JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

11 July 2007 *

In Case T-170/06,

Alrosa Company Ltd, established in Mirny (Russia), represented by R. Subiotto, S. Mobley and K. Jones, lawyers,

applicant,

v

Commission of the European Communities, represented by F. Castillo de la Torre, A. Whelan and R. Sauer, acting as Agents,

defendant,

APPLICATION for the annulment of Commission Decision 2006/520/EC of 22 February 2006 relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/B-2/38.381 — De Beers) (OJ 2006 L 205, p. 24) making binding the commitments given by De Beers to bring to an end its purchases of rough diamonds from Alrosa with effect from 2009, after a period of progressive

* Language of the case: English.

reduction of the amounts purchased by it from 2006 to 2008, and bringing the proceedings to an end in accordance with Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1)

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of H. Legal, President, I. Wiszniewska-Białecka, V. Vadapalas, E. Moavero Milanesi and N. Wahl, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 19 April 2007,

gives the following

Judgment

Legal and factual background to the dispute

1. *Legal background*

Regulation No 1/2003

1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) has been applicable since 1 May 2004.

2 Article 7(1) of Regulation No 1/2003 provides:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.'

3 Article 9 of Regulation No 1/2003 states:

'1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

2. The Commission may, upon request or on its own initiative, reopen the proceedings:

(a) where there has been a material change in any of the facts on which the decision was based;

(b) where the undertakings concerned act contrary to their commitments; or

(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.'

4 Article 27 of Regulation No 1/2003 provides:

'1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. ...

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. ...

3. If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. ...

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time-limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

Regulation No 773/2004

5 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18) was adopted under Article 33 of Regulation No 1/2003 and entered into force on 1 May 2004.

6 Article 10 of Regulation No 773/2004 provides inter alia:

'1. The Commission shall inform the parties concerned in writing of the objections raised against them. The statement of objections shall be notified to each of them.

2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit.

...'

7 Article 15(1) of Regulation No 773/2004 states:

'If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.'

2. *Facts*

8 The applicant, Alrosa Company Ltd ('Alrosa'), is an undertaking established in Mirny (Russia). It is active, inter alia, in the world market for the production and supply of rough diamonds, where it occupies the number two position. It is essentially active in Russia, where it is engaged in exploration, mining, valuation and trading activities, and also in the jewellery business.

9 De Beers SA is a company established in Luxembourg (Luxembourg). The De Beers group, of which it is the principal holding company, is also engaged in the world market for the production and supply of rough diamonds, where it occupies the number one position. It is essentially active in South Africa, Botswana, Namibia and Tanzania, and also in the United Kingdom. It is engaged in those areas in exploration, mining, valuation, trading and manufacturing, and also in the jewellery business, thus covering the entire diamond supply chain.

10 On 5 March 2002, Alrosa and De Beers notified to the Commission an agreement entered into on 17 December 2001 between Alrosa and two subsidiaries of the De Beers group, City and West East Ltd and De Beers Centenary AG ('the notified agreement'), with a view to obtaining negative clearance or an exemption under Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

11 The subject-matter of that agreement, which was concluded in the context of long-standing trading relations between Alrosa and De Beers, was essentially the supply of rough diamonds.

12 Clause 12 of the notified agreement provided that it was entered into for a period of five years from the date of confirmation by the Commission to the contracting parties that 'it [did] not infringe Article 81(1), or merit[ed] an exemption under Article 81(3) EC; and [did] not otherwise infringe Article 82 EC'.

13 During that period, Alrosa undertook to sell natural rough diamonds produced in Russia to De Beers to the value of USD 800 million a year, while De Beers undertook to buy those diamonds from Alrosa, as specified in clause 2.1.1 of the notified agreement. However, in respect of the fourth and fifth years during which the notified agreement was in force, Alrosa was entitled, under clause 2.1.2, to reduce that amount to USD 700 million. The amount of USD 800 million, established in accordance with the prices in force on the date on which the notified agreement was entered into, accounted for around one half of Alrosa's annual production and for the entire production exported outside the Community of Independent States (CIS).

14 On 14 January 2003, the Commission sent a statement of objections to the applicant and De Beers in Case COMP/E-3/38.381, in which it expressed the opinion that the notified agreement was capable of constituting an anti-competitive agreement prohibited by Article 81(1) EC and could not be exempted under Article 81(3) EC. On the same date, it sent a separate statement of objections to De Beers in Case COMP/E-2/38.381, in which it expressed the opinion that the agreement was capable of constituting an abuse of a dominant position prohibited by Article 82 EC.

15 On 31 March 2003, the applicant and De Beers submitted joint written submissions to the Commission in response to the statement of objections issued in Case COMP/E-3/38.381.

16 On 1 July 2003, the Commission sent a supplementary statement of objections to the applicant and De Beers, expressing the opinion that the notified agreement was also capable of constituting an anti-competitive agreement prohibited by Article 53(1) of the Agreement on the European Economic Area (EEA) and could not be exempted under Article 53(3) of the EEA Agreement. On the same date, it sent a separate supplementary statement of objections to De Beers, expressing the opinion that the notified agreement was also capable of constituting an abuse of a dominant position prohibited under Article 54 of the EEA Agreement.

17 On 7 July 2003, the Commission heard oral submissions from the applicant and De Beers.

18 On 12 September 2003, the applicant proposed commitments which involved the progressive reduction of the quantity of rough diamonds sold to De Beers with effect from the sixth year in which the notified agreement was in force and, with effect from 2013, an undertaking no longer to sell rough diamonds to De Beers. The applicant subsequently withdrew those commitments.

19 On 14 December 2004, the applicant and De Beers jointly submitted commitments ('the joint commitments') designed to meet the concerns which the Commission had communicated to them. These joint commitments provided for a progressive reduction in sales of rough diamonds by Alrosa to De Beers, the value of which was to go down from USD 700 million in 2005 to USD 275 million in 2010, and subsequently to be capped at that level.

20 On 3 June 2005, the Commission published a 'notice ... in Case COMP/E-2/38.381 — De Beers-Alrosa' in the *Official Journal of the European Union* (OJ 2005 C 136, p. 32) ('the summary notice'). In that notice, the Commission stated that it had received commitments from Alrosa and De Beers in the course of a Commission investigation pursuant to Articles 81 EC and 82 EC, and Articles 53 and 54 of the EEA Agreement (point 1), gave a summary of the case (points 3 to 10) and described the commitments which had been offered (points 11 to 15). It also invited interested third parties to submit their comments within one month (points 2 and 17) and stated that it intended to adopt a decision making the joint commitments binding, subject to the outcome of that market test (points 2 and 16).

21 Following that publication, 21 interested third parties submitted comments to the Commission, which informed Alrosa and De Beers of those comments on 27 October 2005. At that meeting, the Commission also invited the parties to submit to it, before the end of November 2005, fresh joint commitments intended to lead to a complete cessation of their trading relationship with effect from 2009.

22 On 25 January 2006, De Beers offered individual commitments ('the individual commitments proposed by De Beers') designed to meet the concerns expressed by the Commission in the light of the outcome of the market test. The individual commitments proposed by De Beers provided for a progressive reduction in sales of rough diamonds by Alrosa to De Beers, the value of which was to go down from USD 600 million in 2006 to USD 400 million in 2008, and their subsequent discontinuance.

23 On 26 January 2006, the Commission sent the applicant a copy of the individual commitments proposed by De Beers and invited it to submit its observations in that regard. It also provided it with a copy of the non-confidential versions of the comments from third parties.

24 Subsequently, there was an exchange of views between the applicant and the Commission on certain aspects of the proceedings provided for in Article 9 of Regulation No 1/2003 and of their implications for the present case. The principal issues were the question of access to the file and the question of the rights of the defence and, in particular, of the right to be heard. In addition, in its letter of 6 February 2006, the applicant provided observations on the individual commitments proposed by De Beers and the third-party comments.

25 On 22 February 2006, the Commission adopted Decision 2006/520/EC relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/B-2/38.381 — De Beers) (OJ 2006 L 205, p. 24) ('the Decision').

26 Article 1 of the Decision provides that 'the commitments as listed in the Annex shall be binding on De Beers' and Article 2 provides that 'the proceedings in the present case shall be brought to an end'.

Procedure and forms of order sought

27 By application lodged at the Registry of the Court of First Instance on 29 June 2006, Alrosa brought the present action.

28 By a separate document lodged at the Registry on the same date, the applicant requested the Court of First Instance to deal with the case by means of the expedited procedure pursuant to Article 76a(1) of its Rules of Procedure.

29 On 16 August 2006, the Commission lodged its defence.

30 By decision of 14 September 2006, the Court of First Instance (Fourth Chamber) granted the applicant's application for the case to be dealt with by means of the expedited procedure, after hearing the views of the Commission and having regard to the particular urgency and the circumstances of the case.

31 By letter of 28 September 2006, the Court of First Instance (Fourth Chamber) requested the Commission, pursuant to Articles 49 and 64 of the Rules of Procedure, to produce the statements of objections sent on 14 January and 1 July 2003 to De Beers under Article 82 EC and Article 54 of the EEA Agreement. The Commission complied with that measure of organisation of procedure within the prescribed period.

