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Federal Antimonopoly Service of Russia

Decision in Case No. 1-11/202-11

Moscow
Operative part announced on **16 May 2012**.
Full decision prepared on **25 May 2012**.

Currency reference for this translated act. The legally controlling amounts are in Russian roubles. At the official exchange rate applicable on 25 May 2012, **RUB 671,270,983.68 ≈ USD 21,226,161.31**; **RUB 670,828,519.68 ≈ USD 21,212,170.22**. The equivalents are provided solely to convey historical scale.

The Commission of the Federal Antimonopoly Service for the consideration of cases concerning violations of antimonopoly legislation, composed as follows: **[names redacted in the published copy]** (the "FAS Russia Commission"),

having considered Case No. 1-11/202-11 concerning indications that CJSC ROSTA (1 Lenin Avenue, Podolsk, 142100), OJSC Pharmstandard (5B Likhachevsky Proezd, Dolgoprudny, Moscow Region, 147701) violated Article 11(1)(2) of Federal Law No. 135-FZ of 26 July 2006 "On Protection of Competition" (the "Competition Law"), and that the Ministry of Health and Social Development of the Russian Federation (21 Ilyinka Street, Moscow, 103132) violated Article 15(1)(6) of the Competition Law,

FOUND AS FOLLOWS

By Order No. 145 of FAS Russia dated 2 March 2011, Case No. 1-11/45-11 was initiated on indications that CJSC Firm CV PROTEK and CJSC ROSTA had violated Article 11(1)(2) of the Competition Law.

The basis for opening Case No. 1-11/45-11 was an instruction of the Prosecutor General's Office of the Russian Federation (incoming No. 046762 DSP of 29 September 2010), sent to FAS Russia following an inspection of the Ministry of Health and Social Development. The inspection concerned the Ministry's compliance with Russian law when conducting auctions in 2008–2009 for the procurement of medicines for state needs.

At the same time, on 4 February 2011 the Investigative Committee under the Ministry of Internal Affairs of the Russian Federation opened Criminal Case No. 678509 on indications of an offence under Article 178(2)(c) of the Criminal Code of the Russian Federation, concerning restriction of competition in auctions conducted by the Ministry of Health and Social Development—Nos. 081010/001550/45 of 10 October 2008, 090316/0011550/93 of 16 March 2009, 090428/001550/106 of 28 April 2009, 091009/001550/284 of 5 November 2009 and 091127/001550/312 of 25 December 2009—for the supply of medicines for state needs, allegedly causing especially large damage to the state.

By determination No. AC/28039 of 19 July 2011, OJSC Pharmstandard and LLC Optimal Health were subsequently joined as respondents in Case No. 1-11/45-11.

By determination No. AC/40400 of 27 October 2011, pursuant to Article 47.1(1) and (2) of the Competition Law and for the fullest, most comprehensive and objective consideration, the case against CJSC ROSTA and OJSC Pharmstandard was severed into separate proceedings. The indications concerned a violation of Article 11(1)(2) through an agreement that resulted or could have resulted in maintenance of the auction price for Lot No. 16 of Open Auction No. 091127/001550/312. That auction concerned state contracts for medicines intended for patients with malignant neoplasms of lymphoid, haematopoietic and related tissue, haemophilia, cystic fibrosis, pituitary dwarfism, Gaucher disease and multiple sclerosis, and for patients after organ and/or tissue transplantation, within centralised procurement for federal healthcare institutions subordinate to the Federal Medical-Biological Agency and organisations designated by regional executive authorities for March–December 2010. The auction was conducted on 25 December 2009 by the Ministry of Health and Social Development (the “Auction No. 312”).

The grounds for severing the matter included documents obtained by FAS Russia during a scheduled on-site inspection of OJSC Pharmstandard under FAS Russia Order No. 327 of 4 May 2011, together with the documentation for Auction No. 312.

The severed matter was assigned Case No. 1-11/202-11.

By determination No. AC/41703 of 10 November 2011, the Ministry of Health and Social Development of the Russian Federation (the “Ministry”) was joined as a respondent on indications of a violation of Article 15(1)(6) of the Competition Law.

