choice of venue was not immediately obvious. It depended largely not only on the interpretation of the applicable domestic law, but also on the establishment of facts. In both respects the domestic courts were in a better position than this Court (see *Lebedev v. Russia (no. 2)* (dec.), cited above, § 229, and *Khodorkovskiy v. Russia (no. 2)* (dec.), cited above, § 3). The Court also notes that the Moscow City Court, acting as the court of appeal, unequivocally rejected the applicants' complaint in this respect and found that the Khamovnicheskiy District Court had jurisdiction to hear the case because the "most serious crime" imputed to the applicants was alleged to have been committed on the territory under the jurisdiction of the Khamovnicheskiy District Court (see paragraph 346 above). Finally, the applicants themselves did not specify which court should have had jurisdiction to hear their case. In such circumstances the Court would defer to the national courts and consider that the Khamovnicheskiy District Court was a court "established by law" under Article 6 § 1.

423. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

## C. Merits

### 1. General principles

424. The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 27). To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various

ways. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009).

425. As to the subjective test, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII). The Court has held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wettstein v. Switzerland*, no. 33958/96, § 43, ECHR 2000-XII). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, § 25, Series A no. 86).

426. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein*, cited above, § 44, and *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, Reports 1996-III).

427. The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test (see *Kyprianou*, cited above, § 121, and *Micallef*, cited above, § 97.). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar v. the United Kingdom*, 10 June 1996, § 38, *Reports of Judgments and Decisions* 1996-III, and *Micallef*, cited above, § 97).

428. In terms of the objective test, the conduct of the judges in a given case may be sufficient to ground legitimate and objectively justified apprehensions (as in *Buscemi v. Italy*, no. 29569/95, § 67, ECHR 1999-VI), but it may also be of such a nature as to raise an issue under the subjective test (see, for example, *Lavents*, cited above) and even disclose personal bias. In this context, therefore, whether a case falls to be dealt with under one test

or the other, or both, will depend on the particular facts of the contested conduct (see *Kyprianou*, cited above, § 121).

429. In this respect even appearances may be of a certain importance or, in other words, “justice must not only be done, it must also be seen to be done” (see *De Cubber*, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Micallef*, cited above, § 98).

## 2. *Application to the present case*

430. The Court takes note of the applicants’ submission to the effect that their complaint concerning Judge Danilkin’s alleged bias is based not only on the information published in the media after the trial, but also on his procedural decisions during the trial. The Court observes that, while many procedural decisions taken by Judge Danilkin were indeed unfavourable to the defence, this is conceivable without the judge being biased against the defendants. To overcome the presumption of impartiality (see paragraph 425 above), which is a starting point for its analysis under the subjective test, the Court must have stronger evidence of personal bias than a series of procedural decisions unfavourable to the defence. The Court reiterates that it may not necessarily agree with all of the decisions taken by Judge Danilkin, and will scrutinise them in more detail below; however, there was nothing in them to reveal any particular predisposition against the applicants (see *Miminoshvili v. Russia*, no. 20197/03, § 114, 28 June 2011, and *Khodorkovskiy and Lebedev*, cited above, § 540).

431. The Court notes that after the applicants’ trial several interviews appeared in the media containing allegations as to Judge Danilkin’s lack of independence and impartiality. In particular, Ms Vassilyeva, assistant to Judge Danilkin and subsequently press officer of the Khamovnicheskiy District Court, Mr Kravchenko, another former employee of the Khamovnicheskiy District Court, and Ms D.S. made statements to the effect that Judge Danilkin had not prepared the judgment in the applicants’ case independently, but either he had drafted it under instructions from the Moscow City Court or the entire judgment had been prepared in the Moscow City Court, and Judge Danilkin had merely pronounced it.

432. The Court further notes that the applicants raised the complaint concerning Judge Danilkin’s alleged lack of independence and impartiality on appeal, and the Moscow City Court dismissed it as unsubstantiated (see paragraph 353 above). It also notes that the applicants sought to institute criminal proceedings in this respect, and that after having conducted a check which included questioning Judge Danilkin, Ms Vassilyeva, Mr Kravchenko and Ms D.S., the Investigative Committee refused to institute criminal proceedings, having found the applicants’ allegations to be unsubstantiated (see paragraphs 321 to 326 above). During the questioning, Judge Danilkin denied any contacts with the Moscow City Court with

regard to the applicants' case; Ms Vassilyeva submitted that she did not know any details concerning the drafting of the judgment in the applicants' case and had no evidence of Judge Danilkin's undue contacts with the Moscow City Court in this regard; Mr Kravchenko submitted that his statement had been misrepresented by the journalist who had interviewed him, which was corroborated by the audio recording of Mr Kravchenko's interview; for her part, Ms S.D. confirmed her previous statement to the media that on a certain day between 15 October and early November 2010 she had overheard the telephone conversation of a woman in a prosecutor's uniform, who had said to her interlocutor that "the judgment has not been brought from the Moscow City Court yet".

433. The Court observes that the applicants' allegations as to Judge Danilkin's lack of independence and impartiality in drafting the judgment in their case thus rest on a statement by an identified woman, made in the course of a conversation with an unidentified interlocutor, which happened to have been overheard by Ms S.D. The Court considers this to constitute insufficient evidence to overcome the presumption of personal impartiality of a judge (see paragraph 425 above). Accordingly, the Court dismisses the applicants' allegations under the subjective test.

434. The Court further observes that, while the applicants alleged that Judge Danilkin had been unduly influenced by the Moscow City Court, their allegations did not go beyond the conduct of a particular judge and did not involve allegations of a lack of judicial impartiality that is functional in nature, such as hierarchical links with another person involved in the proceedings (*cf. Miller and Others v. the United Kingdom*, nos. 45825/99 and 2 others, §§ 29-31, 26 October 2004). Having regard to the material before it, the Court finds no appearance of a lack of independence and impartiality under the objective test either.

435. In sum, the Court concludes that there was no violation of Article 6 § 1 of the Convention on account of the conduct of the trial court judge.

### III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION (FAIR HEARING)

436. The applicants complained under Article 6 §§ 1, 2 and 3 of the Convention that their trial as a whole had been unfair. In particular, they complained that (i) they could not have confidential contacts with their lawyers during the trial; (ii) the taking and examination of evidence had been unfair and contrary to the principle of equality of arms: in particular, the applicants had been unable to cross-examine most of the expert witnesses for the prosecution; the court had permitted the prosecution to rely on their expert evidence but dismissed all but one request by the defence to allow their experts to testify or present their written opinions; the court had failed to summon witnesses for the defence, to secure forced



attendance of a number of witnesses or to obtain their questioning by video-conference or through letters rogatory; the court had refused to add exculpatory material to the case file or to order disclosure of exculpatory material or “source materials” in general; the applicants’ conviction was based on judgments in other related cases in which the applicants had not been defendants; and the court had refused to exclude inadmissible evidence for the prosecution, including evidence obtained in breach of lawyer-client confidentiality.

Article 6 of the Convention reads, insofar as relevant:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...”

## **A. The parties’ submissions**

### *1. Confidentiality of the lawyer-client contacts*

437. The Government submitted that the applicants’ right to legal assistance had been respected. In particular, each day when the applicants were brought to the courthouse they had about an hour and a half to discuss the case with their counsel. After the hearings they also had until 10 p.m. to communicate with their lawyers. Between the hearings the applicants could communicate with their counsel either in the hearing room or in the remand prison. Thus, no restrictions had been imposed on either the duration or the confidentiality of the applicants’ contacts with their lawyers.

438. According to the Government, during the hearings the court did not prevent the applicants’ counsel from showing them drafts of procedural documents or written pieces of evidence. However, the lawyers had first to submit any such document to the judge so that he could establish its relevance to the proceedings.

439. As regards the incident of 7 February 2007 at Moscow Domodedovo Airport (see paragraph 55 above), the Government argued that the screening of the applicants’ lawyers’ papers at the airport had been lawful and constituted a routine pre-flight security check of passengers. Furthermore, it did not affect the overall fairness of the criminal proceedings against the applicants.

440. The applicants maintained that they were unable to have confidential contacts with their lawyers, either in the remand prison on account of a CCTV camera in the room, or in the courtroom. They further pointed out that the Government had conceded that the confidentiality of lawyer-client communication had not been respected, since at the hearings their counsel had had to submit each written piece of evidence to the judge in order that the latter would authorise its being handed over to the applicants, depending on its perceived relevance to the proceedings.

441. As regards the incident of 7 February 2007 at Moscow Domodedovo Airport, the applicants contended that the search of their lawyers' papers went far beyond the routine pre-flight security check. They argued that legally privileged papers had been meticulously checked and video-recorded during the search, and that the person overseeing the screening had produced the badge of a Senior Investigator for Particularly Important Cases, which further proved that the search had been directly linked to the criminal proceedings against them.

## *2. Adversarial proceedings and examination of witnesses*

### **(a) The Government's submissions**

442. The Government, relying on Articles 19, 45, 46, 50 and 123 of the Constitution, Article 47 of the CCrP and Ruling no. 576-O-P of the Constitutional Court of 19 May 2009, maintained that criminal judicial proceedings in Russia are adversarial and are based on the principle of equality of parties.

443. According to the Government, the criminal proceedings against the applicants were fully in compliance with the domestic law. The applicants could participate in all court hearings where they had an opportunity to present their arguments to the court. Their right to question defence and prosecution witnesses and to rebut statements by victims and witnesses that were unfavourable to them was not limited in any way. The court examined all the evidence presented by the parties and assessed it from the point of view of admissibility, relevance, truthfulness and accuracy. Furthermore, the court ruled on all the motions filed by the parties. The lawfulness of the judgment was confirmed by the courts of higher instance.

444. In particular, as regards expert reports, specialists' reports and the questioning of experts and specialists, the Government referred to Articles 45 § 2, 46 § 1 and 50 § 2 of the Constitution, Articles 47, 53 § 3, 74, 80 § 3, 86 §§ 2 and 3, 195, 205, 206, 207, 217 § 4, 220 § 4, 271 and 283 and Constitutional Court Rulings no. 2-P of 14 February 2000, no. 18-P of 8 December 2003, no. 135-O of 24 March 2005 and no. 525-O-O of 21 October 2008.

445. According to the Government, the applicants were familiarised with the orders for expert examinations in due time and it was open to them

to put additional questions to the experts, to move for particular experts be appointed or to request that the expert examination be conducted in a particular place. However, they did not exercise these procedural rights in the course of the preliminary investigation. At the trial stage the defence requested that certain experts be questioned at the hearing and that specialists' reports be adduced to the materials of the case. The court examined those motions and refused them on valid grounds. As for the defence's arguments concerning the inadmissibility of certain expert reports, these were also examined and dismissed by the court for the reasons stated in the judgment in the applicants' case, upheld by the appellate court.

446. As regards witnesses living abroad, the Government submitted that an accused's counsel may question witnesses, including persons who do not have the status of "witness" in the criminal proceedings. The counsel may then petition either the investigator or the court, depending on the stage of the proceedings, to adduce the record of the questioning to the case materials. The investigator or the court must then examine the request. However, even if the record of the questioning is adduced to the case materials, this does not replace the questioning of the witness at the court hearing.

447. They further submitted that although domestic legislation provided for the possibility of questioning a witness by means of video-conferencing, this did not apply to witnesses living abroad. However, such a witness might be invited to participate in investigative measures taken on the Russian territory. Accordingly, when refusing the applicants' motion to request foreign authorities to question certain witnesses, the domestic court noted that such witnesses could be questioned at the hearing were they to appear before it.

448. The Government further noted that the statements made at the pre-trial investigation by 34 witnesses, questioned at the hearing, were subsequently read out to the court, because of significant contradictions between their pre-trial statements and those made before the court (in 17 instances) or because of the incompleteness of the statements made in court, attributed to the time that had elapsed since the events in question (in another 17 instances). Accordingly, those statements were read out in order to ensure a complete and comprehensive examination of the case by the court.

449. As regards the applicants' requests to obtain certain written evidence that was in the possession of third parties and obtained by the GPO in the course of the searches conducted in 2003, the Government submitted that they had been refused by the court as irrelevant or unfounded.

450. The Government pointed out that, according to the Court's case-law, the admissibility of evidence is primarily a matter for regulation by national law (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports* 1997-III) and that, as a general rule, it is for the national

courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce (see *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). They argued, with reference to *Engel and Others v. the Netherlands* (8 June 1976, § 91, Series A no. 22) and *Perna v. Italy* [GC] (no. 48898/99, § 29, ECHR 2003-V) that it is for the accused seeking to question witnesses or to adduce a piece of evidence to corroborate the relevance thereof.

