



## **ARBITRATION COURT OF THE CITY OF MOSCOW**

115225, Moscow, Bolshaya Tuskaya str., 17

<http://www.msk.arbitr.ru>

In the name of the Russian Federation

### **RESOLUTION**

Moscow

Case № A40-114871/20-121-616

September 10, 2020

The operative part of the resolution is announced on September 03, 2020.

The decision is fully prepared on September 10, 2020.

Arbitration Court of Moscow consisting of:

presiding judge E. A. Aksenova

with the secretary of the court session - E.V. Karkavtseva

considered the case in an open court session on the application of

Almi Partner, LLC (PSRN: 1065260103204, TIN: 5260175562, date of registration: 17.07.2006, 603093, Nizhny Novgorod region, Nizhny Novgorod city, Kovrovskaya street, house 21a, office 77 floor 7)

to the Ministry of Communications of Russia (PSRN: 1047702026701, TIN: 7710474375, date of registration: 12.07.2004, 123112, Moscow city, Presnenskaya embankment, house 10, building 2)

on invalidation and cancellation of the order dated 19.11.2019 № 745,

The following persons appeared in the court session:

from the applicant: Fadeyev S.S. (under power of attorney dated 07.07.2020 № 1, passport),

from the defendant: Dzhumayev T.B. (under power of attorney dated February 28, 2020 № 16, passport),

### **ESTABLISHED:**

Almi Partner LLC (hereinafter - the applicant, company) referred to the Arbitration Court of Moscow with an application to the Ministry for Digital Development, Communications and Mass Media of the Russian Federation ( hereinafter - defendant, Ministry of Communications of Russia) with the claim on invalidation of order dated 19.11.2019 № 745 in the revision approved by the order of the Ministry for Digital Development, Communications and Mass Media of the Russian Federation No. 80 dated

19.02.2020 on exclusion of information on "AlterOffice" software complex from the unified register of Russian software for computers and databases, the obligation to restore the register record dated 24.04.2019 for № 5287 containing information on "AlterOffice" software complex, the exclusive rights to which belong to Almi Partner LLC in the unified register of Russian software for computers and databases.

In the court hearing, the representative of the applicant supported the stated claim in full. The representative of the defendant objected to satisfaction of the stated claims, referring to the legality and validity of the contested order.

As it follows from the materials of the case, Almi Partner Limited Liability Company is the holder of the exclusive right to the computer software - "AlterOffice" software complex.

On 24.01.2019 "AlterOffice" software complex was registered in the Federal Intellectual Property Service (certificate №2019611306 of 24.01.2019).

On 24.04.2019 by the Order of the Ministry for Digital Development, Communications and Mass Media of the Russian Federation No. 168 dated 24.04.2019 "AlterOffice" software complex was included in the Unified Register of Russian software for computers and databases under №5287 (hereinafter - the Register of domestic software).

31.05.2019, the Ministry of Communications of Russia Federation received an appeal from "New Cloud Technologies" LLC No. 71 dated 30.05.2019, in which it was indicated that the software does not comply with the requirements of p. 5 of the Rules.

Following the results of consideration of the appeal of "New Cloud Technologies" LLC, according to section IV of the Minutes of the meeting of the Expert Council dated 12.07.2019 № 307pr, the decision was made to hold additional examination of "AlterOffice" software for compliance with the requirements of the Rules.

By letter dated 16.09.2019 № 5D-052435 FSUE RI "Voskhod" presented the result of the examination on the comments that showed that the software is confusingly similar to "LibreOffice" office suite and therefore, is subject to the terms of Mozilla public license version 2.0 (<https://www.libreoffice.org/about-us/licenses/>).

Thus, in the opinion of the Ministry of Communications of Russia, in view of the fact that "AlterOffice" software is a composite work, the copyright to which belongs to the applicant, but at the same time the applicant does not have the exclusive right to the software, the latter does not comply with the requirements of p.1 of part 5 of Article 12.1 of the Federal Law dated 27.07.2006 No. 149-FZ "On Information, information technologies and information protection" and subp. "a" of p. 5 of the Rules and cannot be included in the Register.

