

Operative part of the judicial act · A40-94475-2012 · 19.11.2012

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Commercial Court of the City of Moscow

Operative part of the judicial act

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Monetary amounts are shown first in Russian roubles, followed by an approximate USD equivalent calculated at the official Bank of Russia historical rate for the date of the act.

Official Bank of Russia rate used: 1 USD = 31.718400 RUB; effective date 17.11.2012.

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Arbitration Court of the City of Moscow 115191, Moscow, St. Big Tula, d. 17 <http://www.msk.arbitr.ru> In the name of the Russian Federation

d. Moscow Case No. A40-94475/12 149-866 November 19, 2012 The resolution was announced on October 12, 2012. The decision was made in full on November 19, 2012. The arbitration court consisting of Judge M.M. Kuzin. in the course of the record of the court session secretary Soroka E.A. Having considered in open court the case on the application of the Open Joint Stock Company "Pharmstandard", Closed Joint Stock Company "ROSTA" to the Federal Antimonopoly Service (123995, Moscow, Sadovaya Kudrinskaya, 11) 3 persons: The Ministry of Health and Social Development of the Russian Federation on invalidation of the decision of 25.05.2012 in case No. 1 11/202-11, involving: from Pharmstandard: Arkhangelskaya M.A. (dude) 10.01.2012. No. 23), Fedliuk W.P. (dude) from 30.12.2011) from CJSC "ROST": Sholtyreva O.A. (dude) from 15.08.2012) Sakanyan M.M. (dude) 15.08.2012) from the defendant: Zaitseva N.N. (dude) 15.06.2012. IA/18784), Aleshin K.N. (dude) 23.08.2012. IA/27321), E.V. Kozlov. (dude) 13.08.2012. IA/26023), Link E.V. (dude) from 02.11.2011. NoIA/40997 from the Ministry of Health of the Russian Federation: Schatz M.G. (dude) from 11.09.2012. NoPD-MZ-19) Established: Open Joint Stock Company Pharmstandard and Closed Joint Stock Company ROSTA appealed to the Arbitration Court of Moscow with a statement on invalidation of the decision of the Federal Antimonopoly Service of 25.05.2012. in case No. 1 11/202-11 on violation of antimonopoly legislation in terms of recognition of Pharmstandard OJSC and ROSTA CJSC as violating paragraph 2 of paragraph 1 of Article 11 of the Federal Law "On Protection of Competition" by concluding and implementing an agreement that led to maintaining prices at auction No. 091127/001550/312 on lot No. 16.

2 2 2

In support of the stated claims, the applicants point out that the contested Decision is illegal, not justified and does not comply with the current legislation of the Russian Federation, including the Law on Protection of Competition, and violates the rights and legitimate interests of applicants in the field of entrepreneurial and other economic activities. The defendant objects to the satisfaction of the claims, pointing to the legality and validity of the contested decision. Having heard the representatives of the persons involved in the case, having considered the case materials, having assessed the evidence presented in their aggregate and mutual connection, the court concludes that the applicant's claims are subject to satisfaction on the following grounds. According to Part 1 of Article 198 of the CPC of the Russian Federation, citizens, organizations and other persons have the right to apply to the arbitration court with an application for invalidation of non-normative legal acts, illegal decisions and actions (inaction) of state bodies, local self-government bodies, other bodies, officials, if they believe that the

contested non-normative act (decision or action) does not comply with the law or other regulatory legal act and violates their rights and legitimate interests in the field of entrepreneurial and other economic activities, illegally imposes on them any duties, creates other obstacles to entrepreneurial and other economic activities. Thus, the grounds for the adoption by the arbitration court of a decision on the recognition of an act of a state body and a local self-government body as invalid (a decision or action is illegal) are simultaneously as non-compliance of the act with the law or other legal act (illegality of the act). violation of civil rights and legally protected interests of a citizen or legal entity in the field of entrepreneurial or other economic activity. Taking into account the above, the scope of circumstances to be established when considering cases on challenging non-normative acts includes checking the compliance of the contested act with the law or other regulatory legal act and checking the fact of violation of the contested act of the rights and legitimate interests of the applicant. As follows from the case materials, the Order of the FAS of Russia from 02.03.2011. No. 145, case No. 1 11/45-11 was initiated on the grounds of violation of CJSC CV PROTEK and CJSC ROSTA paragraph 2 part 1 of Article 11 of the Law on Protection of Competition.