32 By decision of 9 October 2006, the Court of First Instance, after hearing the parties, referred the case to the Fourth Chamber (Extended Composition), in accordance with Article 14(1) and Article 51(1) of the Rules of Procedure.

33 The parties presented oral argument and replied to questions put by the Court at the hearing on 19 April 2007.

34 Alrosa claims that the Court should:

— annul the Decision;

— order the Commission to pay the costs.

35 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order Alrosa to pay the costs.

Law

1. *Admissibility*

36 While observing that Article 82 EC and Article 54 of the EEA Agreement can relate only to undertakings in a dominant position, which does not apply in Alrosa's case, and that Alrosa cannot therefore be considered as being a party concerned by the proceedings leading to the adoption of the Decision or as being an addressee thereof, the Commission does not challenge the admissibility of the action in so far as it is based on the fact that the applicant is individually and directly concerned by the Decision.

37 However, since the question whether the action is admissible involves considerations of public policy, the Court should examine it of its own motion under Article 113 of the Rules of Procedure (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 23).

38 Since the applicant is not the addressee of the Decision, it is necessary to determine whether the Decision is of direct and individual concern to it, within the meaning of the fourth paragraph of Article 230 EC.

39 In the present case, in accordance with Article 9(1) of Regulation No 1/2003, the Decision makes binding the individual commitments proposed by De Beers to limit its purchases from Alrosa to a particular amount of rough diamonds between 2006 and 2008 and not to purchase, directly or indirectly, any rough diamonds from Alrosa after 2009. In so far as it restricts the ability of De Beers to obtain supplies of rough diamonds from Alrosa, the Decision produces direct and immediate effects as regards Alrosa's legal situation. The applicant is accordingly directly concerned by the Decision.

40 The applicant is also individually concerned by the Decision inasmuch as the Decision: was adopted at the conclusion of proceedings in which Alrosa participated to a decisive extent; refers to Alrosa expressly; is aimed at bringing to an end the trading relationship which had existed for a considerable time between Alrosa and De Beers; and is liable to have an appreciable effect on Alrosa's competitive position on the market for the supply and production of rough diamonds (see, to that effect, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraphs 54 to 56).

41 Accordingly, the applicant is entitled to challenge the validity of the Decision on the basis of the fourth paragraph of Article 230 EC.

2. *Substance*

42 The arguments put forward by the applicant in support of its application can be divided into three pleas in law, alleging, first, infringement of the right to be heard,

secondly, that the Decision infringes Article 9 of Regulation No 1/2003, which does not allow commitments to which an undertaking concerned has not voluntarily subscribed to be made binding on the undertaking, *a fortiori* for an indefinite period, and thirdly, the excessive nature of the commitments that were imposed, in breach of Article 9 of Regulation No 1/2003, Article 82 EC, contractual freedom and the principle of proportionality.

43 In the circumstances of the case, the second and the third pleas should first be considered together.

The pleas alleging infringement of Article 9 of Regulation No 1/2003, Article 82 EC, the principle of freedom of contract and the principle of proportionality

Arguments of the parties

44 The applicant maintains, in the first place, that the Decision infringes Article 9 of Regulation No 1/2003, inasmuch as it makes binding commitments proposed by only one of the two undertakings concerned in the present case, namely the individual commitments proposed by De Beers, and does so for an indefinite period.

45 The first sentence of Article 9 of Regulation No 1/2003 affords to the Commission and to the undertaking or undertakings concerned by proceedings under the competition rules the opportunity of arriving at a mutually beneficial settlement of their dispute. According to the logic of that approach, when several undertakings are concerned and jointly offer commitments to the Commission, it is only those commitments that the latter may accept and make binding, and not commitments

offered individually by one of them. In the present case, the applicant should have been considered as an undertaking concerned. Accordingly, the Commission was not entitled to make the individual commitments by De Beers binding.

46 Furthermore, the second sentence of Article 9 of Regulation No 1/2003 should be construed as requiring the Commission, when it opts to make commitments binding, to adopt decisions in that regard only for a specified period. The Decision, however, was adopted for an indefinite period.

47 The applicant also maintains that the Decision renders impossible, in absolute terms and for a potentially indefinite period, any supply of rough diamonds by Alrosa to De Beers. In doing so, the Decision infringes Article 9 of Regulation No 1/2003, Article 82 EC and contractual freedom.

48 In that connection, the applicant claims, first of all, that the Decision is essentially vitiated by an error of law, inasmuch as it is tantamount to prohibiting lawful conduct for an indefinite period.

49 The principle of a free market economy in which there is freedom of competition, enshrined in Article 4(1) EC, and contractual freedom, enshrined in the laws of the Member States and already recognised by Community law, are of fundamental importance in the Community legal order (Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 180; see also, to that effect, Opinion of Advocate General Rozès in Case 210/81 *Schmidt* v *Commission* [1983] ECR 3045, at p. 3072; and Opinion of Advocate General Jacobs in Case C-7/97 *Bronner* [1998] ECR I-7791, I-7794, point 56).

50 Consequently, the application of the Community competition rules must take account of these principles. In particular, Article 82 EC, which is aimed at specific abusive conduct, cannot be interpreted as making it illegal merely to enter into a contract for the sale or purchase of goods on the sole ground that one of the parties is in a dominant position.

51 In the present case, the Decision deprives Alrosa and De Beers of all freedom to enter into contracts, including those entered into on an ad hoc basis, on the sole ground that De Beers is in a dominant position on the markets downstream from the market for the supply of rough diamonds. The Decision amounts to a legal boycott of Alrosa by De Beers with effect from 2009. That unprecedented situation is all the more noteworthy, since the notified agreement originally covered only 50% of Alrosa's annual output of rough diamonds and 10% of annual worldwide sales, and then, in the version issued to reflect the joint commitments, 18% of Alrosa's annual production and 3.6% of annual worldwide sales.

52 The applicant goes on to maintain that the Decision is essentially vitiated by a manifest error of assessment, inasmuch as the concerns expressed in relation to the notified agreement did not justify in any way the removal of Alrosa's contractual freedom.

53 The principal concern expressed by the Commission in its preliminary assessment of the notified agreement under Article 82 EC and Article 54 of the EEA Agreement was that the exclusive supply commitment laid down in the agreement would result in strengthening De Beers' market power by excluding Alrosa from the market for the supply of rough diamonds and, consequently, depriving other purchasers of access to the significant source of supply which it represented.

54 In such a case it would have been necessary, in accordance with the case-law (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 89, and Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraphs 80, 81

and 160), to conduct a detailed assessment of the foreclosure effects which De Beers' conduct would result in. The need for that assessment was all the more pressing since the Commission and the Community Courts have not thus far had occasion to adjudicate on the lawfulness under Article 82 EC of an exclusive supply commitment involving a dominant purchaser.

55 In the present case, it would have, first, been appropriate to amend the notified agreement to the extent necessary in order to reduce the foreclosure effects found to exist, and, secondly, been unwarranted to rule out any possibility of Alrosa entering into an agreement with De Beers.

56 Finally, the applicant maintains that the Decision will itself have anti-competitive effects. First, the Decision deprives it of access to the largest buyer on the market, thereby running the risk of reducing its output in the absence of any assurance of finding alternative purchasers at equivalent prices. Secondly, it deprives De Beers of access to Alrosa's output, thereby enabling the other purchasers to exercise greater market power in their negotiations with Alrosa and to impose artificial prices.

57 The Decision also infringes Article 9 of Regulation No 1/2003, Article 82 EC and the principle of proportionality.

58 In that connection, the applicant points out, first of all, that under the principle of proportionality enshrined in the third paragraph of Article 5 EC, action by the Community must not go beyond what is necessary to achieve the objectives of the Treaty. Consequently, as the Court has held, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by

the rules in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 93).

59 Next, the applicant claims that this principle applies to decisions adopted by the Commission under Article 9 of Regulation No 1/2003. The powers conferred on the Commission by Regulation No 1/2003 are to be viewed together with its concomitant duty to ensure that the principles laid down in Articles 81 EC and 82 EC are applied. The use made by it of that power cannot therefore exceed what is necessary to ensure that competition is not distorted in the internal market.

60 In that connection, it is immaterial that the commitments made binding by the Commission are initially offered by the undertakings concerned and in what way their offer may go beyond what is necessary in order to comply with Articles 81 EC and 82 EC. It is only in order to meet the concerns which have been notified to them by the Commission that the undertakings concerned offer commitments. Consequently, it remains imperative that the commitments finally deemed necessary by the Commission should meet the concerns expressed in its preliminary assessment, without exceeding what is appropriate and necessary and should be the least onerous possible to ensure compliance with the Community competition rules. At the very least, observance of these requirements is imperative where, as in the present case, the fact of making commitments binding is likely to have an adverse effect on a party involved in the case.