451. The Government averred that in the case at hand all the motions filed by the defence to exclude or adduce certain evidence had been duly examined by the domestic courts with regard to the admissibility and relevance of the evidence in question. Some of the motions were granted. At the same time, the fact that many motions were refused did not as such affect the fairness of the proceedings. Firstly, the domestic courts enjoy wide discretion with respect to assessment of evidence. Secondly, the defence could exercise all its procedural rights. Thirdly, the applicants failed to demonstrate, either to the domestic court or to the Court, that the evidence they thought to adduce was absolutely necessary for the adjudication of the case.

452. With regard to the applicants' complaint concerning the trial court's reliance on judgments in other criminal cases in which the applicants had not been defendants, the Government referred to the Constitutional Court's Ruling no. 30-P of 21 December 2011. They argued that the trial court duly applied the *res judicata* effect of the earlier judicial decisions, since the facts established therein were not rebutted in the criminal proceedings against the applicants. Furthermore, such facts, taken alone, were not sufficient to prove the applicants' guilt, whereas the trial court reached its decision on the basis of the entire body of evidence in the case.

**(b) The applicants' submissions**

453. The applicants maintained their complaint that the way in which the evidence had been taken in the trial had been unfair and incompatible with Article 6 § 1. They claimed that there had been a significant disparity between the defence and the prosecution, attaining the level of a breach of the principle of equality of arms. In particular, the trial court: (i) refused to call most of the prosecution witnesses to be cross-examined at the trial; (ii) refused to allow the defence to rely on evidence provided by the specialists solicited by the defence; (iii) refused to adduce to the case material a significant body of exculpatory evidence; (iv) refused defence motions for disclosure; and (v) refused to exclude inadmissible evidence.

454. With regard to the Government's references to the provisions of domestic law guaranteeing equality of arms in criminal proceedings, the applicants contended that the Government had failed to show that these had been applied in the case at hand. They pointed out, in particular, that the defence was able to question only one witness for the prosecution, Mr Shk.

(see paragraph 158 above), who, according to the applicants, confirmed the falsified nature of the charges against them. In their view, this obliged the prosecution, who enjoyed the support of the court, to avoid a situation whereby the defence could examine any other experts at the hearing. Furthermore, the trial court refused to adduce all of the specialist reports submitted by the defence and only allowed them to question one specialist, Mr Haun.

455. The applicants further contested the Government's assertion that they had been familiarised with the orders for expert examinations in due time and could have put additional questions to the experts or request that particular experts be appointed but had not exercised these procedural rights. They pointed out that they had only been made aware of the orders for expert examinations in 2006, whereas a number of expert reports had already been prepared since 2000 in a different criminal case against them. Therefore, they had had no real possibility either to participate in the preparation of the reports or to challenge them, as had been the situation in *Khodorkovskiy and Lebedev v. Russia* (cited above, §§ 680 and 711-16). At the same time, the trial court refused the defence's motion to examine the underlying source materials at the hearing and to declare the reports inadmissible evidence. Furthermore, it refused the defence's motion to examine the prosecution's experts at the hearing (see paragraphs 170-178 above).

456. In the applicants' view, the trial court refused, under contrived pretexts, their motions to have certain evidence adduced, and only allowed one defence specialist to be examined at the hearing, although he was later found "incompetent" by the same court and his report had not been adduced to the materials of the case (see paragraph 199 above). The applicants believed that the only reason why Mr Haun had been questioned at the hearing at all was because he had been the first specialist called by the defence, and the prosecution had not yet been ready to object. However, after Mr Haun's statement in support of the defence, the prosecution strongly objected to the questioning of each specialist called by the defence, with the trial court invariably supporting the prosecution.

457. The applicants further pointed out that, whereas they had asked the trial court to obtain witness statements from a number of important witnesses living abroad, the court had refused such requests, merely stating that there were "no legal grounds" for granting them. They further argued that the court arbitrarily refused to adduce to the materials of the case affidavits pertaining to questioning of certain witnesses by the applicants' counsel, as adducing them would be compatible with the domestic law (see paragraphs 241-251 above). They also contested the Government's submission that the possibility to question a witness by means of a video-conference did not apply to witnesses living abroad. In their view, there was no such prohibition in the domestic law.

458. As regards the reading out of pre-trial statement by the witnesses questioned at the hearing (see paragraphs 200-201 above), the applicants argued that this had been in breach of the domestic law, which only allowed for such statements to be read out in the event of significant inconsistencies between previously given testimony and the testimony given in court, which had not been the case. In their view, this served to demonstrate the trial court's bias.

459. As for the applicants' requests to obtain certain written evidence that was in the possession of third parties and had been obtained by the GPO in the course of the searches conducted in 2003, the applicants argued that the documents they had sought to obtain included an inventory of the assets and liabilities of Yukos subsidiaries for the period 1998-2006, as well as copies of all stock sheets, collation statements and stocktaking reports. When filing the motions for disclosure the defence made it clear that these documents demonstrated that the entities allegedly "injured by the theft of the oil" had in fact suffered no damage during the relevant period and that there had been no theft of any of their property. The documents thus went to the heart of the case, but the trial court refused the motions for disclosure as "ill-founded".

460. Finally, as regards the trial court's reliance on a number of judgments in other related cases in which the applicants had not been defendants, they insisted that this constituted a breach of their rights guaranteed by Article 6.

### **B. Admissibility**

461. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### **C. Merits**

462. The Court notes that the applicants raised two distinct issues relying on specific guarantees of Article 6 § 3 of the Convention as well as on the general right to a fair hearing provided for by Article 6 § 1 of the Convention. As the requirements of Article 6 § 3 of the Convention are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention (see, among many other authorities, *Van Mechelen and Others*, cited above, § 49), the Court will examine each of these complaints under those two provisions taken together.

### 1. Confidentiality of lawyer-client contacts

#### (a) General principles

463. The Court reiterates that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, as guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz v. Turkey* [GC], no. 36391/02, § 51, ECHR 2008, and *Dvorski v. Croatia* [GC], no. 25703/11, § 76, ECHR 2015).

464. The Court reiterates that an accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society; otherwise legal assistance would lose much of its usefulness (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 97, 2 November 2010, with further references). It further stresses that a measure of confinement in the courtroom may affect the fairness of a hearing guaranteed by Article 6 of the Convention; in particular it may have an impact on the exercise of an accused's rights to participate effectively in the proceedings and to receive practical and effective legal assistance (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 134, ECHR 2014 (extracts), and the cases cited therein).

#### (b) Application of these principles to the present case

465. The Court notes that all the documents which the defence lawyers wished to show to their clients had first to be reviewed by the judge (see paragraph 76 above) who, according to the Government, would establish their relevance to the case (see paragraph 438 above).

466. The Court observes that, in similar circumstances, it has found a violation of Article 6 §§ 1 and 3 (c) on account of interference with the secrecy of the applicants' communications with their lawyers by virtue of a rule, set by the trial court's judge, whereby all written materials had to be checked by a judge before being passed to the applicants (see *Khodorkovskiy and Lebedev v. Russia*, cited above, §§ 642-49).

467. The Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

468. The Court further notes that during the trial the applicants were held in a glass dock (see paragraphs 75-76 above). The Court is mindful of the security issues a criminal court hearing may involve, especially in a large-scale or sensitive case. It has previously emphasised the importance of courtroom order for a sober judicial examination, a prerequisite of a fair hearing (see *Ramishvili and Kokhreidze v. Georgia*, no. 1704/06, § 131, 27 January 2009). However, given the importance attached to the rights of the defence, any measures restricting the defendant's participation in the

proceedings or imposing limitations on his or her relations with lawyers should only be imposed in so far as is necessary, and should be proportionate to the risks in a specific case (see *Van Mechelen and Others*, cited above, § 58; *Sakhnovskiy*, cited above, § 102; and *Yaroslav Belousov v. Russia*, nos. 2653/13 and 60980/14, § 150, 4 October 2016).

469. In the present case, the applicants were separated from the rest of the hearing room by glass, a physical barrier which to some extent reduced their direct involvement in the hearing. Moreover, that arrangement made it impossible for the applicants to have confidential exchanges with their legal counsel, as they were physically removed from them, and any conversations between the applicants and their lawyers would be overheard by the guards in the courtroom.

470. The Court considers that it is incumbent on the domestic courts to choose the most appropriate security arrangement for a given case, taking into account the interests of the administration of justice, the appearance of the proceedings as fair, and the presumption of innocence; they must at the same time secure the rights of the accused to participate effectively in the proceedings and to receive practical and effective legal assistance (see *Yaroslav Belousov*, cited above, § 152, and *Maria Alekhina and Others v. Russia*, no. 38004/12, § 171, 17 July 2018). In the present case, the use of the security installation was not warranted by any specific security risks or courtroom order issues but was a matter of routine. The trial court did not seem to recognise the impact of the courtroom arrangements on the applicants' defence rights and did not take any measures to compensate for those limitations. Such circumstances prevailed for the duration of the first-instance hearing, which lasted over one year and ten months, and must have adversely affected the fairness of the proceedings as a whole.

471. It follows that the applicants' rights to participate effectively in the trial court proceedings and to receive practical and effective legal assistance were restricted and that those restrictions were neither necessary nor proportionate, in breach of Article 6 §§ 1 and 3 (c) of the Convention.

472. In view of that finding, the Court does not consider it necessary to address the other aspects of the applicants' complaint under Article 6 §§ 1 and 3 (c) of the Convention.

## 2. *Adversarial proceedings and examination of witnesses*

### (a) **General principles**

473. The Court reiterates that the key principle governing the application of Article 6 is fairness. The right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 § 1 of the Convention restrictively (see *Moreira de Azevedo v. Portugal*, 23 October 1990, § 66, Series A no. 189, and *Gregatčević v. Croatia*, no. 58331/09, § 49, 10 July 2012).



474. The Court reiterates that the presumption of innocence enshrined in Article 6 § 2 of the Convention and the guarantees relating to the examination of witnesses set out in Article 6 § 3 (d) of the Convention are elements of the right to a fair hearing set forth in Article 6 § 1 of the Convention and must be taken into account in any assessment of the fairness of proceedings as a whole (see *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports* 1996-II; *Gäfgen v. Germany* [GC], no. 22978/05, §§ 162 and 175, ECHR 2010; *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011; *Khodorkovskiy and Lebedev*, cited above, § 743; and *Karaman v. Germany*, no. 17103/10, §§ 42-43, 27 February 2014).

475. The Court further reiterates that as a general rule, Article 6 §§ 1 and 3 (d) requires that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Al-Khawaja and Tahery*, cited above, § 118; and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07, 32786/10 and 34278/10, § 81, 12 May 2016).

476. The term “witnesses” under Article 6 § 3 (d) of the Convention has an autonomous meaning which also includes expert witnesses (see *Gregačević*, cited above, § 67, and *Constantinides v. Greece*, no. 76438/12, §§ 37-38, 6 October 2016). However, the role of expert witnesses can be distinguished from that of an eye-witness who must give to the court his personal recollection of a particular event (see *Khodorkovskiy and Lebedev*, cited above, § 711). In analysing whether the personal appearance of an expert at the trial was necessary, the Court will therefore be primarily guided by the principles enshrined in the concept of a “fair trial” under Article 6 § 1 of the Convention, and in particular by the guarantees of “adversarial proceedings” and “equality of arms”. That being said, some of the Court’s approaches to the personal examination of “witnesses” under Article 6 § 3 (d) are no doubt relevant in the context of examination of expert evidence and may be applied, *mutatis mutandis*, with due regard to the difference in their status and role (see *Bönisch v. Austria*, 6 May 1985, § 29, Series A no. 92, with further references, and *Matytsina v. Russia*, no. 58428/10, § 168, 27 March 2014).

477. The Court reiterates that the principle of equality of arms implies that the applicant must be “afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent” (see *Bulut v. Austria*, judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-II, § 47). The concept of “equality of arms” does not, however, exhaust the content of paragraph 3 (d) of Article 6, nor that of paragraph 1, of which this phrase represents one application among many others. The Court’s task under the Convention is not to give a ruling as to whether witness statements were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in

which evidence was taken, were fair (see, among many other authorities, *Vidal*, cited above, § 33, and *Van Mechelen and Others*, cited above, § 50).