3

The basis for initiating the case No. 1 11/45-11 was the order of the Prosecutor General's Office of the Russian Federation (v. No. 046762 DSP dated 29.09.2010), sent to the FAS of Russia following the results of an inspection of the Ministry of Health and Social Development of Russia, the subject of which was the compliance of this Ministry with the legislation of the Russian Federation when it conducted auctions for the purchase of medicines for state needs in 2008-2009. At the same time, the Investigative Committee under the Ministry of Internal Affairs of the Russian Federation 04.02.2011. criminal case No. 678509 on the grounds of a crime under paragraph 2 of Article 178 of the Criminal Code of the Russian Federation, on the fact of restricting competition during the Ministry of Health and Social Development of Russia auctions No. 081010/001550/45 of 10.10.2008, No. 090316/0011550/93 of 16.03.2009, No. 090428/001550/106 of 28.04.2009, No. 091009/001550/284 05.11.2009, No.091127/0015/309 from 25.12.2009 for the supply of medicines for state needs, which caused particularly large damage to the state. Subsequently, the definition of 19.07.2011. No. ATS/28039 to participate in the consideration of case No. 1 11/45-11 were involved as defendants of OJSC Pharmstandard and OOO Optimal Health. Definition of 27.10.2011. NoAC/40400 in accordance with Part 1 and 2 of Art. 47.1 of the Law on Protection of Competition, in order to ensure the most complete, comprehensive and objective consideration of the case, a case was singled out in a separate proceeding against JSC ROSTA and JSC Pharmstandard on grounds of violation of Part 2 of Article 11.1 of the Law on Protection of Competition, expressed in the conclusion of an agreement by these business entities. , which led to / could lead to the maintenance of prices at auction on lot No. 16 of the open auction No. 091127/001550/312 for the right to conclude state contracts for the supply of medicines intended for the treatment of patients with malignant neoplasms of lymphoid, hematopoietic and related tissues, hemophilia, cystic fibrosis, pituitary nasm, Gaucher's disease, multiple sclerosis , as well as after transplantation of organs and (or) tissues within the framework of centralized procurement for the needs of federal health institutions subordinated to the Federal Medical and Biological Agency, as well as organizations determined by the executive authorities of the constituent entities of the Russian Federation for March-December 2010, conducted on 25.12.2009. Ministry of Health and Social Development of the Russian Federation (hereinafter - Auction No. 312). Grounds for separating the case into a separate proceeding

4.

served the documents received by the FAS of Russia in the course of conducting on the basis of the order of the FAS of Russia from 04.05.2011. No. 327 of the planned on-site inspection of Pharmstandard OJSC, as well as documentation on Auction No. 312. The case was assigned No. 1 11/202-11. Definition of 10.11.2011. No. ATS/41703 to consider the case as a defendant on the grounds of violation of paragraph 6 of part 1 of article 15 of the Law on protection of competition involved the Ministry of health and social development of the Russian Federation (hereinafter - the Ministry of health and social development of Russia). According to the auction documentation and the materials of case No. 1 11/202-11, the auction on lot No. 16 of Auction No. 312 was held as follows: 27.11.2009. The Ministry of Health and Social Development of Russia posted on the website www.zakupki.gov.ru information about the auction No.

091127/001550/312. The subject of the auction for lot No. 16 of this auction is the purchase of the drug Dornaza alpha solution for inhalation 2.5 mg - 2.5 ml No. 6 (hereinafter - the Drug) in the amount of 80.448 packages at the initial (maximum) price of 671.270.RUB 983,68 (approximately USD 31.01). At the same time, according to the auction documentation, the delivery of the drug was to be carried out in two stages: delivery stage - 40% of the total volume of delivery of goods (that is, 32.180 packages) from the date of conclusion of the state contract until 15.02.2010; delivery stage - 60% of the total volume of delivery of goods (i.e. 48.268 packages) from 16.02.2010. and until 01.07.2010. The bidding was scheduled for 25.12.2009. The deadline for filing applications is from 27.11.2009. until 18.12.2009. According to the Protocol of consideration of applications from 23.12.2009. for auction on lot No. 16 18.12.2009. submitted applications to Pharmstandard and Rosta. As a result of the consideration of applications, these business entities were allowed to participate in the bidding. 25.12.2009. No, no, no, no, no. No. 16, no. In this regard, the auction in force of paragraphs 12 and 13 of article 37 of the Federal law of 21.07.2005. No. 94-FZ "On placing orders for the supply of goods, performance of works, provision of services for state and municipal needs" was declared invalid, the right to conclude a state contract at the initial (maximum) price (671.270.RUB 983,68 (approximately USD 31.01)) was received by Pharmstandard OJSC. 13.01.2010. Ministry of Health and Social Development of Russia concluded with Pharmstandard

5

State contract No. K-25-C/2-5 for the supply of the drug Dornaza alpha solution for inhalation 2.5 mg - 2.5 ml No. 6 (manufactured by F.Hofrman-La Roche Ltd. (Switzerland) - trade name Pulmozyme) in the amount of 80.448 packages. The Commission considered the case materials, including documents submitted by the Investigative Department of the Ministry of Internal Affairs of Russia on 06.04.2012. nkhn.No19941- chipboard and from 02.05.2012. No. 25256 of the CPD, heard arguments, objections and explanations of persons involved in the case, and found the following. 17.09.2009. CJSC "ROSTA" under the contract with the company "ADOC TRADING (CYPRUS) LTD." (Cyprus) No70 dated 31.03.2008. for the supply of medicines manufactured by F.Hoffman-La Roche Ltd. (Switzerland), including the drug Pulmozim (trade name Dornaza alpha solution for inhalation 2.5 mg - 2.5 ml No. 6), signed with this company General Specifications for the supply of medicines. General Specification 4 provided for the supply of Pulmozyme in the amount of 10,233 packages, and General Specification 5 - in the amount of 93,820 packages. As indicated by the antimonopoly body, the conclusion of 17.09.2009. The above specifications, providing for the supply of Pulmozym in the amount of 104.053 packages, were due to the purchase of this drug by the Ministry of Health and Social Development of Russia in the framework of open auctions No. 091009/001550/284 (18,967 packages were required) and No. 091127/001550/312 (80,448 packages were required). JSC "ROSTA" 17.09.2009, that is, 2.5 months before the announcement of 27.11.2009 of this auction, having signed the above specifications with the company "ADOC TRADING (CYPRUS) LTD." (Cyprus), agreed to purchase the drug "Pulmozym" in the amount necessary, including for delivery within the framework of Auction No. 312. At the same time, the official publication of the Ministry of Health and Social Development of Russia information on the conduct of the Auction No. 312, according to the results of which the Medicine was to be purchased, including information on the volume of these purchases, took place only on 27.11.2009. 10/01/2009. JSC "ROSTA" and JSC "Pharmstandard" signed the Purchase and Sale Agreement No. 129-P. 01.11.2009g. JSC "ROSTA" and JSC "Pharmstandard" signed General Specification No. 2 to this contract for the supply of Pulmozim drug from JSC "ROST" to JSC "Pharmstandard" in the amount of 32.180 packages in the amount of