On 19.11.2019 the Software was excluded from the Register of domestic software in accordance with subparagraph "b" of paragraph 33 of the Rules of formation and maintenance of the unified register of Russian software for computers and databases and the unified register of software for computers and databases from the member states of the Eurasian Economic Union, with the exception of the Russian Federation (hereinafter - the Rules) (Order of the Ministry for Digital Development, Communications and Mass Media of the Russian Federation No. 745 dated 19.11.2019 in the revision approved by the Order of the Ministry for Digital Development, Communications and Mass Media of the Russian Federation №80 dated 19.02.2020).

The reason for exclusion of AlterOffice software complex from the Register of domestic software was its non-compliance with the requirements established by paragraph 5 of the Rules.

In order to give grounds for exclusion of information on "AlterOffice" software (registration number - 5287) from the Register on 19.02.2020 by the order dated 19.02.2020 № 80 "On introduction of amendments to the Order of the Ministry for Digital Development,

Communications and Mass Media of the Russian Federation dated November 19, 2019 №745 "On exclusion of information on the software contained in the unified register of Russian software for computers and databases", the Ministry of Communications of the Russian Federation amended the order having replaced the words "subparagraph "c" of paragraph 33 of the Rules" with the words "subparagraph "b" of paragraph 33 of the Rules."

Having considered this resolution and the Order of the Ministry of Communications of Russia as illegal and unreasonable, violating the rights and legitimate interests of Almi Partner LLC in the sphere of entrepreneurial and other economic activities, the company referred to the arbitration court with this application.

In accordance with part 1 of Article 198 of the RF APC, individuals, organizations and other persons have the right to refer to the arbitration court with an application on invalidation of non-regulatory legal acts, illegal decisions and actions (omissions) of authorities exercising public powers, officials, if they believe that the contested non-regulatory legal act, decision and action (omission) do not comply with the law or other regulatory legal act and violate their rights and legitimate interests in the field of entrepreneurial and other economic activities, unlawfully impose any duties on them, create other obstacles to entrepreneurial and other economic activities.

Thus, the procedural law establishes availability of two circumstances simultaneously, namely, not-conformity of the contested act to the law or other regulatory legal act, and violation of the rights and legitimate interests of organizations in the sphere of entrepreneurial and other economic activity by the contested act, for invalidation of non-regulatory legal acts, illegal decisions and actions (omission) of state authorities, local authorities, other authorities, officials.

According to Part 4 of Article 200 of the RF APC, in consideration of the cases on contestation of resolutions and actions of authorities exercising public powers, the arbitration court checks contested resolutions and actions and establishes their conformity to the law or other regulatory legal act, powers of the authority or person that committed the contested actions, and establishes whether the contested resolutions and actions violate the rights and legitimate interests of the applicant in the sphere of entrepreneurial and other economic activities.

According to Part 5 of Art. 200 of RF APC, the duty to prove the conformity of the contested non-regulatory legal act to the law or other regulatory legal act, legality of adoption of the contested resolution, commitment of contested actions (omissions), dues powers of the authority or persons for adoption the contested act, resolutions, commitment of contested acts (omissions), as well as the circumstances which gave rise to adoption of the contested act, resolution, commitment of contested actions (omission) shall be imposed on the authority or person that adopted the act, resolution or committed actions (inaction).

The applicant submitted a petition for restoration of the missed period, provided by Part 4 of Art. 198 of the RF APC, to appeal the decision of the person concerned.

The court considers that the period established by p. 4 of Art. 198 of the RF APC is not missed by the applicant.

Having considered the materials of the case, having listened to the arguments of the representatives, parties that appeared in the court session, having assessed the relevance, admissibility, reliability of each evidence individually, as well as sufficiency and the mutual relation of the evidence in their aggregate based on Art. 71 of the RF APC, the arbitration court established that the applicant's claims are stated reasonably and are subject to satisfaction on the following grounds.