According to the auction documentation and the materials of Case No. 1-11/202-11, the bidding for Lot No. 16 of Auction No. 312 proceeded as follows.

On 27 November 2009 the Ministry published information on www.zakupki.gov.ru concerning Auction No. 091127/001550/312. Lot No. 16 concerned the purchase of 80,448 packs of dornase alfa inhalation solution 2.5 mg/2.5 ml No. 6 (the “Medicinal Product”), at an initial (maximum) price of **RUB 671,270,983.68 (approximately USD 21,226,161.31 at the rate on 25 May 2012)**.

Under the auction documentation, delivery was to take place in two stages:

1. stage one—40% of the total quantity, namely 32,180 packs, from the date of the state contract through 15 February 2010;
2. stage two—60% of the total quantity, namely 48,268 packs, from 16 February through 1 July 2010.

The auction was scheduled for 25 December 2009. Applications were accepted from 27 November through 18 December 2009.

According to the application-review protocol of 23 December 2009, OJSC Pharmstandard and CJSC ROSTA submitted applications for Lot No. 16 on 18 December 2009. Both undertakings were admitted to the auction.

CJSC ROSTA did not attend the bidding for Lot No. 16 on 25 December 2009. Consequently, under Article 37(12) and (13) of Federal Law No. 94-FZ of 21 July 2005 “On Placement of Orders for the Supply of Goods, Performance of Work and Provision of Services for State and Municipal Needs,” the auction was declared unsuccessful, and OJSC Pharmstandard obtained the right to enter into the state contract at the initial (maximum) price of **RUB 671,270,983.68 (approximately USD 21,226,161.31)**.

On 13 January 2010 the Ministry entered into State Contract No. K-25-Ts/2-5 with OJSC Pharmstandard for 80,448 packs of dornase alfa inhalation solution 2.5 mg/2.5 ml No. 6, manufactured by F. Hoffmann-La Roche Ltd., Switzerland, under the trade name Pulmozyme.

The Commission examined the case materials, including documents supplied by the Investigative Department of the Ministry of Internal Affairs on 6 April 2012 (incoming No. 19941-DSP) and 2 May 2012 (incoming No. 25256 DSP), heard the arguments, objections and explanations of the participating persons, and established the following.

On 17 September 2009, under Contract No. 70 of 31 March 2008 with ADOC TRADING (CYPRUS) LTD., Cyprus, for medicines manufactured by F. Hoffmann-La Roche Ltd., Switzerland, including Pulmozyme, CJSC ROSTA signed general specifications with that company. General Specification No. 4 provided for 10,233 packs of Pulmozyme, and General Specification No. 5 for 93,820 packs.

The case materials indicate that those specifications, covering 104,053 packs of Pulmozyme, were signed because the Ministry was to purchase that medicine under Open Auctions No. 091009/001550/284 (18,967 packs required) and No. 091127/001550/312 (80,448 packs required).

This shows that on 17 September 2009—two and a half months before the auction was announced on 27 November 2009—CJSC ROSTA, by signing those specifications with ADOC TRADING (CYPRUS) LTD., arranged to acquire the quantity of Pulmozyme needed, inter alia, for supplies under Auction No. 312.

As noted above, however, the Ministry officially published information about Auction No. 312, including the intended procurement volumes, only on 27 November 2009.

On 1 October 2009 CJSC ROSTA and OJSC Pharmstandard entered into Sale and Purchase Agreement No. 129-P.

On 1 November 2009 CJSC ROSTA and OJSC Pharmstandard signed General Specification No. 2 to that agreement for CJSC ROSTA to supply OJSC Pharmstandard with 32,180 packs of Pulmozyme by 4 February 2010; on 19 April 2010 they signed General Specification No. 3 for another 48,268 packs by 15 May 2010.

Accordingly, under those two specifications OJSC Pharmstandard purchased from CJSC ROSTA exactly 80,448 packs of Pulmozyme—the quantity later needed to perform the state contract awarded under Lot No. 16 of Auction No. 312—and in exactly the proportions specified in that state contract: 32,180 packs, or 40%, for the first delivery stage, and 48,268 packs, or 60%, for the second stage.