6

period until 04.02.2010, and 19.04.2010. General specification No. 3 for the supply of the same medicinal product in the amount of 48.268 packages in the period up to 15.05.2010. Thus, on the basis of the 2 above specifications, Pharmstandard acquired 80.448 packages of Pulmozim medicine from JSC ROSTA, that is, exactly the amount of the Medicine that it later needed to fulfill the terms of the state contract concluded on the results of bidding for lot No. 16 of Auction No. 312, and in exactly those proportions. , which were provided for by this state contract (32.180 packages - 40% of the total for the 1st stage of delivery under the terms of the auction documentation and 48.268 packages - 60% of the total for the 2nd stage of delivery under the terms of the auction documentation). At the same time,

General Specification No. 2 for 32.180 packages of the Medicinal Product was signed 27 days before the date of official publication of the information on the Auction No. 312 by the Ministry of Health and Social Development of Russia, that is, 27 days before the date when potential participants of Auction No. 312 could legally become aware of the amount of the Medicinal Product purchased. As indicated by the antimonopoly body, the fact of signing the above specifications indicates that JSC ROSTA and JSC Pharmstandard at least 01.11.2009, that is, 27 days before the official announcement of the Ministry of Health and Social Development of Russia information about the Auction No. 312, already had information concerning the bidding for lot No. 16, namely: information about the Medicinal product, which is offered on this auction lot, the amount of the Medicinal product, which will be purchased, the conditions of its delivery and so on. In response to a request from the FAS of Russia, Pharmstandard OJSC (V. No. 2847 of 18.01.2012) confirmed that the Sales and Purchase Agreement No. 129-P dated 01.10.2009. between Pharmstandard and ROSTA existed. However, according to Pharmstandard, at the time of Auction No. 312, the medicinal product was not available to Pharmstandard, there were no specifications for its supply in the amount of lot No. 16, no payments were made for this medicinal product or its shipments. 25.12.2009 on the auction on lot No. 16 CJSC "ROST" was not. In this regard, the auction was declared invalid, the state contract for the supply of the Medicine in the amount of 80.448 packages was concluded with Pharmstandard OJSC at the initial (maximum) price -671.270.RUB 983,68 (approximately USD 31.01).

7

Thus, as indicated by the antimonopoly body, CJSC "ROSTA" in the presence of its contractual relations with the company "ADOC TRADING (CYPRUS) LTD." (Cyprus) for the supply of a drug determined by the Ministry of Health and Social Development of Russia for purchase on lot No. 16 Auction No. 312, ensured its import into the territory of the Russian Federation in the amount necessary for deliveries on this auction lot, and instead of participating in the auction. , sold the Medicinal Product on the eve of the Auction to one of them - Pharmstandard OJSC, which bought it and "won" the bidding with it at the initial (maximum) price - 671.270.RUB 983,68 (approximately USD 31.01) - due to the fact that CJSC "ROST", which also applied and was admitted to participate in the bidding on lot No. 16 Auction No. 312, did not appear at the auction. Based on the results of the consideration of case No. 1 11/202-11, the Commission concluded that the actions of the Defendants in the case, expressed in the signing of documents for the sale of the Medicinal Product, which is the subject of bidding for lot No. 16 Auction No. 312, as well as in the simultaneous submission of applications for participation in these biddings in the absence of a real intention to participate in them, are the result of a competition-restricting agreement. , achieved between JSC "ROSTA" and JSC "Pharmstandard", aimed at maintaining the price of these biddings in order to obtain maximum profit (hereinafter - the Agreement). At the same time, according to the Commission, this Agreement was reached in the period up to 25.12.2009, and was subsequently implemented during the Auction No. 312. As a legal basis, the defendant states that, by virtue of Article 4 § 18 of the Law on Protection of Competition, an agreement is a written agreement contained in a document or several documents, as well as an oral agreement. The prohibition on such agreements is established by paragraph 2 of part 1 of Article 11 of the Law on Protection of Competition, according to which agreements between business entities-competitors are recognized and prohibited, that is, between business entities selling goods on the same commodity market, if such agreements lead or can lead, inter alia, to maintaining prices at auction. Decision of 25.05.2012. In case No. 1 11/202-11, the FAS Russia Commission for the consideration of the case of violation of antimonopoly legislation recognized Pharmstandard and ROSTA as violating Part 2 of Part 1 of Article 11 of the Law on Protection of Competition by concluding and implementing an agreement that led to the maintenance of the price at the auction No. 091127/001550/312 lot 16.

8.