478. The admissibility of evidence is primarily a matter for regulation by national law (see *Perna*, cited above, § 29). Furthermore, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses (see *Vidal*, cited above, § 33, Series A no. 235-B); it does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter (see, among other authorities, *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 139, 18 December 2018, *Engel and Others*, cited above, § 91, and *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89).

479. It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth (see *Murtazaliyeva*, cited above, § 158, *Engel and Others*, cited above, § 91, and *Perna*, cited above, § 29). In respect of witnesses on behalf of the accused, only exceptional circumstances could lead the Court to conclude that a refusal to hear such witnesses violated Article 6 of the Convention (see *Bricmont*, cited above, § 89, and *Dorokhov v. Russia*, no. 66802/01, § 65, 14 February 2008).

**(b) Application of these principles to the present case**

480. The Court notes that the applicants' complaints concerning the taking and examination of evidence and breach of the principles of equality of arms and presumption of innocence in the proceedings may be divided into six groups. First, the applicants maintained that they had been unable to cross-examine most of the expert witnesses for the prosecution. Second, they complained that the court had permitted the prosecution to rely on their expert evidence but dismissed all but one request by the defence to allow their experts to testify or present their written opinions. Third, they argued that the court had failed to summon witnesses for the defence, to secure forced attendance of a number of witnesses or to obtain their questioning by video-conference or through letters rogatory. Fourth, the applicants complained that the court had refused to add exculpatory material to the case file or to order disclosure of exculpatory material or "source materials" in general. Fifth, they complained about the trial court having relied on judgments in other criminal cases. Sixth, the applicants claimed that the court had refused to exclude inadmissible evidence for the prosecution, including evidence obtained in breach of lawyer-client confidentiality. The Court will address the applicants' complaints in the above order.

*i. Inability of the defence to cross-examine witnesses for the prosecution*

481. The Court observes that on 27 December 2010 the Khamovnicheskiy District Court of Moscow found the applicants guilty of misappropriation and money laundering on the basis of, *inter alia*, a number of expert reports (see paragraph 290 above). The expert reports concerned, in particular, the consistency of the balance sheets of Yukos subsidiaries, distribution of profit by certain Yukos subsidiaries to foreign trading companies and the quantity of oil purchased by Yukos and its trading companies from the production entities (see paragraphs 159-169 above). The applicants asked that the experts Mr Yeloyan, Mr Kupriyanov, Mr Chernikov and Mr Migal, who prepared the above reports, be summoned before the trial court so that they could be questioned about their conclusions. However, the trial court dismissed the requests, finding that it was unnecessary to call in these experts (see paragraphs 170-178 above).

482. As the Court has held on many occasions, one of the requirements of a fair trial is the possibility for the accused to confront the witnesses in the presence of the judge who must ultimately decide the case, because the judge's observations on the demeanour and credibility of a certain witness may have consequences for the accused (see *Hanu v. Romania*, no. 10890/04, § 40, 4 June 2013 with further references). The same also applies to expert witnesses (see *Gregičević*, cited above, § 67, and *Constantinides*, cited above, § 39): it is the Court's well-established case-law that the defence must have the right to study and challenge not only an expert report as such, but also the credibility of those who prepared it, by direct questioning (see, among other authorities, *Brandstetter v. Austria*, 28 August 1991, § 42, Series A no. 211; *Doorson*, cited above, §§ 81-82; *Mirilashvili v. Russia*, no. 6293/04, § 158, 11 December 2008; and *Matytsina v. Russia*, cited above, § 177).

483. In the present case, the applicants clearly indicated to the trial court that they wished to have the expert witnesses examined before the court in order to clarify a number of issues that required specialist knowledge, and to ascertain the experts' credibility (see paragraphs 170-178 above). For the Court, this request was sufficiently clearly formulated to explain why it was important for the applicants to hear the witnesses concerned. The trial court dismissed the applicants' request, finding that it was not necessary to call in the expert witnesses.

484. The Court reiterates that if the prosecution decides that a particular person is a relevant source of information and relies on his or her testimony at the trial, and if the testimony of that witness is used by the court to support a guilty verdict, it must be presumed that his or her personal appearance and questioning are necessary, unless the testimony of that witness is manifestly irrelevant or redundant (see *Khodorkovskiy and Lebedev*, cited above, § 712). The Court finds that the expert reports in question were of significant relevance for the case as part of the body of

evidence relied on by the domestic courts in finding the applicants guilty of the offences with which they were charged. Furthermore, the applicants never had the possibility to confront these expert witnesses and to challenge their opinions during the investigation phase (see, by contrast, *Kashlev v. Estonia*, no. 22574/08, § 47, 26 April 2016). By failing to call the expert witnesses and to examine them during the trial, the trial court was basing its conclusions on expert witness evidence which was never examined during the hearing (see *Avagyan v. Armenia*, no. 1837/10, § 46, 22 November 2018).

485. In these circumstances, the omission of the Khamovnicheskiy District Court to hear in person the expert witnesses whose reports were later used against the applicants was capable of substantially affecting their fair-trial rights, in particular the guarantees for “adversarial proceedings” and “equality of arms”. There has accordingly been a breach of Article 6 §§ 1 and 3 (d) of the Convention.

*ii. Expert evidence proposed by the defence but not admitted by the court*

486. The next aspect of the case the Court must address is the non-admission of expert evidence, written and oral, proposed by the defence for examination at the trial. The Court refers to “expert evidence” in the broad sense, i.e. as including sources of information which did not describe particular facts of the case but instead provided scientific, technical, financial and other analysis of those facts.

487. The Court reiterates that where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial (see *S.N. v. Sweden*, no. 34209/96, § 44, ECHR 2002-V, with further references to *Bricmont*, cited above, § 89, and *Hodžić v. Croatia*, no. 28932/14, §§ 61-62, 4 April 2019).

488. The Court notes that the applicants requested that nine expert witnesses be questioned at the trial. Each expert witness had prepared a report that was ready to be submitted to the court (see paragraphs 202-215 above). It further notes that the trial court refused to hear eight out of the nine expert witnesses. In particular, it refused to hear Mr Dages, an expert in finance and economic analysis, on the ground, *inter alia*, that he had no knowledge of Russian corporate law and only superficial knowledge of the Russian accounting system (see paragraph 205 above). The trial court also refused to hear Mr Delyagin, an economics expert with expertise in the pricing of oil and oil products, on the ground, *inter alia*, that he was not impartial as followed from his public comments in the media on the case.

489. The Court observes that under Article 71 of the CCrP, a specialist may not take part in the proceedings should it be established that he or she is either incompetent or not impartial (see paragraph 379 above). It further

reiterates that it is for the domestic courts to decide whether it is necessary to accept evidence proposed by the defence for examination at the trial (see paragraph 487 above). Accordingly, the Court finds that it was within the trial court's discretion to reach conclusions on the incompetence and lack of impartiality of the expert witnesses proposed by the defence.

490. The Court further notes that the trial court refused to hear professor Lopashenko, a legal expert in the area of organised and economic crimes, on the ground that questions related to the interpretation of criminal law fell within the exclusive competence of the court (see paragraph 209 above).

491. The Court has previously accepted that legal matters are normally within the judge's competence and experience (*iura novit curia*), and it is for the judge to decide whether or not he needs assistance in a particular field of law (see *Khodorkovskiy and Lebedev*, cited above, § 722). Accordingly, in the Court's opinion, the refusal of the trial court to hear the expert witness in question remained within its discretion.

492. The Court notes that the trial court also refused to hear professor Rossinskaya, a forensic scientist, professor Savitskiy, an expert in accounting, credit, finance and evaluation activities, Mr Romanelli, an expert in investment banking, and Ms Harding, a forensic economic analyst. The court justified its refusal by a mere reference to the fact that none of these expert witnesses had been involved in the proceedings as a "specialist" and had not studied the materials of the case, which led the court to doubt their competence as "specialists" capable of assisting with the examination of the criminal case (see paragraphs 211, 213 and 215 above).

493. In this regard, the Court first notes that the domestic law distinguished between "experts" *proprio sensu*, who can be commissioned to conduct an expert examination by either the investigator or the trial court, and "specialists", who can be also engaged by the defence (see paragraphs 376 and 381 above). The Court observes that, following the trial court's logic above, the defence could not obtain questioning at the hearing of any expert witnesses who had not participated in the proceedings as "specialists" from the preliminary investigation stage.

494. The Court observes that the prosecution in the present case tried to prove certain particular points by obtaining expert reports and submitting them to the court. The reports were obtained within the preliminary investigation, i.e. not in adversarial proceedings, and, in this case, without any participation by the defence. Thus, the defence was unable to formulate questions to the experts, challenge the experts or propose their own experts for inclusion in the team, etc. The trial court admitted those reports in evidence because, under the CCrP, the prosecution was entitled to collect them.

495. The defence, on the other hand, had no such right since, as mentioned above, under the CCrP only the prosecution or the courts were entitled to obtain "expert reports". In theory the defence could challenge an

expert report produced by the prosecution and ask the court to commission a fresh expert examination. However, to obtain such a fresh examination it was incumbent on the defence to persuade the court that the report produced by the prosecution was incomplete or deficient (see *Khodorkovskiy and Lebedev*, cited above, § 730). The Court notes that the defence was unable to call any of the experts who had prepared the reports at the request of the prosecution and to question with a view to casting doubt on their credibility. That fact has given rise to a separate finding of a violation under Article 6 §§ 1 and 3 (d) (see paragraph 485 above). Accordingly, the trial court's restrictive interpretation of the CCrP, which prevented the defence from calling "specialist" witnesses unless they had participated as such in the preliminary investigation, left the defence with no possibility to rebut the conclusions reached in the expert reports relied upon by the prosecution. It thus led to a disproportionate limitation of the right of the defence to present evidence.

496. The Court further notes that in its refusal of the applicants' motion to hear Professor Rossinskaya and Associate Professor Savitskiy in relation to expert report no. 8/17 of 2 February 2009 (see paragraph 164 above), the trial court also stated that it was not within a "specialist's" competence to assess an expert report (see paragraph 211 above). Such a statement is tantamount to a general refusal to accept any "specialist" evidence aimed at the rebuttal of an expert report, which, in the Court's view, is incompatible with the principle of equality of arms (see paragraph 477 above).

497. The Court also notes that, while the trial court granted the applicants' motion to hear expert witness Mr Haun, it nevertheless refused to adduce his expert opinion on the issue in relation to which he was heard at the hearing, again on the grounds that Mr Haun did not have the procedural status of the "specialist" in the case (see paragraph 202 above). In the Court's view, not only was the trial court's approach to handling the evidence provided by Mr Haun self-contradictory, but it disproportionately limited the right of the defence to present evidence, for the reasons stated in the preceding paragraphs.

498. Finally, the Court observes that on 17 April 2017 Article 58 of the CCrP was amended. Under new paragraph 2.1, a request by the defence to have summoned a "specialist" for clarifications may not be refused, except where the "specialist's" incompetence or impartiality is established (see paragraph 378 above). While the Court finds this a welcome development, it notes that it has no bearing on the criminal proceedings against the applicants, which had taken place several years before the amendment was enacted.

499. Having regard to the foregoing, the Court concludes that the CCrP, as in force at the material time and as interpreted by the Khamovnicheskiy District Court, created an imbalance between the defence and the prosecution in the area of collecting and adducing "expert evidence", thus

breaching the principle of equality of arms between the parties (see *Khodorkovskiy and Lebedev*, cited above, § 735). There was, therefore, a breach of Article 6 §§ 1 and 3 (d) on that account as well.

*iii. Inability to obtain questioning of defence witnesses*

500. The general principles concerning the examination of defence witnesses are summarised in *Murtazaliyeva*, cited above, §§ 139-68.

(α) Refusal to question witnesses living in Russia

501. The Court observes that the applicants asked the trial court to summon to the hearing high-ranking State officials. In particular, they asked that Mr Putin, at the time Prime Minister and former President of Russia, Mr Sechin, Deputy Chairman of the Russian Government and Chairman of Rosneft's Board of Directors, and Mr Kudrin, Minister of Finance and Deputy Chairman of the Russian Government, be summoned. The trial court dismissed the request, finding the questions that the defence wished to put to the witnesses to be of too general a nature and irrelevant (see paragraph 226 above).

502. The Court reiterates that, as a general rule, Article 6 § 3 (d) leaves it to the national courts to assess whether it is appropriate to call witnesses (see *Vidal*, cited above, § 33, Series A no. 235-B). Accordingly, it considers that, having found that the questioning of the witnesses would be irrelevant for the case, the trial court remained within its discretion.