According to Part 5 of Article 12.1 of the Federal Law of 27.07.2006 No. 149-FZ "On Information, Information Technologies and Information Protection" information on software

for computers and databases that meet the following requirements shall be included in the register of Russian software:

1) exclusive right to software for computers or a database throughout the world and for the entire validity period of the exclusive right belongs to one of more of the following persons (right holders):

a) Russian Federation, subject of the Russian Federation, municipal entity;

b) Russian non-profit organization, which supreme management body is formed directly and (or) indirectly by the Russian Federation, subjects of the Russian Federation, municipal entities and (or) citizens of the Russian Federation and which decisions cannot be determined by a foreign person due to the peculiarities of relations between such a foreign person and a Russian non-profit organization;

c) Russian commercial organization in which the total share of direct and (or) indirect participation of the Russian Federation, subjects of the Russian Federation, municipal entities, Russian non-profit organizations specified in subparagraph "b" of this paragraph, citizens of the Russian Federation exceeds fifty percent;

d) citizen of the Russian Federation;

2) software for computers or a database are marketed lawfully on the territory of the Russian Federation, copies of software for computers or database or the rights to use the software for computers or database are freely exercised throughout the territory of the Russian Federation;

3) total amount of payments under license and other contracts providing for granting of rights to the results of intellectual activity and means of individualization, performance of works, provision of services in connection with development, adaptation and modification of the software for computers or database and for development, adaptation and modification of the software for computers or database, in favor of foreign legal entities and (or) individuals, profit organizations, controlled by them and (or) Russian non-profit organizations, agents, representatives of foreign persons and Russian profit organizations controlled by them and (or) Russian non-profit organizations makes less than thirty percent from the proceeds of the right holder (rights holders) of the software for computers or database from sale of the software computers or database, including granting of rights of use, regardless of the type of a contract for a calendar year;

4) information on the software for computers or database does not make a state secret, and the software for computers or database does not contains information, making a state secret.

Paragraph 5 of the Decree of the Government of the Russian Federation dated 16.11.2015 No. 1236 also states that information on the software, which meets the following requirements, shall be included in the register of Russian software:

a) exclusive right to software throughout the world and for the entire validity period of the exclusive right belongs to one of more of the following persons (right holders):

Russian Federation;

subject of the Russian Federation;

municipal entity;

Russian non-profit organization, which supreme management body is formed directly and (or) indirectly by the Russian Federation, subjects of the Russian Federation, municipal entities and (or) citizens of the Russian Federation and which decisions cannot be determined by a foreign person due to the peculiarities of relations between such a foreign person and a Russian non-profit organization (hereinafter - Russian non-profit organization without prevailing foreign participation);

Russian profit organization in which the total share of direct and (or) indirect participation of the Russian Federation, subjects of the Russian Federation, municipal entities, Russian non-profit organizations without prevailing foreign participation, citizens of the Russian Federation makes more than 50 percent (hereinafter - Russian profit organization without prevailing foreign participation);

citizen of the Russian Federation;

b) software is lawfully put into civil circulation on the territory of the Russian Federation, copies of software or the rights to use the software, services on provision of access to software are freely sold throughout the territory of the Russian Federation, there are no restrictions established, among other things, by foreign states and preventing from distribution or other use of the software for computers and database on the territory of the Russian Federation or the territories of individual subjects of the Russian Federation;

c) total amount of payments under license and other contracts providing for granting of the right to use the result of intellectual activity and means of individualization, performance of works, provision of services on development, modification and adaptation of the software for computers or database in favor of foreign legal entities and (or) individuals, Russian profit and (or) non-profit organizations, controlled by them, agents, representatives of foreign persons and Russian profit and/or non-profit organizations controlled by them, makes less than 30 percent of the proceeds received by the right holder (right holders) for the past calendar year as remuneration for granting of the right to use the software for computers or the database on the basis of a license or other type of contract;

d) information on the software does not make a state secret and the software does not contain information making a state secret;

e) compliance of the software with the information security requirements is confirmed by the certificate of the Information Security Tools Certification System according the information security requirements, issued in accordance with the procedure, established by the Government of the Russian Federation (only for the software which main function is protection of confidential information);

f) the exclusive right to software throughout the world and for the entire validity period of the exclusive right belongs to the persons (right holders) specified in paragraphs five to seven of subclause "a" of this clause, having a license to carry out activities on development and production of means of protection of confidential information (only for the software which main function is protection of confidential information);

g) software does not have forced upgrades and management from abroad;

h) warranty servicing, technical support and upgrading of software are carried out by a Russian profit or non-profit organization without prevailing foreign participation or a citizen of the Russian Federation.