According to paragraph 4 of article 200 of the CPC of the Russian Federation in the consideration of cases on challenging non-normative legal acts, decisions and actions (inaction) of bodies exercising public powers, officials, the arbitration court in the court session shall check the contested act or its individual provisions, contested decisions and actions (inaction) and establish their compliance with the law or other regulatory legal act. establishes the authority of the body or person who took the contested act,

decision or committed the contested actions (inaction), and also establishes whether the contested act, decision and actions (inaction) violate the rights and legitimate interests of the applicant in the field of entrepreneurial and other economic activities. At the same time, according to paragraph 5 of Article 200 of the CPC of the Russian Federation, taking into account paragraph 1 of Article 65 of the CPC of the Russian Federation, the obligation to prove the compliance of the contested non-normative legal act with the law or other regulatory legal act, the legality of the disputed decision, the commission of the contested actions (inaction), the presence of the body or person with the proper powers to adopt the contested act, decision, commission of the contested actions (inaction) , as well as the circumstances that served as the basis for the adoption of the contested act, decision, commission of the contested actions (inaction), is imposed on the body or person who adopted the act, decision or committed actions (inaction). According to Article 13 of the Civil Code of the Russian Federation, a non-normative act that does not comply with the law or other legal acts and violates civil rights and the interests of a citizen protected by law may be declared invalid by a court. According to paragraph 1 of the Resolution of the Plenum of the Armed Forces of the Russian Federation of 01.07.1996. No. 6 and Plenum of the Supreme Court of the Russian Federation No. 8 "On Certain Issues Related to the Application of Part One of the Civil Code of the Russian Federation" if the court finds that the contested act does not comply with the law or other legal acts and restricts civil rights and legally protected interests of a citizen or legal entity, then in accordance with Article 13 of the Civil Code, it may invalidate such act. Thus, from the essence of the above rules, it follows that in order to invalidate the decision of the Federal Antimonopoly Service of Russia, which the applicants are appealing against, two mandatory conditions must be met, namely, non-compliance with its law and the existence of a violation of the applicants' rights and interests protected by law. In case No. 1 11/202-11 on violation of antimonopoly legislation, the conduct of bidders on lot No. 16 of an open auction was considered.

9.

the right to conclude state contracts for the supply of medicines intended for the treatment of patients with malignant neoplasms of lymphoid, hematopoietic and related tissues, hemophilia, cystic fibrosis, pituitary nanism, Gaucher disease, multiple sclerosis, as well as after transplantation of organs and (or) tissues within the framework of centralized procurement for the needs of federal health care institutions , subordinated to the Federal Medical and Biological Agency, as well as organizations determined by the executive authorities of the constituent entities of the Russian Federation for March-December 2010 No. 091127/001550/312. The FAS Commission of Russia recognized ROSTA and Pharmstandard as violating Part 2 of Part 1 of Article 11 of the Federal Law "On Protection of Competition" by concluding and implementing an agreement that led to the maintenance of prices at the above-mentioned auctions. The Federal Law on Protection of Competition (Articles 4, 8, 11, 11.1) considers competition-restricting agreements and concerted actions as separate offences in the field of competition restriction. At the same time, as follows from the Resolution of the Plenum of the RF Supreme Court of 30.06.2008. No. 30 "On some issues arising in connection with the application of antimonopoly legislation by arbitration courts", when establishing the fact of concerted actions, the antimonopoly authority proves the existence of qualifying signs of concerted actions specified in Article 8 of the Federal Law "On Protection of Competition", and also takes into account the provisions of paragraph 2 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 30.06.2008. No. 30. In view of the claims and evidence in the case file, the court considers it necessary to indicate the following. First, since the legislator has distinguished between the performance of concerted actions by an economic entity and the conclusion of anti-competitive agreements, it is not possible to draw an unequivocal conclusion from the evidence available in the case that it was the agreement (agreement) that took place orally, and not concerted actions. Thus, in accordance with Article 3 of the Law on Protection of Competition, the scope of application of the Law on Protection of Competition is relations related to the protection of competition, including the prevention and suppression of monopolistic activities and unfair competition, in which Russian legal entities participate. Section 11, paragraph 2, paragraph 1, of the Law on Protection of Competition prohibits

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agreements between business entities or concerted actions of economic entities in the commodity market, if such agreements or concerted actions lead or may lead, in particular, to an increase, decrease or maintenance of prices at auctions. According to Part 1 of Article 8 of the Law on Protection of Competition, the coordinated actions of economic entities are the actions of economic entities in the commodity market that satisfy the aggregates of the following conditions: the result of such actions corresponds to the interests of each of these economic entities only if their actions are known to each of them in advance; actions of each of these economic entities are caused by the actions of other economic entities and are not a consequence of circumstances that equally affect all economic entities in the relevant commodity market. Such circumstances may include, in particular, changes in regulated tariffs, changes in the prices of raw materials used for the production of goods, changes in the prices of goods on world commodity markets, significant changes in the demand for goods for at least one year or during the existence of the relevant commodity market, if such a period is less than one year. According to paragraph 2 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 30.06.2008 No. 30 "On some issues arising in connection with the application of antimonopoly legislation by arbitration courts" when analyzing the issue of whether the actions of economic entities in the commodity market are coordinated (Article 8 of the Law on Protection of Competition), arbitration courts should take into account: Consistency of actions can be established in the absence of documentary evidence of the existence of an agreement on their implementation. Conclusion of the existence of one of the conditions to be established for the recognition of actions agreed, namely: Each of the business entities knew about the commission of such actions in advance, which can be done on the basis of the actual circumstances of their commission. For example, the consistency of actions, among other circumstances, may be evidenced by the fact that they are committed by different market participants relatively uniformly and synchronously, in the absence of objective reasons. Thus, the qualifying value for proving the alleged violation of the antimonopoly legislation by the defendant is the commission by business entities of unlawful concerted actions that meet the interests of each and are known to each in advance on one commodity market.

11.

