IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 24 June 2009 No. 11-П

in the case concerning the review of the constitutionality of the provisions of Subsections 2 and 4, Article 12, Articles 22^1 and 23^1 of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" and Articles 23, 37, and 51 of the Federal Law "On Protection of Competition" in connection with complaints of Gazenergoset OJSC and Nizhnekamskneftekhim OJSC.

Saint Petersburg, 24 June 2009

The Constitutional Court of the Russian Federation composed of Presiding Judge Yu. M. Danilov and Judges V. D. Zorkin, L. M. Zharkova, G. A. Zhilin, S. M. Kazantsev, M. I. Kleandrov, N. V. Melnikov, N. V. Seleznev, V. G. Strekozov,

in the attendance of attorneys P. A. Posashkov and S. Ye. Tsygankov as representatives of Gazenergoset OJSC, attorneys Ye. A. Gataullin, M. G. Raskin and A. R. Sultanov as representatives of Nizhnekamskneftekhim OJSC, Permanent Representative of the State Duma to the Constitutional Court of the Russian Federation A. N. Kharitonov, Representative of the Council of the Federation Ye. V. Vinogradova, PhD in Law, Plenipotentiary Representative of the President of the Russian Federation to the Constitutional Court of the Russian Federation M. V. Krotov,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Subsection 3, Section 1, Sections 3 and 4, Article 3, Subsection 3, Section 2, Article 22, Articles 36, 74, 86, 96, 97, and 99 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation",

in an open hearing, examined the constitutionality of the provisions of Subsections 2 and 4, Article 12, Articles 22^1 and 23^1 of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" and Articles 23, 37 and 51 of the Federal Law "On Protection of Competition".

The reason for the consideration of the case is complaints of Gazenergoset OJSC and Nizhnekamskneftekhim OJSC. The ground for the consideration of the case is the discovered uncertainty of whether the provisions challenged by the applicants are in conformity with the Constitution of the Russian Federation.

Insofar as both complaints concern the same subject matter and pursuant to Article 48 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation is permitted to consider these applications together.

Having heard the report of Judge-Rapporteur M. I. Kleandrov, statements by the parties' representatives, statements by the following representatives invited to the hearing: I. M. Strelov, Representative of the Supreme Arbitration Court of the Russian Federation, T. A. Vasilyeva, Representative of the Prosecutor General of the Russian Federation, A. A. Smirnov, Representative of the Ministry of Justice of the Russian Federation, M. P. Gorokhova, Representative of the Ministry of Economic Development of the Russian Federation, I. Y. Artemyev and S. A. Puzyrevsky, Representatives of the Federal Antimonopoly Service; and having considered written submissions and other materials, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. Article 12 of Law of the RSFSR No. 948-I of 22 March 1991, "On Competition and Restriction of Monopolist Activities in Commodity Markets", vested the antimonopoly authorities with the power to issue orders to business entities that shall be binding upon them, including orders to transfer, to the federal budget, the income received due to violation of the antimonopoly legislation (Subsection 2) and the power to hold administratively liable commercial and non-commercial organizations, their managers, individuals (including individual entrepreneurs), and officials of federal executive authorities, executive authorities of subjects of the Russian Federation, local self-government authorities, and other authorities or organizations vested with the rights and functions of the above-mentioned authorities for violations of the antimonopoly legislation in cases and under procedures established by the legislation on administrative offences (Subsection 4). The said provisions are reproduced, respectively, in Subsection 2 "j" and Subsection 5, Section 1, Article 23 of Federal Law No. 135-ФЗ of 26 July 2006, "On Protection of Competition".

The Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" also imposed civil, administrative, or criminal liability for violations of the antimonopoly legislation (Article 22^1) and envisaged that the income received due to violation of the antimonopoly legislation by a business entity engaged in activities duly recognized as monopolistic activities or unfair competition shall be recovered to the federal budget in judicial proceedings initiated by the antimonopoly authorities provided that the respective order was not executed (Article 23^1). Article 37, "Liability for Violation of the Antimonopoly Legislation", and

Article 51, "Enforcement of an Order in Proceedings on Violation of the Antimonopoly Legislation. Consequences of Non-Execution of the Order to Transfer Income Received from Monopolistic Activities or Unfair Competition to the Federal Budget", of the Federal Law "On Protection of Competition" have similar content.

