

**Case T-170/06**

**Alrosa Company Ltd**

**v**

**Commission of the European Communities**

(Competition — Abuse of a dominant position — World market for the production and supply of rough diamonds — Decision making binding the commitments proposed by the undertaking in a dominant position — Article 9 of Regulation (EC) No 1/2003 — Principle of proportionality — Contractual freedom — Right to be heard)

Judgment of the Court of First Instance (Fourth Chamber, Extended Composition), 11 July 2007 . . . . . II - 2607

**Summary of the Judgment**

- 1. Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them*  
(Art. 230, fourth para., EC; Council Regulation No 1/2003, Art. 9)

2. *Competition — Dominant position — Abuse — Examination by the Commission — Commitments by the undertakings concerned to meet the Commission's competition concerns*  
(Arts 81 EC, 82 EC and 85 EC; Council Regulation No 1/2003, Arts 7(1) and 9)
3. *Competition — Administrative procedure — Bringing infringements to an end — Commission's powers*  
(Council Regulation No 1/2003, Arts 7(1) and 9(1))
4. *Competition — Administrative procedure — Bringing infringements to an end — Commission's powers*  
(Council Regulation No 1/2003, Arts 7(1) and 9(1))
5. *Competition — Dominant position — Abuse — Commission's powers*  
(Art. 82 EC)
6. *Competition — Administrative procedure — Observance of the rights of the defence*  
(Arts 81 EC and 82 EC; Council Regulation No 1/2003, Art. 9)

1. An undertaking is directly and individually concerned for the purpose of the fourth paragraph of Article 230 EC by a Commission decision which makes binding the individual commitments proposed by an undertaking in a dominant position and relating to the restriction and cessation of the dominant undertaking's contractual relations with the former undertaking, in so far as the decision in question produces direct and immediate effects as regards the former undertaking's legal situation, refers to it in its provisions, and was adopted at the conclusion of proceedings in which the undertaking participated to a decisive extent, is liable to have an appreciable effect on the undertaking's competitive position on the market, and is aimed at bringing to an end the trading relation-

ship which had existed for a considerable time between the two undertakings.

(see paras 38-40)

2. The effect of a Commission decision making binding the commitments proposed by undertakings under Article 9 of

Regulation No 1/2003 is to bring to an end the proceedings to establish and penalise an infringement of the competition rules. Thus, such a decision cannot be considered as being a mere acceptance on the Commission's part of a proposal that has been freely put forward by a negotiating partner, but constitutes a binding measure which puts an end to an infringement or a potential infringement, as regards which the Commission exercises all the prerogatives conferred on it by Articles 81 EC and 82 EC, with the only distinctive feature being that the submission of offers of commitments by the undertakings concerned means that the Commission is not required to pursue the regulatory procedure laid down under Article 85 EC and, in particular, to prove the infringement.

By making a particular type of conduct of an operator in relation to third parties binding, a decision adopted under Article 9 of Regulation No 1/2003 may indirectly have legal effects *erga omnes*, which the undertaking concerned would not have been in a position to create on its own; the Commission is thus their sole author from the time at which it makes binding the commitments offered by the undertaking concerned and accordingly assumes sole responsibility for them. It is not obliged in any way to take into account and, *a fortiori*, to take into account on a take-it-or-leave-it basis, the offers of commitment which the undertakings concerned submit to it.

Moreover, Article 9(1) of Regulation No 1/2003 does not preclude a decision from being adopted for an indefinite duration.

Furthermore, the principle of proportionality, although it is not referred to in Article 9 of Regulation No 1/2003, is a general principle of Community law, with which the Commission is obliged to comply when it adopts decisions making binding the commitments proposed by undertakings on the basis of that provision.

(see paras 87, 88, 91, 92)

3. Notwithstanding the Commission's margin of discretion as to the choice of adopting a procedure under Article 7(1) of Regulation No 1/2003 or Article 9(1) of that regulation, and the voluntary nature of the commitments offered under that provision by the undertakings, the Commission is required to comply with the principle of proportionality when it decides to make such commitments.