It is relatively synchronous and uniform in the absence of objective reasons. The provisions of the Law on Protection of Competition cannot be interpreted as precluding the possibility of the antimonopoly authority to prove the existence of concerted actions through their objectified result: by determining the relevant commodity market in its product, geographical and level boundaries, analyzing its state and substantiating the uniformity of behavior on it of business entities whose actions fall under the criteria of Article 8 of the Law on Protection of Competition and entail the consequences specified in Article 11 of the Law on Protection of Competition. At the same time, the knowledge of each of the subjects about each other's concerted actions in advance can be established not only when providing evidence of their receipt of specific information, but also based on the general state of affairs on the commodity market, which predetermines the predictability of such behavior as a group model, which allows to extract non-competitive advantages through its use. For the purposes of recognizing the actions of economic entities as agreed, the synchronicity of their beginning does not matter, the fact of such actions at the time of their detection by the antimonopoly authority is sufficient. From the meaning of the above provisions, it follows that the distinguishing feature of concerted actions that limit competition is their justification as a model of group behavior, when the achievement of the goal by an individual participant in concerted actions is possible only as a result of the complex role behavior of the entire team of acting jointly economic entities. Usually, these are repeated (similar) actions of several economic entities that are not caused by external conditions of functioning of the relevant commodity market, which distinguishes concerted actions from parallel behavior, that is, the same rational reaction of economic entities to general and independent of their actions changes in the conditions of activity in the commodity market. Meanwhile, the legal regulation of relations related to placing orders for the supply of goods, performance of works, provision of services for state or municipal needs is carried out in accordance with the Law on placing orders. The purposes of regulation of the Law on Order Placement are, among other things, ensuring the effective use of budgetary funds and extrabudgetary sources of financing, the development of fair competition, ensuring transparency and transparency of order placement, preventing corruption and other issues.

12.

Abuse in the placement of orders. In accordance with Part 1 of Art. 32 of the Law on Order Placement, an auction for the right to conclude a state or municipal contract is understood as a tender, the winner of which is the person who has offered the lowest price of a state or municipal contract. The auction is carried out by reducing the initial (maximum) price of the contract (lot price), specified in the notice of the open auction, to the "step of the auction" (part 4 of Art. 37 of the Law on Order Placement). By virtue of Part 12, 13 of Art. 37 of the Law on Order Placement, if one participant participated in the auction, the auction is recognized as invalid. In this case, the customer within three working days from the date of signing the protocol, is obliged to transfer to the sole participant of the auction the draft contract attached to the auction documentation. At the same time, the state or municipal contract is concluded taking into account the provisions of part 4 of article 38 of the Law on placing orders on the conditions provided for by the auction documentation at the initial (maximum) price of the contract (lot price) specified in the notice of the open auction, or at the contract price agreed with the specified participant in the auction, not exceeding the initial (maximum) price of the contract (lot price). If no bidder was present during the auction, or if, due to the lack of proposals for the contract price, there is a lower contract price than the initial (maximum) contract price (lot price) The auction step is reduced in accordance with Part 5 of Art. 37 of the Law on Order Placement to the minimum size and after the three-time announcement of the offer on the initial (maximum) price of the contract (lot price), no offer on the contract price has been received that would provide for a lower contract price, the auction is recognized as invalid. According to the above provisions of the Law on Order Placement, the participant of the order placement, who for various reasons was the only participant in the auction, knowingly receives a win in the form of an opportunity to conclude a state (municipal) contract on the most favorable terms that can only be obtained from participation in the auction - at the price of the contract (lot) specified in the auction documentation. That is, at the highest possible price. In view of the above, the defendant, having come to the conclusion that there is an anti-competitive agreement, freed himself from the need to analyze the commodity market, its state and substantiate the uniformity of behavior on it.

13

business entities. In the absence of an analysis of the drug market and its specifics, the conclusion of the antimonopoly authority on the existence of an oral anti-competitive agreement seems unreasonable, since the results of the bidding are the result of specific actions of participants, which are due to the presence of a number of objective reasons. Thus, the court concludes that the FAS Commission in case No. 1 11/202-11 on violation of antimonopoly legislation was not determined, in connection with which the actions of Pharmstandard and ROSTA were qualified as actions under the agreement, and not as concerted actions. The decision does not even explicitly state whether the companies are accused of oral or written agreement. At the same time, the antimonopoly authority did not reveal any evidence confirming that there was indeed an agreement between Pharmstandard and ROSTA CJSC prohibited by the Federal Law "On Protection of Competition". The subject of lot No. 16 of the open auction No. 091127/001550/312 was the supply of the drug Dornaza alpha solution for inhalation 2.5 mg - 2.5 ml No. 6. At the time of the open auction No. 091127/001550/312 between Pharmstandard and ROSTA CJSC, the Sales and Purchase Agreement No. 129-P dated 01.10.2009 was in force. However, this contract is a framework (in accordance with paragraph 1.1 of this agreement, the assortment, quantity of goods, as well as its price and delivery terms are determined in the general specifications) and was concluded long before the announcement of the open auction No. 091127/001550/312. Therefore, it cannot be accepted as evidence of an agreement aimed at maintaining prices at this auction. Moreover, at the time of the open auction No. 091127/001550/312, the drug Dornaza alfa was not available to Pharmstandard, the specification for its supply in the amount of lot No. 16 was not signed, no payments for Pulmozyme and / or shipment of this drug was not made. At the same time, it is impossible to recognize the conclusion of the antimonopoly that the General Specifications No. 2 of 01.11.2009 g can not be justified. and No. 3 of 19.04.2010. evidence of the sale of Dornaz alfa before auction No. 091127/001550/312. By virtue of Articles 454, 456-459 and 506 of the Civil Code of the Russian Federation, the sale of goods involves the actual transfer of goods to the buyer's ownership. At the same time, shipment