503. The applicants further asked the trial court to question a number of other high-ranking State officials, including several senior executives of Rosneft at the relevant time, several officials of the Tax Ministry, several officials from other government and administrative authorities, including the Federal Security Service and the Ministry of the Interior, and several regional governors. The applicants wished to question these witnesses in relation to transfer pricing practices and discussions thereof with the relevant State authorities, the purchase of oil products from Yukos plc and its subsidiaries by a number of State authorities, the circumstances and conditions of acquisition of Yukos shares by Rosneft, the claims against Yukos by the tax authorities and Yukos activities in the respective regions. The trial court agreed to summon one witness, Mr Bogdanchikov, president of Rosneft at the relevant time, and dismissed the remainder of the request stating that it found "no legal grounds to grant" it (see paragraph 238 above).

504. In the Court's view, the applicants' request to hear the above witnesses was not vexatious, it was sufficiently reasoned, relevant to the subject matter of the accusation, and could arguably have strengthened the position of the defence (see *Polyakov v. Russia*, no. 77018/01, § 34, 29 January 2009, and *Murtazaliyeva*, cited above, §§ 160-61). In such circumstances, the trial court was under an obligation to provide relevant

reasons for dismissing the request (see *Vidal*, cited above, § 34; *Polyakov*, cited above, §§ 34-35; and *Topić v. Croatia*, no. 51355/10, § 42, 10 October 2013, and *Murtazaliyeva*, cited above, §§ 162-66). However, the trial court dismissed the request by merely noting that it found “no legal grounds to grant it”. In the Court’s view, such a formulaic statement cannot be considered a reasoned decision in itself (see *Topić v. Croatia*, cited above, § 47).

505. The Court observes that, having refused the applicants’ request to summon the witnesses concerned, the trial court added that they could nevertheless be questioned at the hearing were they to appear as provided for in Article 271 § 4 of the CCrP (see paragraph 238 above), which states that a court cannot refuse to hear a witness who arrives at the court at the request of the parties (see paragraph 383 above). The Court notes the contradictory nature of this statement, which appears to imply that the trial court conceded that the witnesses in question could be relevant for the proceedings against the applicants. In this light, the trial court’s refusal to summon the defence witnesses appears particularly gratuitous.

(β) Refusal to question witnesses living abroad

506. The Court further observes that the applicants asked the trial court to question a number of individuals who had been senior managers of Yukos companies at the relevant time and were living abroad at the time of the proceedings, either by means of a video-conference or using the mechanism of mutual legal assistance. The applicants sought to question them with regard to a number of issues that, in the Court’s view, went to the heart of the accusation against them (see paragraph 251 above). The requests were thus sufficiently reasoned and relevant to the proceedings (see *Murtazaliyeva*, cited above, §§ 160-61). However, the trial court refused the motions, stating that it found “no legal grounds to grant” them.

507. The Court has already found in paragraph 504 above that such a formulaic answer to the applicants’ motion incompatible was with the trial court’s obligation to provide relevant reasons for dismissing the defence’s request to examine witnesses. The Court notes that the parties disagreed as to whether the domestic law permitted questioning of witnesses living abroad by means of a video-conference (see paragraphs 447 and 457 above). However, the Court does not consider that it is called upon to decide on this matter, since the trial court did not rely on it in refusing to question the defence witnesses living abroad.

(γ) Failure to ensure defence witnesses’ presence

508. The Court notes that the applicants complained about the trial court’s failure to secure attendance of several defence witnesses that it had agreed to hear, in particular, Mr Pyatikopov (see paragraph 230 above),



Mr Bogdanchikov (see paragraph 239 above) and Ms Turchina (see paragraph 240 above).

509. The Court reiterates that, where the trial court grants a request to hear defence witnesses, it is under an obligation to take effective measures to ensure their presence at the hearing by way of, at the very least, issuing summonses (see *Polufakin and Chernyshev v. Russia*, no. 30997/02, § 207, 25 September 2008). It further reiterates that good reason for the absence of a witness must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at the trial. In cases concerning a witness's absence owing to unreachability, the Court requires the trial court to have made all reasonable efforts to secure the witness's attendance, which may include active searched for the witness with the help of the domestic authorities, including the police (see *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 199-22, ECHR 2015).

510. The Court is satisfied that the trial court sent summonses to Mr Pyatikopov and Ms Turchina (see paragraphs 230 and 240 above). However, the Court has not been provided with evidence corroborating that the trial court sent the summons to Mr Bogdanchikov (see paragraph 239 above). In such circumstances the Court cannot conclude that the trial court complied with its duty to ensure the presence of the defence witnesses.

(δ) Failure to ensure questioning of a witness living abroad

511. The Court notes that the applicants asked the trial court to hear Mr Rieger, Financial Controller and subsequently Chief Financial Officer of the Yukos group between 2003 and 2006. The trial court granted the motion. Mr Rieger, who was living in Germany at the time of the proceedings, wrote to the trial court suggesting he gave evidence by means of a video-conference (see paragraph 242 above).

512. The Court observes that, although the trial court granted the applicants' motion to hear Mr Rieger, having thereby recognised that his statement could have been relevant for the case, it has no evidence that the trial court took any steps whatsoever to obtain his statement. The Court therefore concludes that the trial court cannot be said to have complied with the principle of "equality of arms".

(ε) Conclusions concerning inability to obtain questioning of defence witnesses

513. Having regard to the foregoing, the Court considers that the trial court's failure to examine the defence witness in question has adversely affected the overall fairness of the proceedings (see *Murtazaliyeva*, cited above, §§ 167-68). Accordingly, there has also been a breach of Article 6 §§ 1 and 3 (d) on that account.

*iv. Refusal to adduce exculpatory material to the case file or to order disclosure of exculpatory material*

514. The Court observes that the trial court refused a number of the applicants' requests to adduce exculpatory material or to order the disclosure of exculpatory material.

515. The Court reiterates that the guarantees of Article 6 § 3 (d) are applicable not only to "witnesses", but also to documentary evidence (see *Mirilashvili*, cited above, § 159, with further references).

516. It further notes that the trial court refused the defence's motion to adduce documents related, in particular, to financial reporting and accounting within the Yukos group of companies, production and sales processes, capital expenditure and corporate structure (see paragraph 216 above). The trial court also refused the defence's motions for disclosure orders against Transneft in respect of documents related to its transactions with Yukos (see paragraph 253 above), against Rosneft and Tomskneft plc in respect of, in particular, reports on stocktaking and liabilities (see paragraph 254 above), against Samaraneftgaz plc in respect of, in particular, reports on stocktaking and liabilities (see paragraph 256 above), and against the investigating authorities with respect to documents contained in criminal files nos. 18-41/03 and 18-325543/04 (see paragraphs 265 and 266 above).

517. The Court reiterates that the trial court is under an obligation to provide relevant reasons for dismissing the defence's request to hear witnesses on its behalf (see paragraph 504 above). It considers that a similar principle applies to motions by the defence seeking to adduce evidence or to obtain the disclosure of evidence in the possession of third parties.

518. Taking into account the voluminous documentary evidence presented to the court by the prosecution, the Court considers that the applicants' motions to adduce the documents in question and to obtain disclosure of evidence were not vexatious, were sufficiently reasoned, relevant to the subject matter of the accusation, and could arguably have strengthened the position of the defence. However, in refusing the above motions the trial court confined itself to stating that it found "no legal grounds for granting" them (see paragraphs 217, 253, 254, 255, 257 and 267 above).

519. The Court has already found that such a formulaic statement cannot be considered a reasoned decision insofar as the trial court's refusal of the defence's motion to hear witnesses on its behalf is concerned (see paragraph 504 above). The Court sees no reason to reach a different conclusion in respect of the defence's motions seeking to adduce evidence or to obtain disclosure of evidence in the possession of third parties. Accordingly, there has been a breach of Article 6 §§ 1 and 3 (d) on this account.

520. In the light of this finding, the Court considers that the applicants' complaints concerning the trial court's refusal to adduce affidavits from the defence witnesses living abroad (see paragraphs 248 and 250 above) and a copy of the questioning of Mr Aleksanyan in criminal proceedings against him (see paragraph 272 above), and to order disclosure against Sibneft and Rosneft (see paragraph 261 above), do not require a separate examination.

*v. Reliance of the trial court on judgments in other related cases*

521. The Court observes that in its judgment the trial court relied on a number of earlier judicial decisions, including those delivered in proceedings in which the applicants had not been defendants (see paragraph 291 above). Furthermore, the trial court relied, *inter alia*, on the contents of the trial record in the criminal case against Mr Malakhovskiy and Mr Pereverzin and, in particular, on the statements made by a number of witnesses (see paragraph 292 above).

522. The trial court thus reached certain findings by relying on evidence that was examined in different proceedings which the applicants, who were not parties to those proceedings, were unable to contest. The Court considers that, while this complaint is in principle capable of raising separate issues under Article 6 §§ 1, 2 and 3(d) of the Convention, it is appropriate to examine it under the angle of general fairness (see *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, § 102, 23 February 2016).

523. The Court reiterates that "in the light of the principle of presumption of innocence and a defendant's right to challenge any evidence against him or her, a criminal court must conduct a full, independent and comprehensive examination and assessment of the admissibility and reliability of evidence pertaining to the determination of the defendant's guilt, irrespective of how the same evidence may have been assessed in any other proceedings concerning other defendants" (see *Huseyn and Others v. Azerbaijan*, nos. 35485/05 and 3 others, § 212, 26 July 2011).

524. The Court notes that Article 90 of the CCrP provides for the *res judicata* effect of findings of fact made in an earlier final judgment, with a reservation to the effect that such a judgment may not predetermine the guilt of persons who were not defendants in those proceedings (see paragraph 386 above). It further observes that the Constitutional Court in its Ruling no. 30-P of 21 December 2011 concerning Article 90 of the CCrP stated that the facts established by a court in a particular case should be accepted by a different court in a different case, unless they are rebutted; and that the facts established by an earlier judicial decision are only binding on the court in respect of the individual against whom criminal charges were substantiated in that earlier judicial decision (see paragraph 406 above).

525. The Court takes cognisance of the Government's twofold argument that the trial court duly applied the *res judicata* effect of the earlier judicial

decisions because (i) the facts established therein were not rebutted in the criminal proceedings against the applicants; and (ii) the applicants' conviction did not rest on such facts taken alone, but on the entire body of evidence in the case.

526. The Court observes that in the case at hand the trial court read out a number of witness statements made in the course of different proceedings, namely criminal proceedings against Mr Malakhovskiy and Mr Pereverzin, as they were reflected in the trial record of those proceedings (see paragraph 292 above). Those witnesses were never questioned within the criminal proceedings against the applicants. The Government did not specify the stage at which the trial record in the criminal case against Mr Malakhovskiy and Mr Pereverzin had been adduced to the criminal case against the applicants. From the materials available to the Court, it appears that the relevant part of the trial record in question was read out for the first time when the trial judge was reading out the judgement in the applicants' case. Therefore, contrary to the Government's argument, the applicants did not have a possibility to contest the witness statements read out from the trial record in a different criminal case.

527. Furthermore, whereas the trial court relied on the Basmani District Court's finding in its judgment of 1 March 2007 in respect of Mr Malakhovskiy and Mr Pereverzin as to the criminal activity carried out by the group which included the applicants, the Government failed to indicate the elements which might have constituted the trial court's independent reassessment of these findings and the evidence that the applicants allegedly failed to contest. Therefore, the Court finds that the applicants did not have a possibility to rebut the facts established in the criminal case against Mr Malakhovskiy and Mr Pereverzin.

528. Moreover, the Court observes that in the present case the trial court went beyond reliance on findings of facts made in different proceedings. In particular, relying on the judgment in the criminal case against Mr Malakhovskiy and Mr Pereverzin, it expressly referred to the following findings made in that case: "the activities of Ratibor and Fargoil were of a sham character... aimed exclusively at the realisation of the criminal intent of all the members of the organized group to steal the property of others, that is, of the oil that belonged to Yuganskneftegaz plc, Samaraneftgaz plc and Tomskneft plc, and subsequently sell it on the foreign and domestic markets" (see paragraph 291 above).

529. The Court notes that Mr Malakhovskiy and Mr Pereverzin were charged with embezzlement and money laundering, committed as part of a group which also included the applicants (see paragraph 14 above). In such circumstances the trial court's express reliance on the finding of guilt in a case to which the applicants were not a party cannot be qualified as anything but prejudicial.