1.1. By its decision of 30 November 2006, the Ninth Arbitration Appellate Court annulled the Moscow Arbitration Court judgment of 22 November 2005 which, following a complaint of Gazenergoset OJSC and Gazprom OJSC, invalidated the decision of the Federal Antimonopoly Service, which found a violation of the antimonopoly legislation in actions of a group of entities (Gazprom OJSC, AK Sibur OJSC, Gazenergoset OJSC, and Sibur-Gazservis OJSC), which colluded to fix and maintain high monopolistic prices on the market. The court also invalidated the order to transfer the income of 153,760,813 Russian rubles received due to violation of the antimonopoly legislation to the federal budget. The Federal Arbitration Court of the Moscow Circuit upheld the decision of the appellate instance court and verified the accuracy of the antimonopoly authorities' calculation of the income received by the mentioned group of entities, which had to be transferred to the federal budget under Article 12 of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets".

The judgment of the Moscow Arbitration Court of 8 July 2008, which was upheld by the decision of the Ninth Arbitration Appellate Court of 15 September 2008 and the decision of the Federal Arbitration Court of the Moscow Circuit of 24 December 2008, dismissed the lawsuit of the Federal Antimonopoly Service to recover the income of 135,022,341 Russian rubles and 20 kopecks received by Gazenergoset OJSC due to violation of the antimonopoly legislation and transfer it to the federal budget.

1.2. The judgment of the Moscow Arbitration Court of 11 July 2006, upheld by the decision of the Ninth Arbitration Appellate Court of 8 February 2007 and the decision of the Federal Arbitration Court of the Moscow Circuit of 18 June 2007, dismissed the lawsuit of Nizhnekamskneftekhim OJSC aimed at invalidating the Federal Antimonopoly Service's decision of 27 February 2006 in the proceeding on violation of the antimonopoly legislation, the order of 27 February 2006 to terminate violations of the antimonopoly legislation, and the order of 16 March 2006 to transfer the income received due to violation of the antimonopoly legislation to the federal budget.

The Federal Antimonopoly Service lodged an action to recover the income of 70,958,476 Russian rubles and 84 kopecks received by Nizhnekamskneftekhim OJSC due to violation of the antimonopoly legislation in 2004 and 2005 and transfer it to the federal budget, with the Arbitration Court of the Republic of Tatarstan. In its Judgment of 19 February 2008, the Court ruled in favour of the Federal Antimonopoly Service, and the judgment was upheld by the

decision of the Eleventh Arbitration Appellate Court on 21 May 2008 and decision of the Federal Arbitration Court of the Volga Circuit on 17 July 2008.

1.3. Gazenergoset OJSC requests to recognize, as non-conforming to the Constitution of the Russian Federation (namely its Articles 34 (Section 1), 35 (Sections 1, 2, and 3), 49, 50, 52, 53, 54, 55 (Section 3), and 64, the provision of Paragraph 8, Subsection 2, Article 12 of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets", which was applied by arbitration courts in consideration of the action of Gazenergoset OJSC and Gazprom OJSC in the first, appellate and cassation instances. This provision violates the Constitution by permitting antimonopoly authorities to issue orders to transfer the income received due to violation of the antimonopoly legislation to the federal budget to a group of entities without indicating the amount to be transferred to the federal budget by each entity within this group, regardless of the time when the violation was committed or identified, and without establishing the guilt of each of the entities within the group.

In the opinion of Nizhnekamskneftekhim OJSC, the liability in the form of an obligation to transfer the income received due to violation of the antimonopoly legislation to the federal budget imposed on it has public law nature and has features of administrative responsibility. The applicant believes that the provisions of Paragraph 8, Subsection 2, and Subsection 4 of Article 12 of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" applied in its case equally with the similar provisions of Articles 23, 37, and 51 of the Federal Law "On Protection of Competition" currently in force permit public law liability to be imposed on an entity without establishing the degree of its guilt, without guarantees of presumption of innocence, and without considering the statutes of limitations. These provisions violate the constitutional principles of fairness, adequacy and proportionality of state coercive measures, legal certainty and the rule of law, and therefore contradict the Constitution of the Russian Federation, its Articles 1, 2, 15, 17, 18, 19, 21, 34, 35, 45, 46, 49, and 55.

Thus, under Articles 74, 96, and 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the subject matter for consideration by the Constitutional Court of the Russian Federation in the present case is the interrelated provisions of Subsections 2 and 4, Article 12, Articles 22^1 and 23^1 of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" and the respective provisions of Articles 23, 37, and 51 of the Federal Law "On Protection of Competition", which determine procedures for and conditions of transferring the income received due to violation of the antimonopoly legislation to the federal budget.