14.

the drug according to the General specification No. 2 from 01.11.2009g. The auction took place only on 02.02.2010, that is, much later than the open auction No. 91127/001550/312. Moreover, even payment for the goods according to this specification was after summing up the results of the auction: 02.02.2010, 06.05.2010. and 12.05.2010. General specification No. 3 of 19.04.2010. The auction was signed much later than the date of the auction and the conclusion of the state contract by Pharmstandard OJSC following the results of this auction. In addition, according to Article 1 of the Civil Code of the Russian Federation, civil legislation is based on the recognition of freedom of contract, the need for unhindered implementation of civil rights. Legal persons acquire and exercise their civil rights by their will and in their interest. They are free to establish their rights and obligations on the basis of a contract and to determine any terms of the contract that are not contrary to the law. In accordance with paragraph 1 of article 2 of the Civil code of the Russian Federation, civil legislation regulates relations between persons engaged in entrepreneurial activity, or with their participation, on the basis that entrepreneurial is an independent, carried out at your own risk activity aimed at systematic profit from the use of property, the sale of goods, the performance of work or the provision of services by persons. registered in that capacity in accordance with the procedure established by law." By virtue of paragraph 1 of article 9 of the Civil Code of the Russian Federation, citizens and legal entities at their discretion exercise their civil rights." According to paragraph 1 of article 421 of the Civil code of the Russian Federation citizens and legal entities are free to conclude the contract. Thus, Pharmstandard OJSC was entitled to conclude with CJSC "ROST" the above contract and sign General specification No. 2 of 01.11.2009g. It is at your own risk and in your own interest. Moreover, the current legislation does not prohibit the signing of a contract with the supplier before concluding a contract with the customer. Furthermore, the contract does not contain any arrangements regarding conduct in tenders. In addition, Pharmstandard did not have information about the volume of the drug Dornaza alfa supplied to Russia, did not and could not assume that the signing of the contract with ROSTA CJSC could (even theoretically) prevent any other business entity from participating in the public auction No. 091127/001550/312 for lot No. 16 and thereby lead to the signing of the contract with ROSTA CJSC.

15 15

to maintain the prices at the auction. Moreover, in the market of medicines are carried out by various suppliers of medicines: manufacturers of medicines (first suppliers), distributors of manufacturers of medicines, wholesale intermediaries. Pharmstandard concluded an agreement with ROSTA CJSC, as it did not reach agreements with the representative of the manufacturer of the drug Rosh-Moscow CJSC. At the same time, Pharmstandard did not know and could not know about the presence (lack) of agreements (negotiations) on the supply of Dornaz alfa from other business entities - potential bidders with suppliers of this drug available on the market. The non-decrease in the initial (maximum) price of lot No. 16 of the open auction No. 091127/001550/312 was not due to the fault of Pharmstandard OJSC, but was a consequence of the fact that Pharmstandard OJSC was the only bidder for this lot, in connection with which, in accordance with Art. 37 of the Federal Law of 21.07.2005. No. 94-FZ "On placing orders for the supply of goods, performance of works, provision of services for state and municipal needs" the auction for this lot was declared invalid and the state contract was concluded at the initial (maximum) price. The conclusion of the antimonopoly body that the Sales Agreement No. 129-P dated 01.10.2009. is proof of the agreement prohibited by paragraph 2 of part 1 of Article 11 of the Federal Law "On Protection of Competition", directly contradicts the norms of the Russian antimonopoly legislation. In accordance with Part 1 of Article 11 of the Federal Law "On Protection of Competition" are recognized as a cartel and agreements between business entities-competitors are prohibited, that is, between business entities selling goods on the same commodity market, if such agreements lead or may lead to: establishment or maintenance of prices (tariffs), discounts, allowances (supplements) and (or) margins; increase, decrease or maintain prices at auction; division of the commodity market by territorial principle, volume of sale or purchase of goods, assortment of sold goods or composition of sellers or buyers (customers); curtailment or termination of production of goods; (a) the refusal to enter into contracts with certain sellers or buyers (customers)". Thus, the above-mentioned provision of the law clearly establishes that the list of prohibitions of Part 1 of Article 11 of the Federal Law "On Protection of Competition" applies only to "horizontal" agreements.