As it was established by the court and follows from the materials of the case, the applicant was included in the Register of Software on the basis of the order of the Ministry of Communications of Russia No. 168 dated 24.04.2019.

The company presented certificate № 2019611306 dated 24.01.2019 on registration of "AlterOffice" software complex in the Federal Intellectual Property Service in the materials of the case, which confirms that the applicant holds the exclusive right to the computer software - "AlterOffice" software complex.

In accordance with p. 1 of Article 1225 of the RF Civil Code, software for computers (computer software) is the intellectual property and is included in the list of results of intellectual activity, to which legal protection is granted on the territory of the Russian Federation.

Almi Partner LLC, being the right holder of the Software, is entitled to use it at its discretion in any manner that does not contradict the law, including to dispose of the exclusive right thereto, as well as at its sole discretion to allow or prohibit others to use it.

According to Article 1261 of the RF Civil Code the copyright to all types of computer software (including operating systems and software complexes), which can be expressed in any language and in any form, including source text and object code, are protected in the same way as copyrights to works of literature.

By virtue of paragraph 6 of Article 1262 of the RF Civil Code, information entered in the State register of computer software or in the register of databases are considered reliable.

The court also takes into account that the applicant's exclusive rights to "AlterOffice" software are not contested and nor restricted. There are no disputes related to protection of violated intellectual rights in relation to the Software.

No evidence to the contrary is presented to the court.

Paragraph 33 of the Rules provides for an exhaustive list of the grounds for exclusion of information on software from the Register of software.

Subparagraph "b" of paragraph 33 of the Rules, based on which "AlterOffice" software was excluded from the Register provides that the authorized body takes a decision on exclusion of information on the software from the register of Russian software in case of: "receipt of a reasoned appeal containing a reference to the specific circumstances indicating that the software does not comply with the requirements set out in paragraph 5 of the Rules and containing documentary confirmation of such circumstances."

In accordance with subparagraph "b" of paragraph 34 of the Rules clarifies that the decision on exclusion of information on the software from the register of Russian software shall be made by the authorized body: "within 30 working days after the date of receipt of the application, provided that the software does not comply with the requirements established by paragraph 5 of these Rules, is confirmed by documents received in accordance with the established procedure from the state authorities, including effective judicial acts, official documents of foreign states that passed the procedure of consular legalization in accordance with the established order."

Thus, according to the applicable procedure, the software can be excluded from the Register if there are specific circumstances indicative of non-conformity of the software to the requirements of the Rules and confirmed by documents received in accordance with the established procedure from the state authorities, including effective judicial acts, official documents of foreign countries that passed the procedure of consular legalization in accordance with the established procedure.

In violation of the procedure established by p. 33, 34 of the Rules, the Ministry of Communications of Russia failed to submit adequate and admissible evidences to confirm these circumstances.

The comments of the experts of the council submitted by the defendant, as well as the results of the examination of the FSUE Research Institute "Voskhod" do not meet these requirements of the Rules, therefore, the court treats the comments of the experts critically.

The court also takes into account that according to the enclosure to the letter dated 16.09.2019 No. 5D-05/2435 of FSUE Research Institute "Voskhod", within verification carried out on the comments of expert I.I. Massukh and V.V. Rubanov alleged violations of MPL license, namely paragraph 3.2 and 3.4. did not find their confirmation.

During "verification carried out on comments of the expert Rubanov V.V. in accordance with the letter dated 29.08.2019 № P11-1-06-062-20043", on the comments of the expert, regarding paragraph 3.2. of the MPL license So FSUE Research Institute "Voskhod"

indicates: “The result of verification by FSUE Research Institute “Voskhod” - paragraph 8.4. of the license file gives the description of receipt of the source code. The possibility of receipt of the source code through a personal account is verified , the address of the link from the personal account is <https://github.com/Almipartner/core>”.