61 The applicant maintains, finally, that the Decision infringes the principle of proportionality.

62 First, the Decision is not necessary in order to attain the objective of prohibiting abuses of dominant positions pursued by Article 82 EC. The joint commitments proposed to the Commission would have reduced the share of Alrosa's annual output reserved for De Beers from 50% in 2005 to 18% in 2010 and beyond, on the basis of prices prevailing on the date of conclusion of the notified agreement, and in reality to a still lower share thereafter, taking into account, first, the anticipated increase in Alrosa's output and, secondly, the expected increase in rough diamond prices. A 50% share has generally been deemed sufficient by the Commission in previous decisions involving a supplier in a dominant position, and in the present case a share well below that figure would have been sufficient.

63 Secondly, the Decision produces effects which are disproportionate in the light of the objective pursued by Article 82 EC of maintaining undistorted competition. It completely rules out the possibility previously open to Alrosa of entering into a contractual relationship with De Beers. Having regard to the concerns expressed by the Commission as to the risk of foreclosure of the market, it would have been sufficient, having regard to the extent of that risk in practice, to amend the notified agreement in the manner provided for by the joint commitments and, consequently, to limit the share of Alrosa's annual output and the share of worldwide output reserved to De Beers to 18% and 3.6%, respectively, of the market. However, the Commission failed entirely to state in the Decision why that less stringent option which had been proposed to it by the undertakings concerned could not be accepted.

64 Thirdly, the disproportionate nature of the Decision in turn gives rise to discrimination to Alrosa's detriment, since other sellers remain free to sell their rough diamonds to De Beers, in quantities which, as a percentage of annual worldwide production, are equal to or greater than the 3.6% under the notified agreement as amended by the joint commitments.

65 The Commission contends that the pleas put forward by the applicant are unfounded.

66 First of all, the concept of 'undertakings concerned' mentioned in the first sentence of Article 9 of Regulation No 1/2003 refers, in the same way as the concept of 'parties concerned' mentioned in other provisions of that regulation, to the person or, where relevant, the persons against whom the proceedings have been initiated, that is to say, persons who may be held liable for an agreement or concerted practice within the meaning of Article 81 EC and Article 53 of the EEA Agreement or for an abuse of a dominant position within the meaning of Article 82 EC and Article 54 of the EEA Agreement. In the present case, De Beers alone was an undertaking concerned by the proceedings initiated under the provisions relating to abuses of a dominant position. Consequently, only De Beers was entitled to offer in that connection commitments capable of being made binding by the Commission.

67 In addition, the second sentence of Article 9 of Regulation No 1/2003 can be construed only as conferring on the Commission the power, and not as imposing a duty, to adopt decisions for a specified period.

68 The Commission also contends, in the first place, that the Decision does not infringe contractual freedom. First of all, it is wrong to allege that the Decision can be equated to a prohibition of lawful conduct.

69 Contractual freedom is limited by the prohibition of anti-competitive practices referred to in Articles 81 EC and 82 EC. In the present case, the agreement, viewed in the context of the long-standing trading relationship between Alrosa and De Beers, appeared, following a preliminary assessment, to run counter to those provisions, in the same way as other types of trading relationship between the parties entered into during the Commission's investigation, such as ad hoc sales in the form of 'willing-buyer/willing-seller' arrangements. What is more, the Commission did not arrive at that preliminary assessment on the sole basis of the dominant position held by De Beers on the downstream markets, as the applicant maintains, but in the light of its dominant position on the market for the production and supply of rough diamonds, as stated in recitals 23 and 24 in the preamble to the Decision.

70 Nor, moreover, does the Decision have the result of eliminating Alrosa's freedom of contract. On the contrary, it merely makes binding the individual commitments proposed by De Beers, within the scope of its own freedom of contract, to terminate its agreement with Alrosa. It might well be the case that it was in Alrosa's interest to substitute an agreement with its main competitor for the risks that competition gives rise to. However, neither the interest that the partner of a dominant undertaking might have in tying itself to that undertaking by an agreement nor the other circumstances peculiar to that partner, should, according to the case-law, be taken into account for the purposes of the application of Article 82 EC (*Hoffmann-La Roche* v *Commission*, paragraphs 89 and 91; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 71; Case C-393/92 *Almelo and Others* [1994] ECR I-1477, paragraph 44; and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 68).

71 The Commission next contends that it is incorrect to claim that its concerns did not justify the adoption of the individual commitments proposed by De Beers.

72 Whilst agreeing that it is normally necessary to conduct a specific examination of the effects that foreclosure may have on competition, the Commission argues that in the present case it would have been a very complex exercise to carry out an analysis with a view to determining whether De Beers could purchase a specific quantity of rough diamonds from Alrosa without causing the effects identified in the Commission's preliminary assessment and, if so, what that quantity might have been. In any event, that analysis was of no value inasmuch as, having regard to the objective pursued by Article 9 of Regulation No 1/2003, the Commission was legitimately entitled to accept at face value the individual commitments proposed by De Beers. Furthermore, members of its staff had already informed the parties, during the administrative procedure, that it might be minded to require a complete cessation of trading relations between Alrosa and De Beers.

73 Moreover, contrary to the applicant's assertions, the Commission's concerns were not limited to issues of the exclusion of competitors or foreclosure of the market. On the contrary, they extended to all the dealings between Alrosa and De Beers

which sought jointly to regulate, by methods different from those consistent with normal competition, the volume, price and range of rough diamonds on the world market, in such a way as to eliminate an independent supplier from the market, to consolidate the role of market-maker played by De Beers and to undermine the maintenance and development of competition, as indicated in recitals 28, 30 and 32 in the preamble to the Decision.

74 Finally, the Commission submits that the applicant is not entitled to maintain that the implementation of the Decision will have anti-competitive effects. It contends that the arguments put forward in that regard are irrelevant inasmuch as they wrongly present Alrosa as being a supplier of De Beers whereas it is in fact a competitor of De Beers, and are neither persuasive from an economic point of view nor supported on any other basis.

75 In the second place, the Commission maintains that the Decision does not infringe the principle of proportionality.

76 In that regard, it first of all acknowledges that the principle of proportionality is applicable to decisions by which it applies Article 9 of Regulation No 1/2003.

77 However, the specific nature of that provision must be taken into account. Unlike Article 7 of Regulation No 1/2003, which allows the Commission to establish the existence of an infringement, to order the parties concerned to bring it to an end and to impose on them any structural or behavioural remedy, including the cessation of trading relations which are contrary to the Community competition rules, Article 9 of that regulation provides that the Commission, without making a finding of infringement, may establish that there is no need for further action since the

undertakings concerned have voluntarily offered commitments which meet its competition concerns.

78 In the light of these factors, a decision pursuant to Article 9 of Regulation No 1/2003 does not need to be based on a statement of reasons such as that required for a decision pursuant to Article 7 of Regulation No 1/2003, in particular where it proves difficult to determine the nature or extent of the commitment necessary to meet the concerns expressed by the Commission, for example because the conduct of concern to the Commission is novel or specific, as in the present case. Moreover, the achievement of the objective of Article 9 of Regulation No 1/2003 would be undermined if the outcome of the review of a decision pursuant to that provision were to depend on the appraisal of another, hypothetical, decision adopted under Article 7 of that regulation. That would imply that the Commission would none the less have to carry out an assessment, as for a decision taken pursuant to Article 7 of Regulation No 1/2003, and would thus forego a part of the efficiency gains which the legislature sought to obtain through Article 9 of that regulation.

79 Furthermore, before accepting commitments offered to it, the Commission has to ascertain whether they deal sufficiently with the competition concerns that have been identified. Article 9 is an enforcement tool in that context.

80 The Commission accepts that the application of the principle of proportionality obliges it to reject commitments that are manifestly excessive, but adds that in so far as commitments are offered voluntarily by the undertakings concerned, such a case is likely to remain exceptional. In any event, it could not be obliged to conduct a parallel assessment for the purposes of a hypothetical decision adopted under Article 7 of Regulation No 1/2003, since such a parallel assessment would undermine the very purpose of Article 9 of that regulation in terms of effectiveness of procedures.

81 The Commission concludes from the above that, in the light of the objective and structure of Article 9 of Regulation No 1/2003, and if the usefulness of this provision is to be preserved, judicial review of decisions applying that provision should be limited to verifying whether or not there has been a manifest breach of the principle of proportionality and, more generally, whether or not there has been a manifest error in the complex economic assessment carried out to determine whether the commitments offered by the undertakings concerned meet the concerns expressed in the preliminary assessment.

82 The Commission submits, next, that in the present case the Decision is not disproportionate and, in particular, does not unduly affect Alrosa's legitimate business interests.