2. Pursuant to the Constitution of the Russian Federation, everyone shall be entitled to freely use his abilities and property for entrepreneurial activities and other economic activities not prohibited by law (Section 1, Article 34); integrity of economic space, free movement of goods, services and financial resources, support of competition, freedom of economic activity are guaranteed in the Russian Federation (Section 1, Article 8); economic activities aimed at monopolization and unfair competition are prohibited in the territory of the Russian Federation (Article 34, Section 2); customs borders, duties, fees, or any other barriers to free movement of goods, services, and financial resources are prohibited (Section 1, Article 74).

Relying on the above-mentioned provisions of the Constitution of the Russian Federation in conjunction with its Articles 2, 17, 18, and 45 (Section 1), the most favourable conditions shall be established in the Russian Federation for the functioning of the economic system as a whole, which implies the need to stimulate free market economy based on the principles of self-organization of economic activities carried out by entrepreneurs, who are its major actors, and special measures to be taken by the government to protect their rights and lawful interests and therefore to achieve the constitutional aim of optimizing state regulation of economic relations.

At the same time, the constitutional principle of fairness (in particular implying a balance of rights and obligations of all the players of the market) requires that the freedom exercised by persons engaged in entrepreneurial activities and other economic activities not prohibited by law and the protection guaranteed to them shall be counterbalanced by the requirement that these persons (first and foremost those enjoying a dominant position in a certain area) shall responsibly consider the rights and freedoms of persons affected by their economic activities.

3. The prohibition of economic activities aimed at monopolization and unfair competition implies the possibility of applying state measures to persons who violate the antimonopoly legislation. This possibility stems from Article 17 (Section 3) of the Constitution of the Russian Federation, pursuant to which the exercise of the rights and freedoms of man and citizen may not violate the rights and freedoms of others, and consequently it is not an unlawful limitation of constitutional rights and freedoms. Therefore, the federal legislator exercising legal regulation in this area of social relations shall be entitled and obliged to prescribe measures supporting competition and freedom of economic activities.

The Federal Law “On Protection of Competition”, which currently defines organizational and legal grounds for protecting competition, vests the antimonopoly authorities with the power to issue orders to transfer income received due to violation of the antimonopoly legislation to the federal budget. Any failure to execute this order in due time may result in judicial enforcement of its execution by the business entity (Subsection 6 “f”, Section 1, Article 23).

In terms of its grounds, application procedures and legal consequences, this measure is a specific form of coercive influence on the participants in social relations protected by the antimonopoly legislation. It is intended to ensure restoration of the balance of public and private interests by taking income received by the business entity in an abusive manner and thus it aims at compensating the incalculable state expenses incurred to eliminate the negative social and economic consequences of a violation of the antimonopoly legislation.

The compensatory nature of this measure implies the possibility of its application to actions which are monopolistic and violate requirements of fair competition, in parallel with punitive measures of responsibility. In itself such possibility does not fall within the domain of the general legal principle prohibiting to hold anyone responsible twice for the same action (*non bis in idem*).

As was indicated by the Constitutional Court of the Russian Federation, the federal legislator choosing the means and ways of exercising legal influence may not ignore the system of legal regulation divided into branches, established in the Russian Federation as a rule of law state, and the general principles of the respective branches of law (public or private). The legal opinion articulated in Judgment No. 10-П of 18 July 2008 does not preclude a possibility for the federal legislator considering social, economic and other factors and heterogeneous nature of social relations to regulate them by the means of more than one branch of law. However, such legal regulation may not in any event fail to take account of the constitutional principles of fairness, legal equality, proportionality and commensurability of the introduced measures to the constitutionally significant aims and their coherence with the system of legal regulation in force.

The legal mechanism of recovering income received due to violation of the antimonopoly legislation and transferring it to the federal budget shall also rely on these constitutional principles regardless of the specific branch this mechanism is placed in by *lex lata* and (or) *lex ferenda*, i.e. by the current or future regulation.

4. Pursuant to Articles 17 (Section 3) and 55 (Section 3) of the Constitution of the Russian Federation and the principle of fairness, the constitutional requirement of proportionality of legal responsibility implies its differentiation on the basis of gravity of the action, the scope and nature of the harm, the degree of the offender's guilt, and other significant circumstances that underlie the individualization of the penalty to be applied.