Delivery of the medicine under Specifications Nos. 2 and 3 is also confirmed by documents supplied by the Investigative Department of the Ministry of Internal Affairs on 6 April and 2 May 2012.

General Specification No. 2 for 32,180 packs was signed 27 days before the Ministry officially published information about Auction No. 312—that is, 27 days before potential bidders could lawfully have learned the quantity of the medicine to be procured.

The signing of those specifications shows that, at least by 1 November 2009, CJSC ROSTA and OJSC Pharmstandard already possessed information concerning Lot No. 16 of Auction No. 312, including the medicine, the quantity to be procured, the delivery conditions and other auction requirements.

In response to a FAS Russia request, OJSC Pharmstandard (incoming No. 2847 of 18 January 2012) confirmed that Sale and Purchase Agreement No. 129-P of 1 October 2009 existed between Pharmstandard and ROSTA. Pharmstandard nevertheless asserted that, when Auction No. 312 was conducted, it did not have the product at its disposal; no specifications had been signed for the volume of Lot No. 16; and no payments or shipments had occurred.

Those assertions are contradicted by the case materials.

In response to a FAS Russia request (incoming No. 53750 of 15 September 2011), CJSC ROSTA confirmed that it had decided not to bid for Lot No. 16 of Auction No. 312 and instead to sell its stock as one wholesale lot to OJSC Pharmstandard because Pharmstandard "offered a 20% prepayment." ROSTA asserted that this happened "after confirmation that OJSC Pharmstandard's application for Lot No. 16 complied with the auction documentation."

Those assertions are also contradicted by the case materials.

To explain why it purchased medicine worth about **RUB 670 million (approximately USD 21.19 million)**, imported it into Russia and then sold it to a competitor instead of bidding itself, CJSC ROSTA stated that, given its supplies of other imported medicines under state contracts, it was interested in recovering at least part of its import costs as quickly as possible and therefore entered into a sale contract for Pulmozyme "on payment terms more favourable than those under the state contract."

ROSTA did not explain what those more favourable terms were.

On 18 December 2009, on the same day, OJSC Pharmstandard and CJSC ROSTA submitted their applications and were later admitted to the bidding for Lot No. 16 of Auction No. 312.

Particular attention must be paid to the fact that, once admitted to the same procurement procedure, OJSC Pharmstandard and CJSC ROSTA were direct competitors.

Under Article 4(7) of the Competition Law, competition is rivalry between undertakings whereby the independent actions of each exclude or restrict the ability of any of them unilaterally to influence the general conditions of circulation of goods on the relevant product market.

It follows that competitors are undertakings that determine their market conduct independently of one another and compete by offering the buyer the most favourable terms.

ROSTA gave the following explanation for submitting an application (incoming No. 53750 of 15 September 2011): "Since the supply order had already been placed, and in order to avoid cancellation of the auction because of a lack or disqualification of bidders and disruption of state supplies, CJSC ROSTA submitted an application for Lot No. 16."

On 25 December 2009 ROSTA did not attend the bidding. The auction was declared unsuccessful, and the state contract for 80,448 packs was entered into with Pharmstandard at the initial (maximum) price of **RUB 671,270,983.68 (approximately USD 21,226,161.31)**.

Thus, while having contractual arrangements with ADOC TRADING (CYPRUS) LTD. for the medicine designated by the Ministry for Lot No. 16, ROSTA arranged its import into Russia in the quantity needed for that lot. Instead of competing at the auction, ROSTA sold the medicine on the eve of the auction to one of the bidders, Pharmstandard. Pharmstandard purchased it and “won” the auction at the initial (maximum) price of **RUB 671,270,983.68 (approximately USD 21,226,161.31)** because ROSTA, despite applying and being admitted, did not attend.

After considering Case No. 1-11/202-11, the Commission concluded that the respondents’ actions—signing documents for sale of the medicine that was the subject of Lot No. 16, and simultaneously applying to bid without a genuine intention to participate—resulted from a restrictive agreement between ROSTA and Pharmstandard aimed at maintaining the auction price in order to obtain maximum profit (the “Agreement”).

In the Commission’s view, the Agreement was reached before 25 December 2009 and then implemented in Auction No. 312.