530. In consequence, the Court finds that the manner in which the trial court relied on judgments in other proceedings was not compatible with the guarantees of a fair trial, in breach of Article 6 § 1 of the Convention.

531. In the light of this finding, the Court does not consider it necessary to address the other aspects of the applicants' complaint.

*vi. Refusal to exclude inadmissible evidence presented by the prosecution*

532. The Court takes notice of other complaints by the applicants concerning the admission and examination of evidence during the proceedings. It notes, however, that it has already addressed the most important complaints related to the handling of evidence by the domestic courts. In view of its findings above, the Court considers that the other complaints of this nature do not require a separate examination.

*3. Conclusion*

533. The foregoing considerations lead the Court to conclude that there has been a violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (c) and (d) of the Convention on account of the breach of the guarantees of a fair trial.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION (PRESUMPTION OF INNOCENCE)

534. The applicants complained under Article 6 § 2 of the Convention that the principle of presumption of innocence was prejudiced through the public statements of Mr Putin (see paragraphs 273-277 above).

Article 6 § 2 of the Convention provides:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

**A. The parties' submissions**

535. The Government contested this argument. They argued, firstly, that the applicants had never been charged with murder and, therefore, Mr Putin's statements could not have been prejudicial for the criminal proceedings against them on charges of misappropriation and money laundering. On a more general note, the Government pointed out that the criminal proceedings against the applicants had been extensively covered by the media, and some comment by State officials had been virtually inevitable. However, in their view, the applicants failed to present any evidence that any of those statements had affected the courts which, under domestic law, are independent and not accountable to any other authority.

The Government also noted that neither the trial judge nor the judges of the higher-instance courts made any public comments concerning the case.

536. With regard to the Court's request to provide it with information on the nature of the events at the Valdai Discussion Club and VTB Capital (see paragraphs 274-275 above) and with records of those meetings, the Government answered that they did not dispose of this information and the documents requested.

537. The applicants argued that all of the comments made by Mr Putin had been related to the second trial. In particular, when Mr Putin asserted that the charges of embezzlement had been "proven in court" (see paragraph 276 above), he was obviously referring to the second case against the applicants, whereas it was still pending at the time. In their view, the prejudicial nature of this comment, made on 16 December 2010, was particularly harmful to the applicants because, at that very time, the trial judge was deliberating on the verdict. The applicants averred that the timing had not been coincidental, since one day earlier, on 15 December 2010, the trial court had announced that the delivery of the judgment in the applicants' case was postponed until 27 December 2010. It followed that Mr Putin's statement was an attempt to exert pressure on the court.

## **B. Admissibility**

538. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## **C. Merits**

### *1. General principles*

539. The Court reiterates that Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see *Alenet de Ribemont v. France*, 10 February 1995, § 35, Series A no. 308). It not only prohibits the premature expression by the tribunal itself of the opinion that the person "charged with a criminal offence" is guilty before he has been so proved according to law (see *Minelli v. Switzerland*, 25 March 1983, § 38, Series A no. 62), but also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudice the assessment of the facts by the competent judicial authority (see *Alenet de Ribemont*, cited above,

§ 41, and *Daktaras v. Lithuania*, no. 42095/98, §§ 41-43, ECHR 2000-X). The Court stresses that Article 6 § 2 cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (see *Alenet de Ribemont*, cited above, § 38).

540. It has been the Court's consistent approach that the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. The Court has consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see *Khuzhin and Others v. Russia*, no. 13470/02, § 94, 23 October 2008, with further references). Whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see *Butkevičius v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II).

## 2. *Application of these principles to the present case*

541. In the present case, the applicants complain about various statements made by Mr Putin, the then Prime Minister, on four different occasions (see paragraphs 273-277 above). The Court notes that, while the statements made by Mr Putin on 27 November 2009 during a joint press conference following Russian-French talks (see paragraph 273 above) and on 16 December 2010 during a question-and-answer session with the general public (see paragraph 276 above) were reported on the Russian Government's official webpage, it requested the Government to provide it with information on the nature of the events at the Valdai Discussion Club and VTB Capital (see paragraphs 274-275 above) and with records of those meetings. However, the Government was unable to do so (see paragraph 536 above). At the same time, they did not contest the account of the events and the content of the statements as presented by the applicants with reference to media reports. Accordingly, for the purposes of the following analysis, the Court will proceed from the assumption that the events were public, and that the content of the Prime Minister's statements has been presented accurately by the applicants.

542. The Court observes that the nature of the statements in question differed. In particular, on all four occasions Mr Putin alluded to the applicants' complicity in murders committed by the head of Yukos security service, who had been convicted of several counts of murder (see *Pichugin v. Russia*, no. 38623/03, §§ 72-74, 23 October 2012). The Court notes that the applicants were never charged in relation to these criminal offences. In the case at hand they were charged with misappropriation and money laundering.

543. The Court has previously held that Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. Where no such proceedings are, or have been in existence, statements attributing criminal or other reprehensible conduct are relevant rather to considerations of protection against defamation and raising potential issues under Article 8 (see *Zollmann v. the United Kingdom* (dec.), no. 62902/00, *Reports* 2003-XII). Accordingly, the Court finds that Mr Putin's statements in this part do not give rise to any issues under Article 6 § 2 in the present case.

544. The applicants further complain about Mr Putin having compared them to Al Capone, the famous American mobster convicted in the 1930s of, *inter alia*, tax evasion, and Bernard Madoff, an American fraudster convicted in 2009 of several counts of fraud and money laundering for having mounted a "Ponzi Scheme".

545. In so far as the Prime Minister's statement at the press conference of 27 November 2009 is concerned, he appears to have mentioned Bernard Madoff and "a hacker who stole a million dollars" as examples of other high-profile criminal cases involving significant amounts of money, which, in his view, would be a worthier subject for discussion. Mr Putin further mentioned Al Capone with express reference to his conviction of tax evasion, thereby conceivably drawing a parallel to the applicants' first trial (see paragraph 273 above). However, in the Court's view, neither reference appears to have a connection to the applicants' second trial.

546. The Prime Minister also referred to Bernard Madoff in a statement made on 16 December 2010 during the question-and-answer session with the general public. With regard to this statement, the applicants also complain about Mr Putin having asserted that the charges of embezzlement were "proven in court" (see paragraph 276 above), whereas the second case against the applicants was still pending. They consider this to have constituted an attempt to influence the trial judge, who was deliberating on the verdict at precisely this point.

547. The Court observes that the relevant part of the Prime Minister's statement of 16 December 2010 conflated the offence of which the first applicant had indeed been convicted, that is, tax evasion; the charges pending at the time, that is, embezzlement; and an offence with which the



first applicant had never been charged, namely, fraud. The Court considers that the Prime Minister's references to the charges of embezzlement are different from a situation where a State official pronounces on an accused person's guilt in the absence of a final conviction (*cf.*, for example, *Peša v. Croatia*, no. 40523/08, §§ 147-51, 8 April 2010, and *Huseyn and Others*, cited above, §§ 230-34). Rather, due to their unclear character, they may have led persons viewing or listening to the question-and-answer session to believe that a final conviction had already been delivered in the applicants' second trial.

548. The Court reiterates that Article 6 § 2 will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. In this regard the Court emphasises the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence (see *Daktaras*, cited above, § 41). However, what is important for the Court's assessment is the real meaning of the impugned statements having regard to the particular circumstances in which they were made (see *Y.B. and Others v. Turkey*, nos. 48173/99 and 48319/99, § 44, 28 October 2004).

549. Having regard to the circumstances in which the Prime Minister's statement was made, the Court notes that the question-and-answer session on 16 December 2010 was immediately followed by a press conference. There, in response to a question concerning his earlier remarks, Mr Putin stated that he "was referring to the verdict of the court, the verdict of guilty on previous charges". He further added: "As for the current trial, the court will be unbiased, I'm sure. As you know, the sums in question are much bigger than last time... This is what will be put on trial" (see paragraph 277 above).

550. The Court observes that the first statement made by the Prime Minister on 16 December 2010 constituted a spontaneous reaction to a question put to him during the question-and-answer session, which was broadcast live (see *Gutsanovi v. Bulgaria*, no. 34529/10, § 195, ECHR 2013 (extracts)). While it may have created confusion as to which charges the first applicant had already been convicted of by a court (see paragraph 547 above), during a press conference held later on the same day Mr Putin clarified his earlier remarks in a way that, in the Court's view, must have dispelled any possible confusion regarding their meaning. The Court also notes that the contents of the press conference, similar to the contents of the question-and-answer session, were available on the Russian Government's official webpage as well as in the media.

551. Thus, on the basis of the foregoing, the Court concludes that there has been no violation of Article 6 § 2 of the Convention.

## V. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

552. The applicants also complained under Article 6 §§ 1 and 3 (a) and (b) of the Convention that they were not informed promptly of the nature and cause of the accusations against them; in particular, they were not formally charged until February 2007, whereas the investigation in respect of money laundering had started in 2004; and that they did not have sufficient time and facilities for the preparation of their defence.

553. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

554. However, in view of its findings in paragraph 533 above, the Court does not consider it necessary to address the remainder of the applicants' complaints under Article 6 of the Convention.

## VI. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION WITH REGARD TO THE APPLICANTS' CONVICTION

555. The applicants complained under Article 7 of the Convention that they had been subjected to an extensive and novel interpretation of the criminal law and unlawful imposition of a criminal penalty. Article 7 of the Convention reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

### A. The parties' submissions

556. The Government submitted that the applicants had misappropriated the oil of the production companies, having transferred it into the ownership of companies under their control at artificially low prices. They specified that “[the] applicants were accused not of the fact that they had sold oil at the domestic market at prices lower than those used in Rotterdam. They were accused of the misappropriation of oil of [Yukos plc] producing companies through registering property rights to this oil by affiliated companies at artificial low prices”.

557. The Government maintained that the provisions of the Criminal Code applied in the applicant's case were sufficiently precise and

foreseeable. They referred in this respect to Resolutions of the Plenum of the Supreme Court no. 23 of 18 November 2004 and no. 51 of 27 December 2007 (see paragraphs 407 and 408 above) and Ruling no. 851-O-O of 21 June 2011 of the Constitutional Court (see paragraph 405 above).

558. They stated that the applicants had unduly influenced the production companies via management agreements (see paragraphs 90 and 91 above) and general agreements (see paragraph 95 above) which were wrongful and had been unlawfully approved by the general meetings of shareholders (see paragraphs 96 and 98 above). The production companies had thus been selling oil to Yukos trading companies at prices much lower than the prices paid to the trading companies by the end-customers, whereas the applicants received all the profits from the final sales, paid to them as dividends from the trading companies, in detriment to the production companies, whose profit was much smaller. Having stolen the oil, the applicants subsequently legalised the assets under the guise of various financial and other transactions within the Yukos group of companies.

559. The Government referred to the findings of the appeal court concerning earlier decisions by commercial courts which had confirmed the validity of the management agreements and general agreements concluded within the Yukos group, as well as to its findings that the earlier decisions had established that Yukos plc was “*de facto*” but not “*de jure*” owner of the oil in question (see paragraphs 339 and 340 above).

560. The applicants submitted that they had been convicted on account of conduct that had not been criminal. In their view, the domestic courts’ decisions in the criminal proceedings against them contradicted the applicable domestic law and previously delivered final court decisions. Consequently, they considered their conviction to be arbitrary and to constitute a flagrant denial of justice.

561. In particular, the applicants argued that their actions did not fall within the statutory definition of “stealing” since the transfer of oil from Yukos production entities to Yukos trading companies had taken place pursuant to lawful purchase-sale transactions that had never been invalidated. In their view, transfer of property under a lawful contract could not in principle amount to “unlawful uncompensated taking and/or appropriation of another’s property”, as provided in footnote 1 to Article 158 of the Criminal Code.

562. The applicants maintained that their actions did not meet other constituent elements of the offence of “stealing”, such as damage being caused to the owner. In their submission, the Yukos production entities suffered no damage or losses as a result of the sale of oil to Yukos trading companies. While the trial court had held that those entities had suffered damage on account of receiving compensation allegedly based on prices that were fixed below market prices, the applicants argued that this assessment had been arbitrary, for the following reasons: (1) the trial court’s assessment

of what might have constituted market prices had been arbitrary; (2) all the production entities had made a profit from the sale of oil; (3) in any event, the difference of the prices at which the oil had been sold with the market prices could not in principle have been interpreted as “damage” within the meaning of footnote 1 to Article 158 of the Criminal Code; (4) the trial court’s logic was self-contradictory in that sold property, irrespective of the price, could not be simultaneously qualified as “stolen”.