4.1. According to the legal opinions articulated by the Constitutional Court of the Russian Federation, guilt is a necessary element of *corpus delicti* for each offence, and in all branches of law it is a ground for imposing legal responsibility, unless otherwise expressly and lucidly stated by the legislator. The federal legislator prescribing penalty measures may envisage different forms of guilt and allocation of the burden of proof giving regard to the specificity of the

regulated subject matter. Reviewing responsibility for customs offences the Constitutional Court of the Russian Federation reached the conclusion that the absence of guilt in violating customs rules is among circumstances precluding proceedings on a case since it proves the absence of *corpus delicti* of the customs offence. The court ensures protection of the rights and freedoms of individuals and legal persons in imposing customs responsibility by conducting legal proceedings founded on principles of adversariness and equality of rights (Article 123 of the Constitution of the Russian Federation). It may not limit itself to formal determination of the fact of customs rules violation failing to identify other relevant circumstances, including guilt or its absence regardless of its form or the allocation of the burden of proof.

Giving regard to the public law nature of the legal relations between bodies of state control and participants in economic activities, the mentioned legal opinions expressed in Judgments No. 11-П of 15 July 1999, No. 1-П of 25 January 2001, No. 7-П of 27 April 2001 and No. 13-П of 30 July 2001 are fully applicable to the mechanism of recovering income received due to violation of the antimonopoly legislation and transferring it to the federal budget.

The provisions of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" under review may not fail to imply (since they do not prescribe otherwise) that the absence of guilt in violation of the antimonopoly legislation shall be the circumstance which precludes recovery of income received by a business entity due to respective violation and its transfer to the federal budget, and that the antimonopoly authorities may not be relieved of an obligation to establish the guilt of a participant in economic activities as a necessary requirement for recovery of illegally received income and its transfer to the budget (insofar as the federal legislator does not expressly relieve the authority of this obligation).

4.2. As was stated by the Constitutional Court of the Russian Federation in its Judgment No. 7-П of 27 April 2001, the Constitution of the Russian Federation establishes presumption of innocence in Article 49, i.e. in criminal law the burden of proof is allocated to state authorities. Regulating other types of legal responsibility, the legislator has the power to allocate the burden of proof in another way while giving due consideration to the specificity of the respective relationships and their participants (in particular, enterprises, institutions, organizations, and individuals engaged in entrepreneurial activities).

In allocating the burden of proof, the legislator considering the requirement of responsibility being inevitable and the interest in protecting the fundamentals of the constitutional order, morality, health, rights and lawful interests of others, and ensuring the defense of the country and the security of the state (Section 2, Article 15, and Section 3, Article 55 of the Constitution of the Russian Federation) has the power to exempt state

authorities from proving the guilt. However, persons who are believed to be offenders must have a possibility to prove their innocence in judicial proceedings upon complaints envisaged by the procedural legislation (Article 46 of the Constitution of the Russian Federation). The opportunity to lodge such complaints is not excluded by the Federal Law "On Protection of Competition" either.

In entrepreneurial activities, the adverse consequences of any abuse are imposed on the business entity which committed it, while the mentioned actions are not evident. Therefore the necessary balance of public and private interests does not prevent allocation of the burden to prove innocence on the participant in entrepreneurial activities, however, it should be expressly prescribed by law.

4.3. Thus, the reviewed provisions of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" and the Federal Law "On Protection of Competition" do not contradict the Constitution of the Russian Federation as they contain no direct exemption from the rule that the guilt shall be a prerequisite for adverse consequences in public law relationships and do not preclude offenders from proving their innocence in the course of proceedings prescribed by law.

Attribution of a different meaning to the mentioned legal provisions would result in denial of the public law nature of responsibility imposed on the person violating the antimonopoly legislation and the activity of the state body controlling it. Consequently, the guarantees of competition protection in entrepreneurial activities as a private law institution facilitating the exercise of the right of property and freedom of economic activities would have been lowered.

5. Pursuant to Section 2, Article 9 of the Federal Law "On Protection of Competition", the prohibitions imposed by this Federal Law on actions (inaction) of a business entity or business entities also cover actions (inaction) of a group of entities. In the case of Gazenergoset OJSC, the order of the antimonopoly authorities which imposed an obligation to transfer the income received due to violation of the antimonopoly legislation to the federal budget on a group of business entities (and the applicant as a part of it) indicated the total amount of money to be recovered without specifying to what extent it is recovered from each of the members of the group.

Meanwhile, the constitutional principles of fairness, legal equality, proportionality of the liability imposed to the constitutionally significant aims pursued imply that the liability in the form of recovery of income received by a group of business entities due to violation of the antimonopoly legislation and its transfer to the federal budget imposed on each of them shall be proportionate. Any other approach might lead to inequality of the business entities which are

held liable since it would result in equal payments for those who receive different incomes. Therefore, Subsection 2, Article 12 of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" equally with Subsection 2, Article 23 of the Federal Law "On Protection of Competition" in the light of the constitutional principles of fairness and equality may not be considered as permitting the antimonopoly authorities to issue an order on transfer of the total amount of income received by a group of entities without specifying the amounts to be transferred by each of the business entities that participated in the violation.