83 First, the applicant is not entitled to maintain that the Decision went beyond what was necessary in making binding the individual commitments proposed by De Beers. It is misleading to claim that the notified agreement reserved only one half of Alrosa's annual output to De Beers, since the other half was in any event reserved for the Russian market and the notified agreement, as originally framed, thus covered the entire annual output intended for the world market, and then, had the joint commitments been made binding, 36% of that output. Moreover, these percentages should not be viewed in isolation but seen against the background of trading relations that had been in place for almost half a century with a view to jointly regulating output and prices. It was in the light of those factors that, first, the Commission expressed concerns as to control of the market by De Beers and the inability of Alrosa to compete with it fully; that, secondly, the interested third parties then confirmed that it was necessary to bring the trading relationship between those companies to an end; and, thirdly, that De Beers unilaterally offered such commitments and by doing so allayed any possible concerns. The Commission also contends that the prohibition on auctions open to all is justified in the light of the past practices of Alrosa and De Beers in the case of ad hoc sales of a 'willing-buyer/willing-seller' kind. On any basis, the applicant has not shown in any way how less onerous commitments, such as the joint commitments previously offered to the Commission, could have been sufficient.

84 Secondly, the applicant is not entitled to maintain that the Decision has caused it hardship which is disproportionate to the objective pursued. The Commission took due account of its interests by allowing it to submit observations on the individual commitments offered by De Beers and by providing for a transitional phase intended to enable Alrosa to put in place an alternative distribution system. Moreover, in September 2003, Alrosa itself submitted undertakings to the Commission which involved the complete and indefinite cessation of its trading relations with De Beers. Lastly, it is not the case that Alrosa will be unable to enter into contractual relations with De Beers for an indefinite period after that transitional phase, since the proceedings may always be reopened under Article 9(2) of Regulation No 1/2003.

85 Thirdly, the applicant has no basis for alleging that the Decision discriminates against it inasmuch as its situation vis-à-vis De Beers differs from that of other suppliers owing, first, to Alrosa's position as a principal competitor of that dominant undertaking and, secondly, to its long-standing trading relationship with that undertaking.

Findings of the Court

— The powers conferred on the Commission by Article 9 of Regulation No 1/2003

86 It is clear from the actual wording of Article 9 of Regulation No 1/2003 that the Commission may, by decision, make commitments offered by the undertakings concerned binding where those commitments satisfy the concerns expressed in its preliminary assessment. Since offers made by undertakings are themselves without binding legal effect, it is the decision of the Commission taken under Article 9 of Regulation No 1/2003, and that decision alone, which has legal consequences for the undertakings.

87 Because the effect of that decision is to bring to an end the proceedings to establish and penalise an infringement of the competition rules, it 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.

88 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.

89 Although Regulation No 1/2003 does not define the concept of 'undertaking concerned', it is clear from its wording that that expression relates to undertakings which are responsible for the conduct in question and which are liable to be penalised because of it.

90 Proceedings under Article 82 EC therefore involve, as a rule, the undertaking which is in a dominant position and the conduct of which is liable to constitute an abuse. If the correct interpretation were to be that all undertakings liable to be affected by behavioural commitments intended to put an end to an established or contemplated abuse must be associated with the offer of commitments in their capacity as

undertakings concerned, that would result in the use of Article 9 of Regulation No 1/2003 being impossible in practice in most of the situations to which Article 82 EC applies.

91 As regards the period in which the decision making commitments binding may remain in force, it should be noted that while Article 9(1) of Regulation No 1/2003 provides that such a decision may be adopted for a specified period, it does not, however, require this. The definitive wording of Article 9 of Regulation No 1/2003 falls to be distinguished in that regard, as the Commission rightly points out, from the wording which had been used at the stage of the Commission proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (COM(2000) 582 final), which provided that such a decision was 'to be adopted for a specified period'. There is, accordingly, no reason of principle which prohibits the Commission from making commitments for an indefinite period binding.

92 Furthermore, although Article 9 of Regulation No 1/2003 does not, unlike Article 7(1), refer to the principle of proportionality, the Commission is obliged to comply with that principle when it adopts decisions on the basis of Article 9. The principle of proportionality is recognised by settled case-law as constituting a general principle of Community law (*Fedesa and Others*, paragraph 13).

93 Recital 34 in the preamble to Regulation No 1/2003 states, moreover, that 'in accordance with the principles of subsidiarity and proportionality as set out in Article 5 [EC], this Regulation does not go beyond what is necessary in order to achieve its objective, which is to allow the Community competition rules to be applied effectively'.

94 The Commission accepts in its observations that the principle of proportionality applies to decisions adopted under Article 9 of Regulation No 1/2003. It none the less considers that that principle should be applied differently under Article 7(1) and under Article 9(1) of that regulation.

95 In that regard, the Court finds, in the first place, that the objective of Article 7(1) of Regulation No 1/2003 is the same as that of Article 9(1) of that regulation and is indissociable from the main objective of Regulation No 1/2003, which is to ensure the effective application of the competition rules laid down under the Treaty.

96 In order to attain that objective, the Commission possesses a margin of discretion in the choice offered to it by Regulation No 1/2003: it may make the commitments proposed by the undertakings concerned binding through the adoption of a decision under Article 9 of that regulation, or it may follow the procedure laid down under Article 7(1), which requires that an infringement be established.

97 Nevertheless, the existence of that margin of discretion as to the choice of procedure to be followed does not relieve the Commission of the obligation to comply with the principle of proportionality when it decides to make commitments offered under Article 9(1) of Regulation No 1/2003 binding.

98 In the second place, according to settled case-law in the matter, the principle of proportionality requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued (Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraph 144, and *Van den Bergh Foods* v *Commission*, paragraph 201); when there is a choice between

several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21, and Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 28).

99 The review of the proportionality of a measure is thus an objective review, since the appropriateness of and the need for the contested decision must be assessed in relation to the aim pursued by the institution. For decisions adopted under Article 7 of Regulation No 1/2003, the aim is to put an end to the infringement which has been established; for those adopted under Article 9 of that regulation, the aim is to address the concerns expressed by the Commission in its preliminary assessment, which justify it envisaging the adoption of a decision requiring an infringement to be brought to an end.

100 In cases to which Article 7(1) of Regulation No 1/2003 applies, the Commission has to establish the existence of an infringement, which implies a clear definition of the relevant market and, where relevant, of the abuse for which the undertaking in question is alleged to be responsible. It is true that, under Article 9(1) of that regulation, the Commission is not required formally to establish the existence of an infringement, as, moreover, recital 13 in the preamble to Regulation No 1/2003 indicates, but 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 are less definitive than those which are required for the application of Article 7(1) of Regulation No 1/2003, although they should be sufficient to allow a review of the appropriateness of the commitment.

101 Indeed, it would be contrary to the scheme of Regulation No 1/2003 for it to be possible to take a decision which would, under Article 7(1) of the regulation, fall to be regarded as disproportionate to the infringement that had been established, by having recourse to the procedure laid down under Article 9(1) and adopting a decision in the form of a commitment that is made binding, on the ground that the infringement does not have to be formally proved in such a case.

102 It has already been held, on the basis of Article 3 of Regulation No 17, that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed (*RTE and ITP* v *Commission*, paragraph 93). The same interpretation must be given to the first sentence of Article 7(1) of Regulation No 1/2003, the wording of which is very similar to that of Article 3(1) of Regulation No 17.

103 It follows that the Commission cannot, without going beyond the powers conferred on it both by the competition rules of the EC Treaty and by Regulation No 1/2003, adopt on the basis of Article 7(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 (see, to that effect, Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraphs 51 and 52).

104 No objective consideration based on the difference between Article 7 and Article 9 of Regulation No 1/2003 allows any other conclusion to be reached as regards the limits which should be imposed on the capacity of the Commission to lay down binding measures under Article 9(1) of that regulation.

105 In the third place, the voluntary nature of the commitments also does not relieve the Commission of the need to comply with the principle of proportionality, because it is the Commission's decision which makes those commitments binding. The fact that an undertaking considers, for reasons of its own, that it is appropriate at a particular time to offer certain commitments does not of itself mean that those commitments are necessary.

106 Moreover, the Court of Justice has held, as regards the former Regulation No 17, that in some circumstances the obligations imposed by a commitment on the parties must be regarded in the same way as orders requiring an infringement to be brought to an end (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 181). The Court of Justice held that, in giving that commitment, the undertakings concerned merely assented, for their own reasons, to a decision which the Commission was empowered to adopt unilaterally (*Ahlström Osakeyhtiö and Others*, paragraph 181).

107 The fact that the commitments are proposed by an undertaking does not therefore limit the review which the Court is to conduct of the well-foundedness of the Commission's decision to make those commitments binding.

108 Lastly, 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. Having regard to the effect of decisions taken under Articles 81 EC and 82 EC on the fundamental economic freedoms guaranteed by the Treaty, cases involving a limited review must be restricted to those in which the contested decision is based on a complex economic assessment, save in fields, such as concentrations, where the existence of a discretionary power is essential to the exercise of the powers of the regulatory institution (Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraphs 38 to 40).

109 It is true that, in the context of the review of concentrations, settled case-law provides that the Commission enjoys a broad discretion in assessing the necessity of obtaining commitments in order to dispel the serious doubts raised by a notified concentration (Case T-158/00 *ARD* v *Commission* [2003] ECR II-3825, paragraphs 328 and 329). The review limited to manifest error which the Court undertakes in that field is justified by the prospective nature of the economic analysis carried out by the Commission in order to be able to find that the concentration in question will not create or strengthen a dominant position (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 163).