According to the comments of the expert, with respect to paragraph 3.4. of the MPL license it is stated: “The result of verification by FSUE Research Institute “Voskhod” - there is a file with content”.

With regard to the experts' arguments that it is not mentioned that "AlterOffice" software is derivative from the product licensed under the MPL license and that there are respective rights of users of the derivative product integrally inherited from the MPL license. The result of the verification by FSUE Research Institute “Voskhod” is as follows: “in the text of the license file (literal) correspondence that this product is derivative of a product licensed under the terms of the MPL license and the respective rights of users of the derivative product integrally inherited from the MPL license, is not found in the MPL license, but there is paragraph 8.3. Individual components of the Software may contain references and inclusions of materials and software distributed on free licensing conditions. In these cases, the right holder does not pretend to authorship and, whenever possible, makes a footnote to the copyright and location of the license agreement of such software, with a similar meaning described in other words.”

Thus, violations specified by experts of council were refuted by the results of verification by FSUE Research Institute “Voskhod”.

In connection with the above circumstances, the court comes to a conclusion that on the date of adoption of the decision on exclusion of the software from the Register “AlterOffice” software corresponded to all requirements presented to software for inclusion in the Register.

Based on the above, the court comes to a conclusion that in this case there are grounds provided for in article 13 of the Civil Code of the Russian Federation and part 1 of article 198 of the RF APC, which are simultaneously required for the invalidation of a non-regulatory act of the authority, exercising public powers, recognition of resolutions or actions as illegal, thus the applicant's claims are subject to satisfaction.

By virtue of effect of part 2 of article 201 of the RF APC, having established that the contested non-regulatory legal act, resolution and actions (omission) of state authorities, local authorities, other authorities, officials do not comply with the law or other regulatory legal act and violate the applicant's rights and legitimate interests in the sphere of entrepreneurial and other economic activities, the arbitration court resolves to recognize ta non-regulatory legal act as invalid, resolutions and actions (omissions) as illegal.

The arguments of the defendant given in the statement of defense and in court sessions are reviewed and recognized as inconsistent by the court, since they do not refute the circumstances established above and conclusions made on their basis.

In accordance with p. 3 of part 4 of Art. 201 of the RF APC, in order to eliminate the committed violations of the rights and legitimate interests of the applicant, the court imposes the duty on the defendant to eliminate the committed violation of the applicant's rights.

In accordance with Art. 110 of the RF APC, judicial expenses incurred by persons participating in the case, in favor of which a judicial act is adopted, are recovered by the arbitration court from the party.

Based on the above and being guided by Art. 65, 71, 110, 123, 156, 167-170, 176, 198, 200, 201 of the RF APC, the court

decided:

To recognize as illegal the order of the Ministry for Digital Development, Communications and Mass Media of the Russian Federation dated 19.11.2019 № 745 in the revision approved by the order of the Ministry for Digital Development, Communications and Mass Media of the Russian Federation dated 19.02.2020 № 80 on exclusion of information on “AlterOffice” software complex from the unified register of Russian software for computers and databases.

Checked for compliance with the civil law.

To oblige the Ministry for Digital Development, Communications and Mass Media of the Russian Federation to eliminate the committed violation of the rights and legitimate interests of Almi Partner LLC by restoring the register record dated 24.04.2019 under No.

5287, containing information on AlterOffice software complex, exclusive rights to which are held by Almi Partner LLC in the Unified register of Russian software for computers and databases within thirty days after the date of entry of the judicial act into legal force.

To collect expenses for payment of the state duty in the amount of 3,000 (three thousand) rubles from the Ministry for Digital Development, Communications and Mass Media of the Russian Federation in favor of Almi Partner LLC.

The resolution can be appealed within a month after the date of its adoption to the Ninth Arbitration Court of Appeal.

The resolution made in the form of an electronic document shall be sent to the persons participating in the case by its placement on the official website of the arbitration court in the information and telecommunication network “Internet” in restricted access mode latest on the next day after the day of its adoption.

Judge

E.A. Aksenova

The electronic signature is valid.

Data of ES: Certification Center of the FSBU IAC of the Judicial Department

Date 13.11.2019 8:20:00

Issued to: Aksenova Ekaterina Aleksandrovna