Thus, the provisions of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" and the Federal Law "On Protection of Competition", which regulate recovery of income received by a group of business entities and its transfer to the federal budget, in their constitutional interpretation imply the necessity to specify the amounts of income to be individually recovered from each of these entities and proportionally to the illegally received income.

6. In the light of the legal opinions expressed by the Constitutional Court of the Russian Federation about the institution of a statute of limitations, limitations of recovery of tax penalties and limitations on imposing administrative and criminal responsibility, the purpose of establishing the respective statutes of limitations is to ensure effectiveness of public functions, stability of the legal order, and rational organization of the law-enforcement authority's activities. Equally they maintain necessary stability of legal relations and guarantee the constitutional rights of the person who committed an action which may trigger legal consequences, since no one may be put at risk of being held liable for an indefinite or excessively long period of time (Judgments No. 7-П of 27 April 2001 and No. 9-П of 14 July 2005, Decision No. 445-O of 3 November 2006). The existence of periods during which adverse consequences can arise for a person in his relations with the state, is a prerequisite for these consequences.

Yet, neither the Federal Law "On Protection of Competition" nor the earlier Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" (and the Rules of Consideration of Cases on Antimonopoly Legislation Violations, which were adopted on its basis and approved by Order of the Federal Antimonopoly Service No. 12 of 2 February 2005) expressly determine the statute of limitations for antimonopoly liability.

The Federal Law "On Protection of Competition" only establishes a limitation period to review an application or materials indicating violation of the antimonopoly legislation, which may not exceed one month after their submission (Articles 39 and 44). The activities of antimonopoly authorities regarding state control of compliance with antimonopoly legislation are

aimed at coercing the liable entities to due behaviour by issuing orders. However, as follows from Article 23 of the mentioned Federal Law the mechanism to enforce recovery of the received income is court proceedings. Namely, if a business entity does not voluntarily comply with the order, the antimonopoly authorities need to lodge with an arbitration court an action for enforcement of the order to transfer the income received due to violation of the antimonopoly legislation to the federal budget (Subsection 6 "f", Section 1).

Since, pursuant to the reviewed legal provisions, enforcement of the transfer of the due amounts to the budget is exercised on the basis of a lawsuit, the statute of limitations for such recovery is the general statute of limitations for civil lawsuits (in the absence of another statute of limitations determined specifically for these violations). The use of the general statute of limitations is coherent with the existing system of legal regulation and provides minimal constitutional guarantees of the rights and lawful interests of persons whose income received due to violation of the antimonopoly legislation is to be recovered to the federal budget.

Concluding from the above and pursuant to Article 6, Article 71 Sections 1 and 2, Article 72, 75, 79, 87, and 100 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation

h e l d :

1. To recognize, as conforming to the Constitution of the Russian Federation, the provisions of Subsections 2 and 4, Article 12, Articles 22^1 and 23^1 of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" and Articles 23, 37, and 51 of the Federal Law "On Protection of Competition", since these provisions within their constitutional meaning do not permit issuing an order to transfer income received by a business entity due to violation of the antimonopoly legislation to the federal budget without establishing its guilt and without specifying the amount to be transferred to the budget by each of the business entities that participated in the violation, provided that until the law establishes otherwise these legal provisions are applied only within the limits of general statute of limitations for civil actions.

The constitutional meaning of the mentioned legal provisions established by the Constitutional Court of the Russian Federation in the present Judgment shall be generally binding and shall preclude any other interpretation in the law-enforcement practice.

2. The law-enforcement decisions delivered in regard of Gazenergoset OJSC and Nizhnekamskneftekhim OJSC and based on the provisions of Subsections 2 and 4, Article 12, Articles 22^1 and 23^1 of the Law of the RSFSR "On Competition and Restriction of Monopolist Activities in Commodity Markets" and Articles 23, 37, and 51 of the Federal Law "On

Protection of Competition", with an interpretation diverging from their constitutional meaning established in the present Judgment, are to be reconsidered according to the established procedure.

3. This Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon pronouncement, shall be directly applicable, and shall not require confirmation by other authorities and state officials.

4. Pursuant to Article 78 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", this Judgment shall be published in the Collection of Laws of the Russian Federation and *Rossiyskaya Gazeta*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court
of the Russian Federation

No. 11-П