The contract concluded between Pharmstandard and ROSTA is a “vertical” agreement, since according to Article 4, paragraph 19 of the Federal Law “On Protection of Competition”, a “vertical” agreement is an agreement between business entities, one of which purchases goods and the other provides (sells) goods. Moreover, in the current at the time of the conclusion of the above contract, the editorial board of the Federal Law “On Protection of Competition” (ed.). Federal Law No. 164-FZ of July 17, 2009 was part 1.1 of Article 11, which stated that the prohibitions provided for in Part 1 of this Article do not apply to “vertical” agreements. In addition, according to the definition given in Article 11 of the Federal Law “On Protection of Competition”, competitors are entities that sell goods on one commodity market. In accordance with paragraph 4 of article 4 of the Federal law “On protection of competition” commodity market - the sphere of circulation of goods (including goods of foreign production), which can not be replaced by another product, or interchangeable goods (hereinafter - a certain product), within the boundaries of which (including geographical) based on economic, technical or other possibility or expediency of the acquirer can purchase goods and such possibility or expediency is not available outside of it. Recognizing Pharmstandard and ROSTA as guilty of violating Article 11, paragraph 2, part 1, of the Federal Law “On Protection of Competition”, the FAS of Russia did not substantiate its assertion that at the time of the conclusion of the Sales Agreement No. 129-P dated 01.10.2009. Pharmstandard and ROSTA were competitors, did not define either the product or geographical boundaries of the commodity market, although in accordance with paragraph 3.26 of the FAS Administrative Regulations on the execution of the state function of initiating and considering cases of violations of the antimonopoly legislation of the Russian Federation, approved by the Order of the FAS of Russia of December 25, 2007 No. 447 (hereinafter referred to as “Administrative Regulation No. 447”), the antimonopoly authority was obliged to do this. In the opinion of the Commission, this Agreement was reached in the period up to 25.12.2009. Meanwhile, until 01.10.2009. Pharmstandard has never participated in the civil circulation of the drug Dornaza alfa, did not purchase and especially did not sell this drug. Thus, in the period up to 01.10.2009. Pharmstandard and ROSTA were not competitors.

17.

At the time of signing the Sales Agreement No. 129-P of 01.10.2009. JSC “ROSTA” and JSC “Pharmstandard” were not competitors, since JSC “ROST” actually acted as the official distributor of the manufacturer, and JSC “Pharmstandard” - as a buyer. At the same time, as in itself, the Sales Agreement No. 129-P of 01.10.2009. It was a framework and did not determine not only the quantity, but even the range of goods. In fact, the agreement on the supply of the drug Pulmozym in the volume of lot No. 16 of the open auction No. 091127/001550/312 was reached by Pharmstandard OJSC and ROSTA CJSC after summing up the results of this auction and signing of the state contract, namely 19.04.2010. Since before the auction announcement they did not know and could not know the exact data on the needs of the state customer for the drug Dornaza alfa. In addition, it is not clear what legal significance for the recognition of Pharmstandard OJSC and ROSTA CJSC violating paragraph 2 of part 1 of Article 11 of the Federal Law “On Protection of Competition” by concluding and implementing an agreement that led to the maintenance of prices at auction No. 091127/001550/312 on lot No. 16, has the date of General Specification No. 2 from 01.11.2009. The Antimonopoly Authority does not justify its conclusion that the signature of this specification was in the period from 01.11.2009. 27.11.2009, and not in the period from 27.11.2009. 18.12.2009. is proof of an anti-competitive agreement between Pharmstandard and ROSTA. In neither of these periods Pharmstandard and ROSTA were competitors, as they were not participants in the same bidding procedure. The application for participation in the auction on lot No. 16 of the open auction No. 091127/001550/312 was submitted by Pharmstandard OJSC on 18.12.2009. In the contested decision, the FAS of Russia indicated that 18.12.2009. Pharmstandard and ROSTA have submitted applications. However, filing applications on the same day does not prove the existence of an anti-competitive agreement between the companies, especially since according to the Notice of the Open Auction No. 091127/001550/312, 18.12.2009. It was the last day of the application. In addition, the assertion of the antimonopoly body that Pharmstandard OJSC does not have a real intention to participate in the bidding has not been documented. In accordance with part 1 of article 37 of the Federal law “On placing orders” in the auction can

participate only participants of placing the order recognized by the participants of the auction. According to part 3 of article 36 of the Federal Law "On placing orders", the decision to admit to participation in the auction of the participant of placing the order and to recognize the participant of placing the order who submitted an application for participation in the auction, the participant of the auction, or to refuse to admit such participant of placing the order to participate in the auction is made by the auction commission on the basis of the results of consideration of applications for participation in the auction. That is, Pharmstandard and ROSTA became potential competitors only after they were recognized as participants in the same tender. Considering that the consideration of the auction commission of applications for participation in the open auction No. 091127/001550/312 on lot No. 16 and admission to participation in the auction took place only on 23.12.2009, the participants in the bidding for lot No. 16 of the open auction No. 091127/001550/312 of Pharmstandard and CJSC ROSTA became only 23.12.2009. In the period from 23.12.2009. until 25.12.2009. Pharmstandard and ROSTA were potential competitors, but did not enter into any anti-competitive agreements. No other evidence was provided by the antimonopoly authority. Sales contract No. 129-P dated 01.10.2009. General Specification No. 2 of 01.11.2009g. cannot serve as evidence of the conclusion of Pharmstandard and ROSTA of the cartel agreement imputed to them, as they were signed in the preceding period. General specification No. 3 of 19.04.2009. cannot serve as evidence of the conclusion of Pharmstandard and ROSTA of the cartel agreement imputed to them, as it was signed much later than 25.12.2009. Thus, the conclusion of an anti-competitive agreement between Pharmstandard and ROSTA CJSC in the period from 23.12.2009. until 25.12.2009. The antimonopoly authority has not been proven. The behavior of Pharmstandard at the auction and the result of the bidding were due to objective reasons (Pharmstandard was the only bidder and the auction was declared invalid), therefore, there was no price support from Pharmstandard OJSC. Pharmstandard did not know in advance that it would be the only bidder for lot No. 16 of the open auction No. 091127/001550/312, and did not agree with anyone on the conduct of the bidding. Both the agreement and the concerted actions of economic entities within the meaning of antimonopoly legislation should pursue the achievement of the agreement.