Under Article 4(18) of the Competition Law, an agreement is an arrangement in writing, contained in one or more documents, or an oral arrangement.

The Competition Law establishes special requirements for identifying an agreement as an expression of the will of undertakings, distinct from the requirements of the Civil Code of the Russian Federation.

According to Resolution No. 9966/10 of the Presidium of the Supreme Commercial Court of the Russian Federation dated 21 December 2010, Article 11(1) of the Competition Law prohibits agreements between undertakings if they result or may result, among other things, in setting or maintaining prices, tariffs, discounts, surcharges or mark-ups; or division of a product market by territory, volume of sales or purchases, product range, or composition of sellers or buyers. Read together, Articles 11, 12 and 13 prohibit agreements that result or may result in the consequences listed in Article 11(1). The antimonopoly authority need not prove actual performance of the agreement because the violation lies in reaching an arrangement capable of producing those consequences. Article 4 defines an agreement as a written arrangement in one or more documents or an oral arrangement; its existence does not depend on formal execution as a civil-law contract under Articles 154, 160, 432 and 434 of the Civil Code.

Consequently, the existence and implementation of an anticompetitive agreement may be proved by analysing the parties’ business conduct in light of reasonableness and substantiation.

Under Plenum Resolution No. 30 of the Supreme Commercial Court dated 30 June 2008, prohibitions on restrictive agreements apply regardless of whether the parties hold dominant positions.

The Agreement between ROSTA and Pharmstandard therefore falls within the definition in Article 4(18) of the Competition Law.

Article 11(1)(2) prohibits and classifies as a cartel agreements between competing undertakings operating on the same product market where those agreements maintain prices in tenders or auctions.

The case materials show that implementation of the Agreement aimed at maintaining the auction price was completed on 18 August 2010 when the state customer made the final payment under State Contract No. K-25-Ts/2-5 of 13 January 2010, entered into with Pharmstandard following Auction No. 312, Lot No. 16.

The conduct also shows that by 1 November 2009—at least 27 days before the Ministry officially announced the auction—ROSTA and Pharmstandard already possessed information about Lot No. 16, including the medicine, quantity, delivery conditions and auction-document requirements.

Only the Ministry, as organiser of the auction and drafter of its documentation, in substance possessed the information concerning the medicines, quantities and procurement schedule.

Article 15(1)(6) prohibits federal executive authorities, regional and local authorities, other bodies or organisations exercising those functions, organisations involved in providing state or municipal services, state extra-budgetary funds and the Central Bank from adopting acts or taking action or inaction that results or may result in preventing, restricting or eliminating competition, except where federal law provides otherwise. In particular, granting an undertaking priority access to information is prohibited.

At the same time, the case file contains no documents proving that the Ministry supplied the information described above to ROSTA and/or Pharmstandard.

The Commission also established that, as a result of entering into and implementing the restrictive agreement that maintained the price for Lot No. 16, ROSTA received income of **RUB 670,828,519.68 (approximately USD 21,212,170.22)** and Pharmstandard received income of **RUB 671,270,983.68 (approximately USD 21,226,161.31)**. This constituted an indication of an offence under Article 178 of the Criminal Code of the Russian Federation.

Guided by Article 23, Article 39(1), Article 41(1)–(4), Article 48 and Article 49(1) of Federal Law No. 135-FZ of 26 July 2006 “On Protection of Competition,” the Commission

DECIDED

1. To terminate consideration of Case No. 1-11/202-11 against the Ministry of Health and Social Development in relation to the alleged violation of Article 15(1)(6), pursuant to Article 48(1)(2) of the Competition Law.
2. To find that CJSC ROSTA and OJSC Pharmstandard violated Article 11(1)(2) of the Competition Law by entering into and implementing an agreement that maintained the price in Auction No. 091127/001550/312, Lot No. 16.
3. Not to issue an order requiring ROSTA and Pharmstandard to remedy the antimonopoly violation because the state contract had already been performed.
4. To notify the Investigative Department of the Ministry of Internal Affairs of the decision in Case No. 1-11/202-11.

Translation status: complete unofficial English translation prepared for reader convenience. The Russian-language decision controls. Corporate forms are translated according to their status at the time of the act.