110 By contrast, the analysis which the Commission is required to carry out in proceedings initiated under Regulation No 1/2003 concerns, whether a decision adopted under Article 7(1) or Article 9(1) of Regulation No 1/2003 is involved, existing practices. Plainly, that fact does not mean that complex economic assessments may not be necessary, but it 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.

111 It follows that the Court must verify in the present case whether the measures made binding by the Decision were appropriate and necessary to bring to an end the abuse that had been identified in the Commission's preliminary assessment.

— Whether the Decision complied with the principle of proportionality

112 According to settled case-law, the principle of proportionality requires that measures adopted by Community institutions should not exceed the limits of what

is appropriate and necessary in order to attain the aim pursued, and where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (*Fedesa and Others*, paragraph 13, and Case C-180/00 *Netherlands* v *Commission* [2005] ECR I-6603, paragraph 103).

113 The aim pursued by the Commission in adopting the Decision must be sought in the preliminary assessment contained in the statement of objections addressed to De Beers under Article 82 EC. That assessment provided that the notified agreement prevented Alrosa from operating as an independent supplier on the rough diamond market and thereby eliminated a source of supply for potential customers. The Commission therefore takes the view that the notified agreement leads to exclusivity of distribution for the benefit of De Beers and is capable of constituting an abuse of a dominant position.

114 It follows that the abuse identified in the Commission's preliminary assessment is constituted by the notified agreement, the entering into of which by De Beers is presented as an abuse of its dominant position. In those circumstances, it could be said that the mere fact of not permitting the parties to implement that agreement would, in the context of the proceedings initiated under Article 81 EC, have been sufficient to put an end to any possible abuse.

115 However, and even though the complaints set out in the statement of objections under Article 82 EC relate only to the notified agreement, it may be noted that the concerns expressed by the Commission in the Decision also relate to the situation disclosed by the notified agreement, that is to say, more precisely to the existence of long-standing relations between the parties, the continuation of which the notified agreement ensures.

116 Thus, point 28 of the Decision states: '... the investigated practices raising concerns due to dominance and the "market-maker" role of De Beers are those arising from the purchase relationship between De Beers and its most important competitor Alrosa in the light of its historic context. The Commission's investigation revealed that De Beers and Alrosa had established their long-lasting trading relationship in order jointly to regulate volume, assortment and prices for rough diamonds sold on the world market. The basis for today's purchases still appears to be the same and to constitute one of the main elements for De Beers' market-maker role'.

117 It can therefore be concluded that the notified agreement was envisaged in the preliminary assessment as being the source of the Commission's competition concerns not only as such, which would render any recourse to Article 82 EC inappropriate, but because it strengthened and perpetuated pre-existing trading relations, considered to be abusive in themselves.

118 Point 46 of the Decision states that the main reason for the Commission's concerns regarding the practice identified in the proceedings under Article 82 EC 'was De Beers' enhancing or maintaining its dominant position by reducing access to a viable source of alternative supply of rough diamonds for potential customers and by hindering the second biggest competitor [Alrosa] from competing fully with De Beers'.

119 Therefore, the aim pursued by the Commission in making the individual commitments proposed by De Beers binding was to bring to an end practices which prevented Alrosa from establishing itself as an effective competitor on the market in question and to provide third parties with an alternative source of supply.

120 Accordingly, the need for the Decision must be assessed in the light of those two objectives.

121 Point 47 of the Decision states that the individual commitments proposed by De Beers were sufficient to address the concerns expressed in the Commission's preliminary assessment, a matter which the applicant does not contest. However, it remains necessary to consider whether the individual commitments proposed by De Beers and made binding by the Decision also satisfy the criterion of necessity, even though the conclusion of the Decision does not address that aspect of the proportionality of the measure.

122 In that regard, as was stated above, judicial review of Commission measures involving complex economic assessments must be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 279).

123 In order for the Court to be able to undertake only a limited review of the proportionality of the Decision in the present case, it would require to be in a position to determine that the Commission had carried out its assessment on the basis of a complex economic analysis which allowed it to conclude that the commitments that were made binding were necessary in order to address the concerns set out in its preliminary assessment.

124 Both in its defence and at the hearing, the Commission indicated that there might have been a grey zone between the joint commitments and the individual commitments proposed by De Beers, but that the identification of alternative solutions to the commitments that were made binding would have required a

complex economic assessment which Article 9 of Regulation No 1/2003 is intended to avoid. The Commission also stated that, having regard to the difficulty in establishing alternative solutions, it had reached the conclusion that a complete prohibition represented the only appropriate solution in order to address its initial concerns.

125 It follows that in the present case the Commission did not carry out a complex economic assessment justifying a limitation of the review to be undertaken by the Court of the Decision and that its contention that a limited review should be undertaken is based on the particular characteristics of Article 9 of Regulation No 1/2003 alone. As is mentioned in paragraph 100 of this judgment, although Article 9 does not require the Commission to adduce evidence of the infringement targeted by the proceedings, that does not relieve it of the necessity of establishing an analytical framework which is sufficient to allow an effective judicial review of the proportionality of the measure adopted.

126 The Court holds that, on any basis, the Decision is vitiated by an error of assessment which, moreover, is manifest. It is clear from the circumstances of the case that other, less onerous, solutions than the permanent prohibition of transactions between De Beers and Alrosa were possible in order to achieve the aim pursued by the Decision, that their determination presented no particular difficulties of a technical nature and that the Commission could not relieve itself of the duty to consider such solutions.

127 In that regard, the Court notes in the first place that, according to settled case-law, an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 82 EC (*Hoffmann-La Roche* v *Commission*, paragraph 89). Applied to a purchaser in a dominant position, that case-law means that for De Beers to reserve to itself the whole of Alrosa's production exported outside the CIS could, even if the latter consented, constitute an abuse in the context of their relations.

128 Prima facie, the most appropriate way of bringing an abuse of this kind to an end would therefore have been to prohibit the parties from entering into any agreement allowing De Beers to reserve to itself the whole, or even a material part, of Alrosa's production exported outside the CIS, in order for Alrosa to re-establish its independence on the market and for third-party access to an alternative source of supply to be guaranteed, without it being necessary to prohibit all purchases by De Beers of diamonds produced by Alrosa.

129 In the second place, joint commitments had been proposed in December 2004 by De Beers and Alrosa, and the Commission has failed to explain in what way they did not address the concerns expressed in its preliminary assessment.

130 It is true that the Commission is never obliged under Article 9(1) of Regulation No 1/2003 to decide to make commitments binding instead of proceeding under Article 7 of that regulation. It is therefore not required to give the reasons for which commitments are not in its view suitable to be made binding, so as to bring the proceedings to an end.

131 However, 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.

132 The joint commitments proposed in December 2004 by De Beers and Alrosa, which the Commission admittedly was under no procedural obligation to take into account, either in its decision or in its statement of reasons, none the less represented a less onerous measure than the measure which it decided to make binding and it follows that examination of those commitments is relevant in that regard to the review of proportionality.

133 In so far as, first, they progressively opened up access by third parties to Alrosa's production and, secondly, gave Alrosa the time necessary to develop its own distribution system for rough diamonds, and therefore to become an effective competitor to De Beers, the joint commitments were, prima facie, capable of addressing the concerns expressed by the Commission.

134 The Court finds that, for the period from 2005 to 2009, the joint commitments provided for a substantial reduction in the quantity of diamonds reserved by Alrosa for De Beers, with that quantity going down from USD 700 million in 2005 to USD 275 million with effect from 2009. Alrosa would therefore have sold, with effect from 2009, only 35% of the quantity of diamonds to De Beers that it had sold to that company in 2004. It would accordingly have been difficult for De Beers to influence the prices set by Alrosa, inasmuch as more than two thirds of the diamonds exported by Alrosa outside the CIS would have been sold at a price determined in negotiation with third parties. Even if it were to be accepted that De Beers and Alrosa wished to coordinate their pricing policies, it would thus be difficult to conceive how such coordination could have been put into practice, in so far as, faced with a refusal by third parties to buy at the price agreed between the two undertakings, Alrosa would not have been able to turn to De Beers in order to sell the unsold stock. The joint commitments would thus have given third parties effective access to an alternative and independent source of supply.

135 A progressive reduction over five years in the quantity sold to De Beers, coupled with a limit on sales to a maximum value of USD 275 million with effect from 2009, would also have allowed Alrosa to set up its distribution system outside the CIS, without which it could not establish itself as an effective competitor to De Beers. The Court notes, however, that at point 47 of the Decision the Commission stated that the transitional period from 2006 to 2008, that is to say, three years, was necessary for Alrosa to build 'a competitive distribution system for the quantities of diamonds previously sold by De Beers'. However, the Commission does not explain in what way such a period could have been sufficient for that purpose, when Alrosa had informed the Commission in September 2003 that it needed a period of eight years to put in place an effective distribution system and that it would only be with

effect from 2012 that it took the view that it could stop all sales of rough diamonds to De Beers, as is clear from the documents annexed to the application.