certain objectives that create a kind of economic preferences for all parties to the agreement or concerted actions. In the present case, the agreement imputed by the FAS of Russia in the contested Decision between Pharmstandard OJSC and ROSTA CJSC does not meet such goals. Signing a contract with JSC "ROSTA" and submitting an application for participation in the open auction No. 091127/001550/312 on lot No. 16, Pharmstandard wanted to enter the market of the drug Dornaza alfa and win bidding on this lot, which is a natural desire for every conscientious bidder (which Pharmstandard is). At the same time, the filing of an application for participation in the above-mentioned tenders by CJSC "ROST" cannot be recognized as corresponding to the interests of Pharmstandard OJSC, since in fact this jeopardized the winnings of Pharmstandard OJSC. To foresee the absence of price offers from the JSC "ROST" Pharmstandard could not. Taking into account the circumstances set forth, which, in the opinion of the defendant, confirm that each of the persons found to have violated clause 2, part 1, of Article 11 of the Law on Protection of Competition, was aware in advance of the actions of another infringer, the court considers that they do not constitute sufficient evidence of such agreement (agreement). , which could lead to an unfavorable consequence in the form of concluding a contract with a single participant at the initial (maximum) price. As mentioned above, according to paragraph 18 of article 4 of the Law on protection of competition, the agreement is recognized as an agreement in writing, contained in a document or several documents, as well as an oral agreement. According to Article 8 of the Law on Protection of Competition, coordinated actions are understood as actions of economic entities in the commodity market that satisfy the aggregates of the following conditions: the result of such actions corresponds to the interests of each of these economic entities only if their actions are known to each of them in advance; actions of each of these economic entities are caused by the actions of other economic entities and are not a consequence of circumstances that equally affect all economic entities in the relevant commodity market. Thus, the Law on Protection of Competition (Article 11, Part 1, Article 8, Part 2, Article 4, Paragraph 18) considers competition-restricting agreements and concerted actions as independent offences in the field of competition restriction.

At the same time, as follows from the Resolution of the Plenum of the RF Supreme Court of 30.06.2008. No. 30 "On some issues arising in connection with the application of antimonopoly legislation by arbitration courts" when establishing the fact of concerted actions, the antimonopoly authority proves the existence of qualifying signs of concerted actions specified in Article 8 of the Law on Protection of Competition, and also takes into account the provisions of paragraph 2 of the RF Supreme Court Resolution itself. At the same time, the Law does not similarly name the qualifying features of an oral agreement prohibited by Part 1 of Article 11 of the Law. During the consideration of the case and when making the decision, the FAS Commission of Russia did not determine why and on the basis of what evidence the applicants' actions were qualified as an agreement, and not as concerted actions, and in addition, no exhaustive evidence of the existence of such an agreement (agreement) was provided. Taking into account the above circumstances, the court concludes that the actions of the applicants were unjustifiably qualified by the antimonopoly authority as violating paragraph 2 of part 1 of Article 11 of the Law on Protection of Competition, in connection with which the contested decision of the Federal Antimonopoly Service of 25.05.2012. in case No. 1 11/202-11 violates the rights and legitimate interests of the applicants in the field of entrepreneurial and other economic activities. Based on the above, the court concluded that the disputed decision of the Federal Antimonopoly Service of 25.05.2012 was illegal and groundless. in case No. 1 11/202-11, adopted by the defendant in violation of the norms of the current legislation of the Russian Federation, and violating the rights and legitimate interests of the applicants in the field of entrepreneurial and other economic activities. Therefore, in this case, there are legal grounds provided for by Article 13 of the Civil Code of the Russian Federation, which are simultaneously necessary to satisfy the applicants' claims. In these circumstances, the applicant's claims are subject to full satisfaction. In accordance with Part 2 of Article 201 of the CPC of the Russian Federation, the arbitration court, having established that the contested non-normative legal act, decision and actions (inaction) of bodies exercising public powers, officials do not comply with the law or other regulatory legal act and violate the rights and legitimate interests of the applicant in the field of entrepreneurial and other economic activity decides on the invalidation of a non-normative legal act,

[illegible]

decisions and actions (inaction) are illegal. The costs of paying the state fee are borne by the defendant in accordance with Art. 110 of the APC of the Russian Federation. Based on the above, guided by Art. 64, 65, 69, 71, 75, 167-170, 176, 198, 200, 201 of the APC of the Russian Federation, the court decided: Checking for compliance with the Federal Law "On Protection of Competition" of 26.07.2006. No. 135-FZ, to recognize illegal the decision of the Federal Antimonopoly service of 25.05.2012. in case No. 11/202-11 on violation of antimonopoly legislation in terms of recognition of Pharmstandard OJSC and ROSTA CJSC as violating paragraph 2 of paragraph 1 of Article 11 of the Federal Law "On Protection of Competition" by concluding and implementing an agreement that led to maintaining prices at auction No. 091127/001550/312 on lot No. 16. To recover from the Federal Antimonopoly Service in favor of the Open Joint Stock Company "Pharmstandard" the costs of paying the state fee in the amount of RUB 1 000 (approximately USD 31.53) To recover from the Federal Antimonopoly Service in favor of the Closed Joint Stock Company "ROST" the costs of paying the state fee in the amount of RUB 1 000 (approximately USD 31.53) Return to the Closed Joint Stock Company "ROST" from the federal budget The fee in the amount of RUB 3 000 (approximately USD 94.58) Return to the Open Joint Stock Company Pharmstandard from the federal budget the state fee in the amount of RUB 1 000 (approximately USD 31.53) The decision may be appealed within a month from the date of acceptance to the Ninth Arbitration Court of Appeal.

Judge: M.M. Cousin