563. Furthermore, in the applicants’ view, the property was not “entrusted to the culprit” as required by Article 160 § 4 of the Criminal Code in order to qualify as misappropriation.

564. The applicants also noted that, in so far as their conviction appears to be based on the assumption that the production entities had been forced to enter into sale contracts on disadvantageous terms, no shareholder, including the Russian Federation itself (which had been a minority shareholder in Yukos until 2003), had instituted proceedings to invalidate the transactions under Article 181 § 2 of the Civil Court.

565. They further referred to Ruling no. 1037-O-O of 2 July 2009, where the Constitutional Court had stated that criminal charges could not be brought in respect of lawful civil-law transactions (see paragraph 403 above) and argued that this ruling by the Constitutional Court had not been properly applied in their case.

566. Finally, the applicants contended that their conviction failed to recognise the *res judicata* effect of more than sixty earlier judgments in civil and tax cases which had recognised the contracts of sale as valid and Yukos plc as the owner of the oil (see paragraphs 307 and 339-340 above). They pointed out that in the proceedings before the Court in the case of *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20 September 2011, the Government had expressly recognised that Yukos plc was the owner of the oil. In the same proceedings the Court had recognised that the oil had been sold by the Yukos production entities to Yukos trading companies and, therefore, it could not have been stolen.

## **B. Admissibility**

567. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## C. Merits

### 1. General principles

568. The Court reiterates that the guarantee enshrined in Article 7 of the Convention is an essential element of the rule of law. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 92, 17 September 2009, and *Huhtamäki v. Finland*, no. 54468/09, § 41, 6 March 2012). Article 7 of the Convention is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, among other authorities, *C.R. v. the United Kingdom*, 22 November 1995, §§ 32-33, Series A no. 335-C; *S.W. v. the United Kingdom*, 22 November 1995, §§ 34-35, Series A no. 335-B; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97, 44801/98, § 50, ECHR 2001-II; and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 140, ECHR 2008).

569. In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition (see *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 91-93, ECHR 2013). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see, among other authorities, *S.W. v. the United Kingdom*, cited above, § 36; *Streletz, Kessler and Krenz*, cited above, § 50; *K.-H. W. v. Germany* [GC], no. 37201/97, § 45, ECHR 2001-II; and *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015).

570. A law may still satisfy the requirement of “foreseeability” where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Achour v. France* [GC], no. 67335/01, § 54, ECHR 2006-IV, and *Huhtamäki*, cited above, § 44). Even when a point is ruled on for the first time in an applicant’s case, a violation of Article 7 of the Convention will not arise if the meaning given is both foreseeable and consistent with the essence of the offence (see *Jorgic*, cited above, § 114; *Custers and Others v. Denmark*, nos. 11843/03, 11847/03 and 11849/03, 3 May 2007; *Soros v. France*, no. 50425/06, § 126, 6 October 2011; and *Huhtamäki*, cited above, § 51).

571. Moreover, according to its general approach, the Court does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law (see, *inter alia*, *Société Colas Est and Others v. France*, nos. 37971/97, § 43, ECHR 2002-III; *Korbely v. Hungary* [GC], no. 9174/02, §§ 73-95, ECHR 2008; and *Liivik v. Estonia*, no. 12157/05, § 101, 25 June 2009).

## *2. Application of these principles in the present case*

572. In the light of the above-mentioned principles, the Court notes that it is not its task to rule on the applicants’ individual criminal responsibility, that being primarily a matter for the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether the acts the applicants were convicted of fell within a definition of a criminal offence which was sufficiently accessible and foreseeable.

573. The applicants were convicted of large-scale misappropriation or embezzlement with abuse of position, committed by an organised group and of large-scale laundering of money or of other assets acquired as a result of commission of a crime, with abuse of position, and committed by a group acting in concert (see paragraph 334 above).

### **(a) The offence of “misappropriation or embezzlement”**

574. As regards the charge of misappropriation, the first-instance and the appeal courts found that the applicants, as leaders of an organised criminal group, had organised and implemented the scheme to misappropriate the oil produced by the Yukos production entities, through its purchase by Yukos trading companies at “artificially low prices”. The courts held that, although the oil had been sold by the Yukos production entities to Yukos trading companies under sale agreements approved by the general meetings of shareholders, such approvals had been secured by deceit and manipulation by way of obtaining a majority at the general meeting of shareholders through shareholders under the applicants’ control, so that the production entities’ will had been distorted and they had been effectively forced to sell

the oil on disadvantageous terms (see paragraphs 301–303 and 335–336 above).

575. Initially the applicants were charged and convicted under Article 160 § 3 (a) and (b) of the Criminal Code (large-scale misappropriation or embezzlement with abuse of position, committed by group acting in concert). This charge was requalified on appeal as falling under Article 160 § 4 (large-scale misappropriation or embezzlement with abuse of position, committed by an organised group).

576. The Court notes that the issue under Article 7 in the present case is substantially different from that it had to examine in the previous case brought by the applicants, *Khodorkovskiy and Lebedev*, cited above, §§ 745–821, which concerned the charge of tax evasion in the first set of criminal proceedings against them. In that case the Court observed that while “tax evasion” was defined in the domestic criminal law in very general terms, this did not in itself raise any issues under Article 7. It further noted that given that the forms of economic activity and, consequently, the methods of tax evasion were in constant development, the domestic courts might invoke legal concepts from other areas of law, in particular the tax law, so as to decide whether a particular conduct amounted to “tax evasion” in the criminal-law sense (see *Khodorkovskiy and Lebedev*, cited above, § 791). The Court subsequently held that, having found the applicants’ business practices to constitute tax evasion, the domestic courts had given a novel interpretation to “tax evasion” which, however, was consistent with the relevant provisions of the Criminal Code and “consistent with the essence of the offence” (see *Khodorkovskiy and Lebedev*, cited above, § 821).

577. The Court further notes that in the case of *OAO Neftyanaya Kompaniya Yukos*, cited above, §§ 597–98, which concerned the tax-assessment proceedings in respect of Yukos plc, it stated, albeit in the context of Article 1 of Protocol No. 1, that the relevant provisions of the Tax Code enabled the domestic courts to change the legal characterisation of transactions and also the legal characterisation of the status and activity of taxpayers and that, should a tax fraud be uncovered, a taxpayer faced the risk of tax reassessment of its actual economic activity in the light of the relevant findings of the competent authorities.

578. The Court observes that none of the above considerations apply to the case at hand. The proceedings at issue did not concern tax matters. Here the applicants were convicted of “misappropriation or embezzlement” defined in Article 160 of the Criminal Code, as in force of the material time, as “stealing of other people’s property entrusted to the culprit”. Footnote 1 to Article 158, as in force at the material time, provided that “stealing” meant “the unlawful and uncompensated taking and/or appropriation of another’s property to the benefit of the culprit or of other parties, thereby causing damage to the owner or to any other possessor of the property”. The Court notes that “stealing” is an offence long known to the criminal law and

that, unlike the offence of tax evasion, a precise definition of it was given in the Criminal Code. Also unlike tax evasion, determination of this charge did not involve reassessment of the applicants' entire economic activity, but was limited to particular transactions, namely those involving sale of oil from the Yukos production entities to the Yukos trading companies.

579. Having regard to the specific criminal acts described in paragraph 574 above, the Court notes that the applicants' criminal conduct, as defined by the domestic courts, included purchasing, via Yukos trading companies, oil at "artificially low prices" from Yukos production entities after having coerced the latter into contracts on disadvantageous terms by distorting their will through manipulation. The Court therefore has to examine whether the conclusions reached by the domestic courts concerning the applicants' conduct were based on an analysis which could be considered as arguably reasonable and, consequently, whether it was foreseeable that the applicants' acts could constitute misappropriation or embezzlement.

580. The Court observes that it is neither contested by the parties, nor was it called into question by the domestic courts, that the Yukos production entities had received payment for the oil they had sold to the Yukos trading companies under the contracts concluded to that effect. The contracts in question were valid under civil law at the relevant time and so remain to date, having never been invalidated within civil proceedings. The Court notes that under Article 160 of the Criminal Code "misappropriation or embezzlement" is a type of "stealing". The definition of the latter offence, as provided at the relevant time in footnote 1 to Article 158, contained among its essential elements "the unlawful and uncompensated taking and/or appropriation of another's property".

581. The Court finds itself unable to conceive how a reciprocal transaction that is valid under civil law can amount to "the unlawful and uncompensated taking... of another's property". It notes in this regard that the Constitutional Court in its Ruling no. 1037-O-O of 2 July 2009 on the first applicant's complaint expressly ruled out the possibility of bringing criminal charges under Article 160 of the Criminal Code in respect of lawful civil-law transactions (see paragraph 403 above).

582. The Court takes note of the Government's reference to Resolution no. 51 of the Plenum of the Supreme Court of 27 December 2007 (see paragraph and 408 above). In so far as the Government refer to the Plenum's finding in § 20 of the Resolution to the effect that "partial compensation of the damage caused to the victim does not in itself constitute proof of the lack of the intent to misappropriate or embezzle the entrusted property", the Court is of the opinion that it cannot be applicable to consideration under valid civil-law transactions (see also the separate opinion of Judge Kononov of the Constitutional Court in paragraph 404 above). To hold otherwise would mean that any contract of sale that is lawful under civil law would be open to being recognised as a criminal



offence of stealing should a dispute arise as to the prices set out in the contract. This would amount to an untenable position capable of leading to arbitrary consequences, let alone the fact that it contravenes the Constitutional Court's Ruling no. 1037-O-O of 2 July 2009 cited in the preceding paragraph.

583. The Court notes that the applicants disputed the domestic courts' factual findings concerning the acts imputed to them of manipulating and distorting the will of the Yukos production entities. However, the Court considers that it is not called upon to reassess the domestic courts' findings in this respect. Accepting for the purposes of the present analysis the domestic courts' establishment of the facts, and without prejudice to the possibility of the acts imputed to the applicants being punishable under a different provision of the Criminal Code, the Court cannot but establish that "deceit" did not feature as a qualifying element in either the offence of "misappropriation or embezzlement" in Article 160, or the offence of "stealing" defined in footnote 1 to Article 158 of the Criminal Code. Therefore, in the Court's view, the acts imputed to the applicants could not in any event be punishable under the provisions of the Criminal Code applied by the domestic courts in the criminal proceedings against them.

584. The Court further notes the applicants' argument that their conviction for misappropriation was not consistent with other constituent elements of the offence. In particular, in their view, the property in question had not been "entrusted to them", and no "damage" had been caused to Yukos production entities. However, in the light of its findings in paragraphs 581-582 above, the Court does not consider it necessary to examine these aspects of the applicants' complaint.

585. In the light of the foregoing the Court concludes that in the determination of the criminal charges against the applicants the offence set out in Article 160 § 4 of the Criminal Code, as in force at the time of their conviction, was extensively and unforeseeably construed, to their detriment. It considers that such an interpretation could not be said to have constituted a development consistent with the essence of the offence (see *Liivik*, cited above, §§ 100-01; *Huhtamäki*, cited above, § 51; and *Navalnyye v. Russia*, no. 101/15, § 68, 17 October 2017). In view of the above, it was not possible to foresee that the applicants' conduct in entering into the transactions on the sale of oil from the Yukos production entities to the Yukos trading companies would constitute misappropriation or embezzlement.

**(b) The offence of "laundering of money or of other assets"**

586. In the light of its findings above, the Court considers that it was equally unforeseeable that the profits from the sale of the oil from the Yukos production entities to the Yukos trading companies would be found to constitute the proceeds of a crime, the use of which could amount to

laundering of money or of other assets under Article 174.1 of the Criminal Code (see *Navalnyye*, cited above, § 68, 17 October 2017).

**(c) Conclusion**

587. It follows that there has been a violation of Article 7 of the Convention.

**VII. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION WITH REGARD TO THE CALCULATION OF THE APPLICANTS' PRISON TERM**

588. The applicants also complained under Article 7 of the Convention that their prison term had been wrongfully calculated by the domestic courts, in breach of the applicable provisions of the Criminal Code.

589. The Court observes that this complaint is closely linked to the complaint under Article 7 examined above and must likewise be declared admissible. However, having regard to its conclusions in paragraph 587 above, the Court does not consider it necessary to examine the present complaint.