136 It will also be noted that on 3 June 2005, the date on which the notice relating to the joint commitments was published in the *Official Journal of the European Union*, the Commission intended, subject to the results of the market test, to make those commitments binding. The Commission was therefore of the view that those commitments addressed, prima facie, the concerns it had expressed in its preliminary assessment.

137 In the third place, even if it were to be accepted that the joint commitments were unable to address the Commission's initial concerns, changes to them would also have been capable of resolving the competition problems arising from the notified agreement, without it being necessary to require the parties to put an end completely to all trading relations with effect from 2009.

138 In particular, it would have been possible to respond to the amendment proposed by the applicant in its letter to the Commission of 6 February 2006, which would have allowed it to sell, by way of sales to De Beers at auction, diamonds having a maximum annual value of USD 275 million. Such an amendment would, first, have given third parties full access to Alrosa's output and, secondly, have allowed Alrosa to continue to sell a limited quantity to the largest buyer on the market on an ad hoc basis.

139 It is true that 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. However, there is nothing to prevent it from making proposed commitments binding only in part or to a particular extent. Moreover, it appears that in the present

case, at the meeting of 27 October 2005, the Commission had proposed to the parties that the joint commitments be amended. On that occasion, it announced its intention to take a decision, based on Article 7 of Regulation No 1/2003, which would prohibit them from having any trading relations with effect from 2009 if they did not offer commitments to that effect before the end of November 2005.

140 None the less, the Commission cannot lawfully 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. In the present case, a decision adopted under that provision which required De Beers to bring to an end with effect from 2009, for an indefinite period, all direct or indirect trading relations with Alrosa would manifestly go beyond what the Commission could have required if it were to comply with the principle of proportionality, having regard to the objective pursued.

141 Only exceptional circumstances, which have not been identified in the Decision and which are not apparent from the file, can justify a decision adopted under Article 9(1) prohibiting undertakings completely and indefinitely from contracting amongst each other. It is true that, where the undertakings concerned have a collective dominant position, it is possible that nothing less than a complete prohibition of any dealings between them may be the only way of preventing abuses. But, while the Commission gave it to be understood in the statement of objections notified to the parties under Article 81 EC that an oligopoly might have existed between Alrosa and De Beers, the analysis set out in the Decision is based solely on the dominant position of De Beers and not on a possible collective dominant position of the two undertakings. Both in its defence and at the hearing, the Commission confirmed that the Decision should indeed be understood in that way.

142 Furthermore, the comparison made by the Commission between the commitments offered by the applicant in September 2003, the joint commitments and the commitments that were made binding cannot suffice to show that the latter were necessary, since the necessity for the prohibition imposed in the present case, in the form of commitments that were made binding, must be assessed objectively, having regard to the aim pursued by the Commission.

143 As regards the commitments proposed by the applicant in September 2003, on which the Commission relies in order to justify the proportionality of the measure, it is true that these envisage a complete and indefinite cessation of trading relations with De Beers. However, the Court finds, first, that those commitments provided for such a cessation of trading relations with effect from 2013 and not from 2009, which gave Alrosa further four years in which to develop a distribution system outside the CIS allowing it to sell the volume of rough diamonds previously sold to De Beers. The putting in place of such a system was clearly necessary in order to allow third parties to have access to Alrosa's output and to allow Alrosa to compete fully with De Beers. Secondly, Alrosa withdrew those commitments on the ground that they were not economically viable. Lastly, the fact that an undertaking has offered commitments at a particular time, for reasons of its own, does not mean that those commitments can be assumed to be proportionate and does not relieve the Commission of the obligation to verify their adequacy and their necessity as regards the aim which it is sought to achieve. Consequently, the fact that Alrosa proposed a number of commitments in September 2003 has no effect on the lawfulness of the Decision.

144 As regards the joint commitments proposed by the parties in December 2004, the Commission describes these as inadequate, on the ground that if De Beers was allowed to continue to buy rough diamonds from Alrosa up to a value of USD 275 million a year, that could prevent Alrosa from competing with it, since the remaining two thirds of its production intended for export would make it more difficult for Alrosa to offer regular supplies of a wide range of diamonds. In addition, the Commission considers that De Beers could continue to use Alrosa's diamonds in order to perform its market-maker role.

145 However, the Court finds that the only point put forward by the Commission in support of the assertion that Alrosa's capacity to supply a wide variety of diamonds would be reduced if a maximum annual quantity equivalent to USD 275 million continued to be sold to De Beers is a reference to point 70 of the statement of objections under Article 81 EC. That point states: 'De Beers ... has a considerable advantage over its competitors, not only because of its size but also because it is able to guarantee the best consistency [in the] supply [of rough diamonds] to its customers. That is because it has access to the output of a larger number of different mines producing a larger variety of rough diamonds and it is the only producer keeping large stocks'. That point does not explain why Alrosa could not guarantee a regular supply of significant quantities of rough diamonds if it continued to supply a limited quantity to De Beers.

146 Furthermore, even if it were to be accepted that the sale to De Beers of a limited quantity of diamonds could have allowed the latter to maintain or to reinforce its market-maker role, and hence its dominant position, an infringement of the competition rules would not necessarily be established. 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 (*Michelin* v *Commission*, paragraph 57), they cannot amount to a requirement that the very existence of the dominant position be called into question.

147 In the present case, the Commission has required the parties to put an end to all trading relations, with the clear intention of weakening De Beers' role as market-maker.

148 The Decision also de facto obliges Alrosa, which is not subject to the procedure initiated under Article 82 EC, to make significant changes to its structure and activity in order to compete with De Beers outside the CIS, and to do so within a period of three years.

149 The Commission is thus forcing an operator which is not directly concerned by the proceedings initiated under Article 82 EC to work towards a change in the structure of the market for the production and supply of rough diamonds. Such a measure exceeds the powers of the Commission under Article 82 EC.

150 The Commission lastly contends that the prohibition on transactions by way of open auction is justified in the light of the past practices of Alrosa and De Beers in relation to ad hoc sales (of a 'willing-buyer/willing-seller' kind). It argues that it would be legitimate to be concerned that those sales could allow the parties to continue to implement the notified agreement, since the quantities sold in such a case could be the same as the quantities laid down under that agreement.

151 In that regard, even if it were to be accepted that De Beers and Alrosa might have wished, by another route, to maintain the value of the transactions laid down under the notified agreement, the Commission was not without the means to take such measures against them as were necessary to ensure compliance with the competition rules. In particular, Article 9(2) of Regulation No 1/2003 provides that the Commission may reopen the proceedings where the undertakings concerned act contrary to their commitments. Likewise, Article 23(2) of that regulation allows it to penalise undertakings which fail to comply with a commitment made binding under Article 9.

152 Furthermore, even if it were the case that ad hoc sales between De Beers and Alrosa allowed De Beers to maintain or strengthen its role as market-maker, such a result would not, of itself, contravene the competition rules, in so far as such sales were made to the party making the highest offer.

153 The Court accordingly does not accept the argument that to allow Alrosa to sell a particular quantity of diamonds to De Beers at auction would necessarily have imperilled the achievement of the objectives targeted by the Commission. Such sales

would have allowed, first, third parties to gain access to Alrosa's production under the same conditions as De Beers, and, secondly, Alrosa to sell to the largest buyer on the market. Since the Commission has not established that criteria other than the value of the offer to purchase were taken into account by Alrosa in the case of sales actually made at auction, the argument based on the preferential treatment which De Beers would have enjoyed at such sales cannot be accepted. Moreover, in its letter of 6 February 2006, which was admittedly sent to the Commission after the expiry of the period allowed for new commitments to be submitted, Alrosa proposed to limit the value of diamonds sold to De Beers at auction to USD 275 million. At the very least, such a limit would have reduced the risks of distortion of competition put forward by the Commission.

154 It follows that there were, in the present case, less onerous alternative solutions for the undertakings than the total prohibition of transactions and that the Commission could not refuse to take them into consideration on the basis of the alleged difficulty in determining them.

155 As regards, lastly, the Commission's argument that the Decision is not permanent in nature because it would be possible to reopen the proceedings in accordance with Article 9(2) of Regulation No 1/2003, the Court points out that that possibility arises in three cases: where there has been a material change in any of the facts on which the decision was based; where the undertakings concerned act contrary to their commitments; and where the decision was based on incomplete, incorrect or misleading information. Since the situations justifying a reopening are thus exhaustively listed, Alrosa could not request that the proceedings be reopened on grounds such as those set out in its application, in particular on the basis that the principle of proportionality had been infringed. Furthermore, the Commission would have a discretion to refuse to reopen. The Commission's argument based on Article 9(2) of Regulation No 1/2003 cannot therefore be accepted.

156 That being so, the applicant is right to argue, first, that the prohibition on all trading relations between De Beers and itself for an indefinite period manifestly goes beyond

what was necessary in order to achieve the targeted objective and, secondly, that other solutions existed that were proportionate to that objective. In making use of the procedure allowing commitments offered by an undertaking concerned to be made binding, the Commission was not relieved of its duty to apply the principle of proportionality, which requires in this case that there be an appraisal *in concreto* of the viability of those intermediate solutions.