Since the review of the proportionality is an objective review, the appropriateness

of and the need for the Commission decision must be assessed in relation to the aim pursued by the institution, which consists, according to Article 7(1) of Regulation No 1/2003, of putting an end to the infringement which has been established and, according to Article 9(1) thereof, addressing the concerns expressed by the Commission in its preliminary assessment. If, contrary to the decisions adopted under Article 7(1), the Commission is not required under Article 9(1) formally to establish the existence of an infringement, it must none the less establish the reality of the competition concerns which justified its envisaging the adoption of a decision under Articles 81 EC and 82 EC and which allow it to require the undertaking concerned to comply with certain commitments. This presupposes an analysis of the market and an identification of the infringement envisaged which, while less definitive than those under Article 7(1) of Regulation No 1/2003, must be sufficient to allow a review of the appropriateness of the commitment. Consequently, the Commission cannot, without going beyond the powers conferred on it both by the competition rules of the Treaty and by Regulation No 1/2003, adopt, whether on the basis of Article 7(1) or Article 9(1) of that regulation, a decision prohibiting absolutely any future trading relations between two undertakings unless such a decision is necessary to re-establish the situation which existed prior to the infringement.

Furthermore, the level of review carried out by the Court of the analyses carried

out by the Commission on the basis of the competition rules of the Treaty must take into account the margin of discretion which underlies each decision under consideration and is justified by the complexity of the economic rules to be applied. In that regard, the fact that the analysis undertaken by the Commission, both under Article 7(1) and under Article 9(1) of Regulation No 1/2003, may require complex economic assessments cannot mean that, in the absence of such assessments, the review undertaken by the Court of the decisions of the Commission is, on any basis, to be limited to manifest errors of assessment.

(see paras 95-97, 99, 100,  
103-105, 107-110)

4. In assessing proportionality, the need for a Commission decision which makes binding the individual commitments proposed by an undertaking in a dominant position and which relate to the restriction and cessation of its contractual relations, must be assessed in relation to its aims, such as the cessation of practices which prevented the contracting partner from establishing itself as an effective competitor on the market in question and from providing third

parties with an alternative source of supply.

In particular, compliance with the principle of proportionality requires that, when measures that are less onerous than those it proposes to make binding exist, and are known by it, the Commission should examine whether those measures are capable of addressing the concerns which justify its action before it adopts, in the event of their proving unsuitable, the more onerous approach. To that effect, although the Commission cannot substitute itself for the parties so as to amend the commitments they offer under Article 9 of Regulation No 1/2003 in order that those commitments may address the concerns set out in its preliminary assessment, it is able to make those commitments binding only in part or to a particular extent. However the Commission cannot propose to the parties that they should offer it commitments which go further than a decision which it could have adopted under Article 7(1) of Regulation No 1/2003.

Only exceptional circumstances, such as where the undertakings concerned have a collective dominant position, can justify a decision adopted under Article 9(1) of Regulation No 1/2003 prohibit-

ing undertakings completely and indefinitely from contracting amongst each other. Therefore, in the absence of such circumstances, a Commission decision requiring, for an indefinite period, all direct or indirect trading relations between two undertakings to be brought to an end, infringes the principle of proportionality.

(see paras 112, 119-121, 131, 139-141)

5. Since the object of Article 82 EC is not to prohibit the holding of dominant positions but solely to put an end to their abuse, the Commission cannot require an undertaking in a dominant position to refrain from making purchases which allow it to maintain or to strengthen its position on the market, if that undertaking does not, in so doing, resort to methods which are incompatible with the competition rules. While special responsibilities are incumbent on an undertaking which occupies such a position, they cannot amount to a requirement that the very existence of the dominant position be called into question.

(see para. 146)

6. As regards a Commission decision requiring that long-standing trading

relations between two undertakings that are party to an agreement capable of constituting an abuse of a dominant position, the close connection between the two sets of proceedings initiated by the Commission on the basis of Articles 81 EC and 82 EC, following notification of that agreement, and the fact that that decision expressly refers to the contracting partner but is not addressed to it, must lead to the applicant being accorded, as regards the proceedings taken as a whole, the rights given to an 'undertaking concerned' within the meaning of Regulation No 1/2003, although, strictly speaking, it does not fall to be so classified in proceedings relating to Article 82 EC. Consequently, that undertaking is entitled to be heard on individual commitments which the Commission intends to make binding by adopting a decision — in the context of proceedings initiated under Article 82

EC, and proposed by the undertaking with which it has maintained long-standing trading relations which the decision requires to be terminated — and must have the possibility to exercise that right fully. It is necessary, if the right to be heard is to be complied with, first, that the undertakings which proposed those commitments under Article 9 of Regulation No 1/2003 be informed of the essential factual elements on the basis of which the Commission required new commitments, including conclusions which the Commission drew from the third-party observations on the proposed commitments, and, secondly, that those undertakings can express their views on the matter.

(see paras 187, 196, 203)