**VIII. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

590. The applicants complained under Article 8 of the Convention that their transfer from the penal colonies where they had been serving their sentences to remand prisons, first in Chita and then in Moscow, adversely affected their family lives. They argued, in particular, that the regime in the remand prisons did not permit them to enjoy the same level of family contacts as the regime in the penal colonies.

Article 8 of the Convention reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

**A. The parties' submissions**

591. The Government contested that argument. They pointed out that the applicants' transfer to the remand prisons and the level of contacts they could maintain with their family there was fully in accordance with the law (see paragraph 411 above). Moreover, taking into account that the applicants were first transferred to a remand prison in Chita and then to

Moscow, this arrangement actually facilitated contacts with their relatives, who were no longer required to make complicated travel arrangements to visit them. The Government submitted, in particular, that during the second applicant's detention in the remand prison in Chita his family, including his parents, wife and children, had visited him 15 times, and that during the first applicant's placement in the remand prison in Moscow he had had 54 visits from his relatives. The Government argued that, having regard to the foregoing, the applicants' transfer to the remand prisons had not constituted an additional interference with their family life.

592. The applicants acknowledged that they could have more frequent short visits in the remand prisons than in the correctional facilities. However, they pointed out that, although there was a direct flight between Moscow and Chita, the journey nevertheless took six hours. Thus, while the applicants were detained in Chita it was still difficult for their relatives to travel there, and they could hardly benefit from the higher number of permitted short visits. Most importantly, in their view, long visits were disallowed in the remand prisons altogether. Whereas, under the regime of the correctional facilities where the applicants had been serving their sentences (see paragraph 410 above), they could have had six long visits per year, they were not entitled to any such visits after their transfer to the remand prisons.

### **B. Admissibility**

593. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### **C. Merits**

594. The Court takes note of the Government's argument that, in accordance with the domestic law, after their transfer to the remand prisons the applicants could have more short visits than had been the case in the correctional facilities. In the light of the information provided by the Government, it appears that the applicants availed themselves of such a possibility, which is not contested by them.

595. The Court observes, however, that the gist of the applicants' complaints concerns the unavailability of long-term visits in the remand prisons. In *Resin v. Russia*, no. 9348/14, § 40, 18 December 2018, in a comparable situation of a prisoner transferred from a penal colony to a remand prison, the Court found that the restriction was based on the specific legislative provision, that is Article 77.1 of the Code of Execution of Sentences (see paragraph 411 above), which explicitly bars convicted

prisoners who are brought to a remand prison from a correctional facility as part of an investigation from having long-stay family visits.

596. The Court further found, however, that the restriction did not pursue a legitimate aim and was not “necessary in a democratic society” having regard to the Government’s failure to provide, beyond a reference to the applicable legal provision, any explanation of the legitimate aim or to give any justification for the impugned measure (see *Resin*, cited above, § 41).

597. The Court observes that the Government have not submitted any information or arguments that would enable the Court to depart from these findings in the present case.

598. There has accordingly been a violation of Article 8 of the Convention on account of the unavailability of long-stay visits in the remand prisons SIZO-1 of the Zabaykalskiy Region and SIZO-1 in Moscow.

#### IX. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 OF THE CONVENTION

599. The applicants complained under Article 4 of Protocol No. 7 to the Convention that at their second trial they had been tried for a second time for the same offence. Article 4 of Protocol No. 7 reads, in so far as relevant:

“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State...”

##### **A. The parties’ submissions**

600. The Government contested that argument. They submitted that these allegations had been examined and dismissed by the domestic courts. They relied in this respect on the findings of the appeal court (see paragraph 343 above) and of the supervisory review instances (see paragraphs 356 and 360 above), according to which the applicants’ convictions in the two criminal cases against them had been based on different acts, concerned different objects of the offences and were related to different periods. Furthermore, the offences they had been convicted of had different qualifying elements under the domestic law.

601. The applicants contended that both trials had concerned the activities related to the sale of the oil extracted by the Yukos production entities to Yukos trading companies. In their view, the tax-evasion charges in the first set of criminal proceedings against them were based on an assessment of concrete factual circumstances and were inextricably linked in time and space to the charges brought against them in the second set of

criminal proceedings. In particular, the courts in each case referred to the fact of setting up the companies Business Oil, Mitra, Vald Oil and Forest Oil.

602. They further argued that their convictions were mutually exclusive and incompatible. In the applicants' view, they could not have been convicted of misappropriation of oil and money laundering and, at the same time, of tax evasion in respect of the amounts that they had allegedly obtained unlawfully as a result of such misappropriation and laundering.

### **B. Admissibility**

603. The Court acknowledged in the case of *Sergey Zolotukhin v. Russia* (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 81-84, ECHR 2009) the existence of several approaches to whether the offences for which an applicant was prosecuted were the same. The Court presented an overview of the existing three different approaches to this question. It found that the existence of a variety of approaches engendered legal uncertainty incompatible with the fundamental right not to be prosecuted twice for the same offence. It was against this background that the Court provided in that case a harmonised interpretation of the notion of the "same offence" for the purposes of Article 4 of Protocol No. 7. In the *Zolotukhin* case the Court thus found that an approach which emphasised the legal characterisation of the two offences was too restrictive on the rights of the individual. If the Court limited itself to finding that a person was prosecuted for offences having a different legal classification, it risked undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention. Accordingly, the Court took the view that Article 4 of Protocol No. 7 had to be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arose from identical facts or facts which were substantially the same. It was therefore important to focus on those facts which constituted a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which had to be demonstrated in order to secure a conviction or institute criminal proceedings (see *Glantz v. Finland*, no. 37394/11, § 52, 20 May 2014).

604. In the present case, it is not contested by the parties that the legal characterisation of the offences the applicants were convicted of in the two sets of criminal proceedings against them was different. However, the parties disagree as to whether both sets of criminal proceedings arose from the same facts. The Court must therefore determine whether the second set of criminal proceedings against the applicants arose from facts which were substantially the same as those which had been the subject of their final conviction within the first set of criminal proceedings against them (see *Sergey Zolotukhin*, cited above, § 82; *Ramda v. France*, no. 78477/11, § 84,

19 December 2017, and *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, § 141, 15 November 2016).

605. The Court notes at the outset that the judgment of the Meshchanskiy District Court of 16 May 2005 convicting the applicants of, *inter alia*, tax evasion, became final on 22 September 2005 when the Moscow City Court upheld it on appeal. No ordinary remedy lay against the latter judgment. From that point onwards, therefore, the applicants were to be considered as having already been finally convicted of an offence for the purposes of Article 4 of Protocol No. 7.

606. The Court notes that in the judgment of 16 May 2005 the Meshchanskiy District Court convicted the applicants of a number of economic offences committed between the years 1994 and 2000 (for more details see *Khodorkovskiy and Lebedev*, cited above, §§ 99-118 and 265-76). It is the applicants' conviction of corporate income-tax evasion in 1999-2000 that is relevant for the purposes of the present analysis. The applicants were found guilty, in particular, of registering in Lesnoy ZATO and other low-tax zones trading companies such as Business Oil, Vald Oil, Forest Oil and Mitra, which were found by the court to have been sham legal entities that had conducted no real business in those zones. Therefore, these companies were not entitled to preferential taxation. However, the applicants, through the CEOs of these companies controlled by them, arranged the filing of the 1999 and 2000 tax returns of the companies, having deliberately included in them false information to the effect that tax privileges were assessed and they had no tax arrears (see *Khodorkovskiy and Lebedev*, cited above, §§ 265-66).

607. The Court further notes that in the course of the second set of criminal proceedings the applicants were charged with and eventually convicted in the Khamovnicheskiy District Court's judgment of 27 December 2010 of large-scale misappropriation and money laundering in 1998-2003. The conviction for misappropriation was based on the court's findings that the applicants had organised and implemented the scheme to misappropriate the oil produced by the Yukos production entities through its purchase by Yukos trading companies at very low prices, using deceit and manipulation in order to obtain the approval of such transaction by Yukos production entities' shareholders meetings (see paragraphs 301-303 and 335-336 above).

608. The Khamovnicheskiy District Court also convicted the applicants of laundering of money or of other assets acquired as a result of the commission of a crime by putting in place a scheme through which the misappropriated oil had been either sold or converted into oil products that had also been subsequently sold, and the applicants derived profits from such sales (see paragraph 305 above). The judgment became final on 24 May 2011, having been upheld on appeal in the relevant part by the Moscow City Court.

609. The Court observes that in their complaint the applicants rely on the fact that both convictions referred to activities related to the sale of the oil extracted by the Yukos production entities to the Yukos trading companies and, in particular, to the fact of setting up trading companies Business Oil, Mitra, Vald Oil and Forest Oil.

610. With regard to the first argument the Court observes that the applicants ran a large-scale oil production and trade business, which involved a vast number of business operations and transactions of various natures. Therefore, in the Court's view, the argument that both convictions concerned activities related to the sale of the oil within the Yukos group of companies is too general and unable to lead the Court to the conclusion that the convictions in the two sets of criminal proceedings arose from the same facts.

611. The applicants' other argument concerns more specifically the fact that the domestic courts in both cases referred to the fact of setting up the trading companies Business Oil, Mitra, Vald Oil and Forest Oil. In this regard the Court observes that, as noted above, the applicants ran a large-scale business involving numerous business activities and operations. The Court is not convinced that mentioning certain details related to the organisation of the applicants' business in both judgments is sufficient to show that both convictions arose from the same facts.

612. The Court notes in this regard that in the first set of criminal proceedings against the applicants the domestic courts referred to the registration of the above trading companies' in low-tax zones. Given that, according to the courts' assessment, these companies were not entitled to preferential taxation under the domestic law, this constituted an essential element of the offence of tax evasion.

613. In the second set of criminal proceedings against the applicants the domestic courts merely mentioned the fact of setting up the above companies, along with a number of other Yukos trading companies. In these proceedings the courts were not concerned with their registration in a low-tax zone. Rather, they referred to the fact that there existed a number of trading companies engaged, under the applicants' control, in the subsequent sale of oil after its purchase from the Yukos production entities, which the domestic courts qualified as money laundering.

614. The Court therefore concludes that the applicants were not prosecuted or convicted in the second set of criminal proceedings on the basis of facts that were substantially the same as those that were the subject of their final conviction in the first set of criminal proceedings.

615. As regards the aspect of the applicants' complaint about their convictions being mutually exclusive and incompatible, in so far as they may be understood to complain about the nature of the charges brought against them in the second set of criminal proceedings, the Court has

examined this grievance under Article 7 of the Convention (see paragraphs 568-587 above).

616. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

## X. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

617. The applicants complained about an alleged political motivation for their detention, criminal prosecution and punishment. They relied on Article 18 in conjunction with Articles 5, 6, 7 and 8 of the Convention and Article 4 of Protocol No. 7 in this respect. Article 18 of the Convention reads as follows:

“The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

### A. The parties' submissions

618. The Government submitted that the restriction of some of the applicants' rights was a result of their being charged and convicted of criminal offences in accordance with the procedures prescribed by the domestic law. Thus, such restrictions did not exceed those that would be imposed on any person subject to criminal responsibility. Consequently, no issues under Article 18 arose in the present case.

619. The applicants argued that since the moment of their initial arrest in 2003, both sets of criminal proceedings against them had been politically motivated. They argue that violations of their rights found by the Court in the cases of *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011; *Lebedev v. Russia*, no. 4493/04, 25 October 2007; and *Khodorkovskiy and Lebedev*, cited above, served to corroborate their allegations of an ulterior purpose to their prosecution.

### B. The Court's assessment

620. The Court's case-law states that Article 18 of the Convention can only be applied in conjunction with other Articles of the Convention, and a violation can only arise where the right or freedom concerned is subject to restrictions permitted under the Convention (see *Gusinskiy v. Russia*, no. 70276/01, § 73, ECHR 2004-IV). The applicants alleged that their criminal prosecution and conviction had been brought about for political reasons and that those ulterior motives had affected every aspect of the case.



They relied on Article 18 in conjunction with Articles 5, 6, 7 and 8 of the Convention and Article 4 of Protocol No. 7.