157 It follows from all of the above that the plea alleging infringement of Article 9(1) of Regulation No 1/2003 and of the principle of proportionality is well founded and that the Decision should be annulled on that ground alone.

158 However, having regard to the powers of the Commission in relation to the enforcement of judgments annulling decisions adopted on the basis of Articles 81 EC and 82 EC, it is appropriate, for the sake of completeness, to give a ruling in the present case on the applicant's first plea, alleging infringement of the right to be heard.

The plea alleging infringement of the right to be heard

Arguments of the parties

159 The applicant claims that the Decision was adopted in breach of its right to be heard in that the Commission, first, did not inform it of the reasons for which it took the view, in the light of the observations submitted by the interested third parties, that the joint commitments did not address the Commission's concerns and, secondly, that the Commission did not afford it an opportunity to state its position in that regard.

160 In support of that plea, Alrosa argues first of all that the right to be heard, as guaranteed in the context of proceedings applying the competition rules, imposes two obligations on the Commission. That right, which is available to every person before any individual measure which would affect him or her adversely is taken, as is mentioned in the first indent of Article 41(2) of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), implies that the parties concerned should be put in a position before the measure is adopted to submit their observations on the objections which the Commission considers must be upheld against them and that in that regard they must be informed of the facts on which those objections are based (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299) and of the conclusions drawn from those matters by the Commission (Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 38).

161 The applicant next argues that the concerns expressed by the Commission in the Decision differ from those previously set out by it in its preliminary assessment, in the form in which it was brought to Alrosa's notice.

162 Initially, the Commission expressed concerns in relation to two points. As is apparent from the statement of objections concerning Article 81 EC and Article 53 of the EEA Agreement and the summary notice, it stated, first, that the agreement appeared to restrict competition on the ground that it reserved half of Alrosa's production to De Beers and thereby reduced Alrosa's capacity to conduct itself as an independent operator on the market. The Commission indicated, secondly, that the agreement appeared to constitute an abuse of a dominant position on the ground that it deprived De Beers' customers of access to an alternative source of supply and strengthened De Beers' market power at the expense of its main competitor. It was in the light of that preliminary assessment that the applicant and De Beers offered joint commitments which the Commission initially intended to make binding.

163 Subsequently, the Commission changed its view. Once it had been given notice of the comments submitted by the interested third parties in response to the summary notice, which mentioned six other concerns as regards the competition rules, the Commission stated, in recitals 41 and 42 in the preamble to the Decision, that, whilst they did not identify any new relevant concerns, those observations, and the Commission's own analysis, finally led it to form the view that the joint commitments did not meet its concerns.

164 Lastly, the applicant considers that, in those circumstances, it was for the Commission to afford it the possibility of making its views known not only as regards the observations submitted by the interested third parties but also as regards the analysis on the basis of which the Commission subsequently took the view that the joint commitments were no longer sufficient and that it was necessary to make the individual commitments proposed by De Beers binding. That, however, did not happen.

165 The Commission's objections in that regard are, it argues, unfounded. First, the Commission cannot reasonably maintain, as it did in recital 41 in the preamble to the Decision, that the individual commitments merely enhanced the joint commitments. The absolute and potentially indefinite prohibition on having any trading relationship whatever with De Beers is, from an economic point of view, quite different in nature from the possibility of pursuing such a relationship, albeit under restrictive conditions. Secondly, the Commission cannot legitimately argue that the applicant is not a party concerned by the proceedings initiated under Article 82 EC and Article 54 of the EEA Agreement. Since the Commission has itself acknowledged that the circumstances of the case warranted hearing the applicant in relation to the observations submitted by the interested third parties, it was not justified in refusing to hear it in regard to its revised assessment.

166 The Commission takes the view that this plea is unfounded.

167 First of all, it states that it is necessary to distinguish the applicant's position in the context of the proceedings initiated under Article 81 EC and Article 53 of the EEA Agreement, on the one hand, and its position under the proceedings initiated under Article 82 EC and Article 54 of the EEA Agreement, on the other. The first of those sets of proceedings was initiated against De Beers and Alrosa, which were addressees of a statement of objections, offered joint commitments to the Commission and were heard by it, in particular with regard to the observations submitted by the interested third parties regarding those commitments. However, those proceedings became devoid of all purpose by reason of the individual commitments proposed by De Beers and were therefore closed without any decision being adopted. The second set of proceedings was, for its part, initiated against De Beers but not against the applicant and led to the adoption of the Decision.

168 The Commission goes on to contend that the legal situation of the party concerned by proceedings applying the competition rules, that is to say, the legal situation of the person against whom those proceedings are initiated and upon whom a penalty may be imposed, must be distinguished from that of parties interested by those proceedings, that is to say, persons who may have an interest in its outcome but against whom those proceedings have not been initiated and upon whom a penalty will not be imposed. The scope of the right to be heard, as enshrined in general principles of law and the provisions of secondary law, is not the same for those two categories of persons.

169 Finally, the Commission advances an argument as to the specific nature of the legal situation of parties who are involved in some capacity in proceedings under the competition rules where it is envisaged that recourse will be had to Article 9 of Regulation No 1/2003. That provision, which was enacted in order to enable the Commission to bring the proceedings to an end rapidly and efficiently when it is offered commitments meeting its concerns, does not require the Commission to hear the parties in the same way as when that is not the case. In particular, the Commission's first task is not to address a statement of objections to the parties concerned but to inform the undertakings concerned of its concerns by means of a preliminary assessment. When those undertakings offer to it commitments which

appear to meet its concerns and it envisages making them binding, the Commission must then enable interested third parties to submit their comments in that connection by publishing a summary notice in the *Official Journal of the European Union*.

170 Such publication does not prejudge the Commission's assessment and does not require it to apply Article 9 of Regulation No 1/2003. Thus, the Commission may continue its examination of the commitments offered by the undertakings concerned and may decide, in the light of that examination, and on the basis of any observations submitted by interested third parties and the circumstances of the case, to make those commitments binding, or to take the view that they fail to meet its concerns and examine a new set of commitments offered by the undertakings concerned, or indeed have recourse to the procedure laid down under Article 7 of Regulation No 1/2003. The Commission is accordingly under no obligation whatever to adopt a decision which applies Article 9 of Regulation No 1/2003.

171 In the present case, since the applicant is not a party concerned by the proceedings which led the Commission to adopt the Decision, there was no basis on which it might be entitled to the benefit of the rights conferred on the parties concerned by Article 27 of Regulation No 1/2003 and by Articles 10 to 12 of Regulation No 773/2004.

172 None the less, the applicant was in fact accorded the right to be heard to which it could legally claim to be entitled in the context of those proceedings. The scope of that right was determined by the applicant's particular position in the present case. In essence, that position had its origin in the parallel pursuit of two sets of proceedings concerning agreements and abuses of a dominant position, under the provisions of Regulation No 17 and then of Regulation No 1/2003. It may also be accounted for by the successive presentation of joint commitments by the applicant and De Beers and then, following the market test, of the individual commitments proposed by De Beers.

173 Accordingly, the applicant was informed, first, of the concerns expressed by the Commission in its preliminary assessment of the notified agreement under Article 82 EC and Article 54 of the EEA Agreement, by means of the summary notice; secondly, of the observations submitted in that connection by the interested third parties; and, thirdly, of the individual commitments offered by De Beers. Furthermore, Alrosa had the possibility of making known its views on the comments of the interested third parties and on the individual commitments offered by De Beers, and in fact expressed its views in that connection.

174 Moreover, it is wrong to claim that the Commission raised fresh concerns following publication of the summary notice and receipt of the observations of the interested third parties. The Commission merely analysed whether the joint commitments of Alrosa and De Beers met or did not meet its concerns in regard to the agreement. The observations submitted by the interested third parties in that connection did not raise fresh issues and confirmed the inadequacy of the joint commitments.

Findings of the Court

175 Regulation No 1/2003 distinguishes between a number of categories of participants in the proceedings before the Commission: undertakings 'concerned' (Article 7), 'complainants' (Articles 7 and 27), undertakings or parties 'concerned' (Articles 9, 17, 18, 21(1), 27(2)), 'undertakings which are the subject of the proceedings' (Article 27(1)) and 'interested third parties' (Article 27(4)).

176 It is clear immediately that the applicant is not a 'complainant'. In addition, for the reasons set out above, De Beers alone is the undertaking 'concerned' and the 'subject of the proceedings' conducted by the Commission under Article 82 EC.

177 However, the applicant is also not a mere 'interested third party' to the proceedings for the purposes of Article 27(4) of Regulation No 1/2003. Alrosa is the contracting partner of De Beers in the context of a long-lasting bilateral trading relationship, which the Decision brings to an end. The applicant was also involved in both sets of proceedings initiated by the Commission following the notification of its agreement with De Beers.

178 The manner in which the Commission initiated the two sets of proceedings relating to the agreement between De Beers and Alrosa supports that conclusion.