621. In so far as the applicants' complaint under Article 18 in conjunction with Article 5 relates to their pre-trial detention following their initial arrest in 2003, the Court observes that the applicants' rights under Article 5 were not subject of its examination in the present case. At the same time, the Court notes that in *Khodorkovskiy*, cited above, §§ 254-61, it found no violation of Article 18 in respect of the first applicant's arrest on 25 October 2003. It further notes that in *Khodorkovskiy and Lebedev*, cited above, §§ 897-909, it likewise found no violation of Article 18 in respect of the first set of criminal proceedings against the applicants, which included their pre-trial detention. The Court observes that the applicants do not refer to any new circumstances that have not been examined by the Court in the previous cases before it. Accordingly, this aspect of the complaint has to be rejected as being substantially the same as the matter that has already been examined by the Court.

622. The Court notes that the essence of the applicants' complaint under Article 18 in conjunction with Articles 6 and 7 of the Convention and Article 4 of Protocol no. 7 is that, from the moment of their arrest in 2003, both sets of criminal proceedings against them pursued an ulterior purpose. Having regard to the applicants' submissions in the light of the recent developments in the case-law on the general principles applicable to complaints under Article 18 of the Convention (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 291, 28 November 2017, and *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 164, 15 November 2018), the Court does not consider that the applicants' complaint represents a fundamental aspect of the present case. In particular, the Court notes that it already dismissed the allegations that the applicants' prosecution was politically motivated and used to destroy Yukos plc and take control of its assets (see *Khodorkovskiy*, cited above, § 260; *Khodorkovskiy and Lebedev*, cited above, § 909; and *OAO Neftyanaya Kompaniya Yukos*, cited above, § 666, as well as paragraphs 36, 43 and 50 above). Insofar as the applicants' complaint relates to the allegations that the second set of criminal proceedings against them did not comply with the Convention requirements, the essence of this complaint has been addressed by the Court's in the above assessment of the complaints under Articles 6 and 7 of the Convention and Article 4 of Protocol no. 7.

623. Therefore, the Court concludes that no separate issue arises under Article 18 in conjunction with Articles 6 and 7 of the Convention and Article 4 of Protocol no. 7.

624. In so far as the applicants rely on Article 18 in conjunction with Article 8, the Court observes that it has found a violation of Article 8 on account of the unavailability of long visits in the remand prisons to which the applicants had been transferred, from the correctional facilities where

they had been serving their sentences, on account of the pending investigation (see paragraphs 594-598 above). It has found that, in particular, while the restriction was based on a legislative provision, the Government have failed to provide any explanation of the legitimate aim or to give any justification for the measure in question.

625. Taking into account that the unavailability of long visits in the remand prison is based on a domestic legislative provision that is applied indiscriminately to all detainees of remand prisons, the Court is unable to find in the fact of its application in the present case evidence of an ulterior motive as alleged by the applicants.

626. Having regard to the foregoing, the Court cannot find that Article 18 was breached in the present case.

## XI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

627. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### A. Damage

628. The applicants submitted that they had suffered considerably as a result of the violations of their rights in the present case. However, having regard, in particular, to the heavy burden on the Government’s budget of the award made by the Court in *OAO Neftyanaya Kompaniya Yukos v. Russia* (just satisfaction), no. 14902/04, 31 July 2014, they decided not to make any claims for just satisfaction. The finding of a violation of their rights would thus constitute sufficient just satisfaction.

629. The Government did not make any comments in this respect.

630. Having regard to the applicants’ submissions, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants.

### B. Costs and expenses

631. The applicants did not claim costs and expenses for the reasons stated in paragraph 628 above.

632. Accordingly, the Court makes no award under this head.

## FOR THESE REASONS, THE COURT,

1. *Decides* to join the applications;
2. *Declares*, unanimously, the complaint under Article 6 § 1 concerning the independence and impartiality of the trial court judge, the complaint under Article 6 § 2, the complaints under Article 6 §§ 1 and 3 (a), (b), (c) and (d) concerning guarantees of a fair trial and the complaints under Articles 7 and 8 admissible and the remainder of the applications inadmissible;
3. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention concerning the independence and impartiality of the trial court judge;
4. *Holds*, unanimously, that there has been a violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (c) and (d) of the Convention on account of the breach of the guarantees of a fair trial;
5. *Holds*, unanimously, that there is no need to examine the complaints under Article 6 § 1 taken in conjunction with Article 6 § 3 (a) and (b) of the Convention;
6. *Holds*, unanimously, that there has been no violation of Article 6 § 2 of the Convention;
7. *Holds*, by five votes to two, that there has been a violation of Article 7 of the Convention concerning the applicants' conviction;
8. *Holds*, unanimously, that there is no need to examine the complaint under Article 7 of the Convention concerning the calculation of the applicants' prison term;
9. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention;
10. *Holds*, unanimously, that there is no need to examine the complaint under Article 18 in conjunction with Articles 6 and 7 of the Convention and Article 4 of Protocol No. 7;
11. *Holds*, unanimously, that there has been no violation of Article 18 in conjunction with Article 8 of the Convention;

12. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants.

Done in English, and notified in writing on 14 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips  
Registrar

Paul Lemmens  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Lemmens and Dedov is annexed to this judgment.

P.L.  
J.S.P.

## JOINT PARTLY DISSENTING OPINION OF JUDGES LEMMENS AND DEDOV

1. To our regret we are unable to agree with the majority's view that there has been a violation of Article 7 of the Convention.

In our opinion, the applicants were held guilty on account of acts which constituted criminal offences at the time when they were committed. We consider that the interpretation given by the domestic courts to the relevant provisions of the Criminal Code was not unforeseeable.

2. The applicants were convicted of acts which constituted "large-scale misappropriation or embezzlement with abuse of position committed by an organised group" (Article 160 § 4 of the Criminal Code) and "large-scale laundering of money or of other assets acquired as a result of commission of crime, with abuse of position and committed by a group acting in concert" (Article 174.1 § 3 of the Criminal Code) (see paragraph 334 of the judgment).

Before the domestic courts, the applicants argued that there had been no "misappropriation", since that crime implied the "stealing" of other people's property entrusted to the culprit, and "stealing" meant, according to footnote 1 to Article 158 of the Criminal Code, the "unlawful and uncompensated" taking and/or appropriation of another's property to the benefit of the culprit or of other parties, thereby causing damage to the owner or to any other possessor of the property (for the content of Articles 158 and 160 § 4, see paragraphs 388-89 of the judgment). In particular, the applicants argued that the oil allegedly "stolen" from the Yukos production entities had never been physically appropriated by the applicants (see paragraph 181). Moreover, the oil had been sold by the Yukos production entities to the Yukos trading companies at prices that corresponded to the prices prevailing in Russia at the time (see paragraphs 183-85). Finally, the lawfulness of the agreements between Yukos and the production entities, as well as of the contracts for the sale of oil concluded on the basis thereof, had been ascertained in dozens of lawsuits before commercial courts (see paragraph 190).

The Khamovnicheskiy District Court of Moscow dismissed the applicants' arguments. It found that, while the applicants had not been charged with physical theft of the oil extracted and refined by the production entities, these entities had lost profits as a result of the misappropriation of oil profits in the applicants' interests (see paragraph 300 of the judgment). The agreements between Yukos and the production entities had been approved by the general meetings of shareholders, but those approvals had been "obtained through deceit and manipulation" (see paragraph 301).

The following paragraph of the present judgment deserves to be quoted in full, as it explains who, in the opinion of the domestic court, suffered losses, and why these losses amounted to a deprivation of property:

“The [Khamovnicheskiy District Court of Moscow] considered that the applicants did not employ the system of transfer pricing, but that they simply forced the production entities to sell their oil for artificially low prices, which resulted in a reduction of the profits for the production entities and, in turn, *deprived the minority shareholders, including the State itself, of their dividends*. The fact that the production entities received payments for the oil did not mean that there had been no misappropriation; this legal concept also covered situations where misappropriation of property is followed by *inadequate compensation* for that property” (see paragraph 303 of the judgment; emphasis added).

On appeal, the reasoning of the first-instance court was upheld by the Moscow City Court (see paragraphs 336-40).

3. Before the Court, the applicants argue that, since the transfer of oil from the Yukos production entities to Yukos Trading companies had taken place pursuant to lawful purchase-sale transactions, such transfer could not in principle amount to “unlawful uncompensated taking and/or appropriation of another’s property” (see paragraph 561 of the judgment). Nor, in their submission, did the production entities suffer any damage or losses, since they all had made a profit from the sale of oil (see paragraph 562). Lastly, they argued that the property had not been “entrusted to the culprit” (see paragraph 563).

4. The question raised by the applicants’ complaint is that of the degree to which domestic courts can interpret a provision of criminal law in order to conclude that a given form of conduct falls under that provision.

The majority admit that “the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition” (see paragraph 569 of the judgment, referring to *Del Río Prada v. Spain* [GC], no. 42750/09, § 93, ECHR 2013). And further, “Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen” (ibid.; see *Del Río Prada*, cited above, § 93, and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 155, ECHR 2015).

The question therefore is whether the domestic courts’ interpretation of the terms “misappropriation or embezzlement”, used in Article 160 § 4 of the Criminal Code, was “consistent with the essence of the offence” and “could reasonably be foreseen”.

5. The majority accept the applicants’ first argument. In substance, they consider it inconceivable that “a reciprocal transaction that is valid under civil law can amount to ‘the unlawful and uncompensated taking ... of another’s property’” (see paragraph 581 of the judgment). In this respect, they refer to the Constitutional Court’s ruling no. 1037-O-O of 2 July 2009,

pronounced on the complaint brought by the first applicant, in which that Court excluded the possibility of bringing criminal charges in respect of “lawful” civil-law transactions (see paragraphs 403 and 581). For the majority, to hold that a contract which is lawful under civil law could be recognised as the criminal offence of “stealing” would “amount to an untenable position capable of leading to arbitrary consequences” (see paragraph 582).

6. With all due respect, we do not see the difficulty.

In our opinion, a contract can be valid under civil law and still be a means by which a criminal act is committed. It is the context of the transaction that matters. In the case of the applicants, as was found by the domestic courts, the contracts in question were used to drain oil at a low price (about half of the market price) from the Yukos production entities to the Yukos trade companies, the latter being located offshore and controlled by the applicants. The oil was subsequently sold at the real market price to end-customers. The minority shareholders in the Yukos companies were not aware of the overall structure of the activities. The full picture, including the “sham” character of the agreements held to be valid by the commercial courts, became clear only later.

There is nothing wrong with the domestic courts’ assessment finding that the agreements, although approved by the general meetings of shareholders, constituted the means by which criminal offences were committed, having regard to the fact that “those approvals were obtained through deceit and manipulation” (see paragraph 301 of the judgment). “Deceit” may not feature as a qualifying element in either the offence of “misappropriation or embezzlement” or in the offence of “stealing” (see paragraph 583), but this does not mean, in our opinion, that the domestic courts were not entitled to refer to the existence of deceit as a feature that could transform an otherwise valid agreement into an element proving the existence of conduct that had to be characterised as “misappropriation or embezzlement” or “stealing”.

In short, we do not consider that the courts’ interpretation of the notions of “misappropriation or embezzlement” or “stealing” was inconsistent with the essence of these offences or could not reasonably have been foreseen.

7. What seems to distinguish our approach from that of the majority is the angle from which the impugned agreements are considered.

The majority seem to limit their assessment to the particular transactions concluded through the various agreements involving the sale of oil from the Yukos production entities to the Yukos trading companies (see paragraph 578 of the judgment). They do not examine the applicants’ “entire economic activity” (*ibid.*). Incidentally, this explains why they do not exclude the possibility that the acts imputed to the applicants are punishable “under a different provision of the Criminal Code” (see paragraph 583).

The majority's approach is, in our opinion, too restricted. It seems to be based on an understanding of the notion of "stealing" as a rather instantaneous act.

The domestic courts adopted a broader approach, involving "reassessment of the applicants' entire economic activity" (compare paragraph 578 of the judgment). In this assessment the impugned agreements were seen as part of a scheme set up to deprive the minority shareholders of the dividends that would normally have been theirs. It is for the domestic courts to assess the facts and to interpret the provisions of domestic law. We see no reason to question their broader approach to the facts. Equally, we do not find that their interpretation of the relevant provisions of the Criminal Code amounted to an excessively extensive interpretation.

8. For the above reasons, we consider that there has been no violation of Article 7 of the Convention. The applicants could have foreseen that their operations amounted to misappropriation or embezzlement, and, in consequence, to money laundering.

In fact, they tried by all means to keep the true nature of these operations hidden (see paragraphs 126-28 of the judgment). This is for us quite telling.