179 Thus, following intimation of the notified agreement on 14 January 2003, the Commission initiated two sets of proceedings, one based on Article 81 EC, and the other on Article 82 EC. The two sets of proceedings were registered under the same number (38.381), as the Commission stated at the hearing.

180 The Commission sent the statement of objections concerning the proceedings based on Article 81 EC to the applicant and the statements of objections concerning both sets of proceedings to De Beers. Each of the statements related to the agreement which De Beers and Alrosa intended to enter into, against the background of the relations which existed between the parties at the time.

181 Following on the statements of objections, the applicant and the Commission entered into discussions, to which De Beers subsequently became a party, with a view to reaching a negotiated settlement of the case. On 31 March 2003, the applicant and De Beers sent joint written observations to the Commission in reply to the statement of objections issued under Article 81 EC. Those observations also addressed the compatibility of the agreement with Article 82 EC, although the applicant did not receive a copy of the statement of objections sent to De Beers under that article.

182 Moreover, on 7 July 2003, the applicant and De Beers made oral submissions to the Commission. On 14 December 2004, the applicant and De Beers jointly submitted commitments designed to address the concerns which the Commission had notified to them.

183 The statement in case COMP/E-2/38.381 — De Beers — Alrosa of 3 June 2005, in which the Commission referred to the joint commitments offered by the applicant and De Beers and invited the interested third parties to submit to it their observations, also makes no distinction between the two sets of proceedings.

184 To that, there falls to be added the fact that on 27 October 2005 the applicant and De Beers attended a joint meeting with the Commission, at which the Commission informed them of the observations of the 21 interested third parties submitted following the notice of 3 June 2005.

185 Lastly, in a letter of 22 February 2006, the Commission informed the applicant that the proceedings involving it had been brought to an end as a result of the individual commitments proposed by De Beers in the proceedings brought under Article 82 EC.

186 This summary of the facts shows that the proceedings taken by the Commission under Articles 81 EC and 82 EC were at all times treated de facto as being a single set of proceedings, not only by the Commission but also by the applicant and by De Beers.

187 In the circumstances of the present case, the close connection between the two sets of proceedings initiated by the Commission and the fact that the Decision expressly refers to Alrosa should have led 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 did not fall to be so classified in the proceedings relating to Article 82 EC.

188 Recital 37 in the preamble to Regulation No 1/2003 states that it respects 'the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union' and that it 'should be interpreted and applied with respect to those rights and principles'. Article 41(2) of the Charter of Fundamental Rights of the European Union provides that every person has the right to be heard 'before any individual measure which would affect him or her adversely is taken'.

189 Likewise, Article 27(2) of Regulation No 1/2003 provides that 'the rights of defence of the parties concerned shall be fully respected in the proceedings' and that the parties concerned are to be 'entitled to have access to the Commission's file'.

190 Lastly, recital 10 in the preamble to Regulation No 773/2004, which relates to the conduct of proceedings by the Commission pursuant to Articles 81 EC and 82 EC, states: 'in order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision'.

191 It should also be noted that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21).

192 The Court finds that on 3 June 2005, the date on which the notice in which the Commission referred to the joint commitments offered by De Beers and the applicant was published, the Commission intended to make those commitments binding, subject to the result of the consultation with third parties. It accordingly took the view that those commitments addressed, prima facie, the concerns it had expressed in its preliminary assessment.

193 However, following receipt of the comments from third parties, the Commission took the view that the joint commitments did not address its initial concerns and that the only solution that could be envisaged was the cessation of all relations between Alrosa and De Beers with effect from 2009. The Commission none the less stated in point 41 of the Decision that a 'large majority of the observations confirmed [its] competition concerns, as expressed in its preliminary assessment, but indicated that the Commission's competition concerns would be insufficiently addressed with the proposed commitments' and that 'no relevant new concerns' were identified in those third-party observations. That means that the Commission did not accept any new objections raised by the third parties.

194 However, the Court is not convinced by the Commission's assertion that the comments from the third parties did no more than confirm its initial concerns. If the comments from the third parties added nothing to the Commission's preliminary assessment, the Commission could, in the circumstances, have made the joint commitments binding. If, on the contrary, the third parties took the view that the joint commitments were inadequate and if their comments led the Commission to conclude that only a definitive cessation of relations between the parties with effect from 2009 was capable of addressing its initial concerns, the Commission was under a duty to hear the parties on those observations, and on the other factual elements justifying its new conclusion. It is clear that the Commission can depart from the assessment made of the joint commitments only if the factual background has changed or if that assessment was undertaken on the basis of incorrect information.

195 It is true that the Commission was entitled to take the view, after receipt of the observations from the third parties, that the commitments proposed by the parties did not address the concerns set out in its preliminary assessment, since the purpose of the consultation with third parties provided for under Article 27(4) of Regulation No 1/2003 is precisely to allow the Commission to take a decision which will address the competition issues identified in its preliminary assessment.

196 However, it is necessary in a case of this kind, if the right to be heard is to be complied with, first, that the undertakings which proposed those commitments be informed of the essential factual elements on the basis of which the Commission required new commitments and, secondly, that those undertakings can express their views on the matter. In the present case, the applicant was provided only with a summary of the conclusions which the Commission drew from the third-party observations. At the meeting of 27 October 2005, the Commission merely informed it of the fact that the third-party comments had principally referred to the risk of partitioning of the market and the risk of a cartel between De Beers and Alrosa, and that the Commissioner for Competition had requested the team responsible for the case not to accept the joint commitments in the circumstances. At the same time, Alrosa received a summary of the third-party observations and was informed of the nature of the commitments which the Commission expected the parties to give following the negative result of the consultation with third parties: cessation of all relations with effect from 2009 and a new offer of commitments, on that basis, before the end of November 2005.

197 The undertakings concerned also have the right, under Article 27(2) of Regulation No 1/2003, of access to the Commission's file. According to settled case-law, that right is one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively (Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 334, and Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407). In accordance with Article 15(1) of Regulation No 773/2004, the exercise of that right presupposes that the undertaking concerned has made a request to that effect to the Commission.

198 In that regard, the Court notes in the first place that the parties are in agreement that the applicant requested a non-confidential version of the third-party observations. However, according to the applicant, that request was made orally at the meeting of 27 October 2005 and repeated in the letter of 6 December 2005, whereas, according to the Commission, it was not until 6 December 2005 that the applicant requested a non-confidential version of the third-party observations, that is to say, after the expiry of the period allowed for the submission of new commitments.

199 The file shows that at the meeting of 27 October 2005, in reply to a question from the applicant's lawyers regarding access to the non-confidential version of the third-party observations, the Commission indicated that, in accordance with the procedure laid down in Article 9(1) of Regulation No 1/2003, it was under no duty to provide Alrosa with that version. The fact that the possibility of access to those documents was discussed between the parties at that meeting is, moreover, not disputed by the Commission.

200 It must also be pointed out that the individual commitments made binding by the Decision were submitted by De Beers on 25 January 2006, that is to say, after the final date of 30 November 2005 given by the Commission at the meeting of 27 October 2005 for the submission of new commitments. That being the case, it cannot be maintained that new proposals for joint commitments could no longer be submitted by Alrosa and De Beers after 30 November 2005 or that, after that date, a request for access to the third-party observations would have been of no practical benefit to the applicant.

201 Following on the formal request made by the applicant in writing on 6 December 2005, the Commission did not supply a non-confidential version of those third-party observations until 26 January 2006, that is to say, more than six weeks after the date of the applicant's formal request in that regard and more than three months after the meeting of 27 October 2005, at which the question of access to the non-confidential version of the third-party observations had been discussed by the parties. The Court also notes that those documents were supplied to the applicant at the same time as the copy of the individual commitments proposed by De Beers, thus making it impossible for the applicant to provide an effective reply and to propose new joint commitments with De Beers.

202 The third-party observations were of particular importance in the proceedings, in so far as the Commission took them into account in concluding that the market testing was negative and that only the cessation of all trading relations with effect from 2009 constituted an acceptable solution. According to point 42 of the Decision, 'those observations, together with the Commission's own analysis, led the Commission to suggest amendments to the proposed commitments'.

203 It follows that the applicant had, in circumstances such as those of the present case, a right to be heard on the individual commitments proposed by De Beers which the Commission envisaged making binding in the proceedings initiated under Article 82 EC and that it was not given the opportunity to exercise that right fully, even though the extent to which such an irregularity might have affected the Commission's decision cannot be precisely determined in the present case.

204 Accordingly, the applicant's first plea in law, which has been considered for the sake of completeness, is also well founded.

205 It follows that the Decision must be annulled.

Costs

206 Under Article 87(2) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must, in accordance with the forms of order sought by the applicant, be ordered to pay, in addition to its own costs, the costs incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision 2006/520/EC of 22 February 2006 relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/B-2/38.381 — De Beers);**

2. **Orders the Commission to pay its own costs and those incurred by Alrosa Company Ltd.**

Legal Wiszniewska-Białecka Vadapalas

Moavero Milanesi Wahl

Delivered in open court in Luxembourg on 11 July 2007.

E. Coulon H. Legal

Registrar President