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COMMISSION DECISION

of 22 II 2006

relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement

(Case COMP/B-2/38.381– De Beers)

(Only the English text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, in particular Article 54 and Article 56(2), second sentence, thereof,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, in particular Article 9(1) and Article 34(2) thereof,

Having regard to the Commission Decision of 14 January 2003 to initiate proceedings in this case by sending a statement of objections and the supplementary statement of objections of 1 July 2003,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003²,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

WHEREAS:

1. SUBJECT MATTER

- (1) This Decision is addressed to De Beers société anonyme, incorporated in Luxembourg ('De Beers SA'), a holding company of the De Beers Group of companies ('De Beers'). The subject matter of the procedure is De Beers' purchase relationship with ALROSA Company Ltd ('ALROSA'), the second largest diamond producer on the worldwide market, concerning rough diamonds which are to a large extent distributed and/or processed in the European Economic Area ('EEA'). In its preliminary assessment, the Commission considered that De Beers' purchases from ALROSA raised concerns under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, which prohibit abuses of a dominant position, in that they reduce access to a viable source of alternative supply of rough diamonds for potential customers and hinder the second biggest competitor from competing fully with De Beers.

2. PARTY

- (2) De Beers société anonyme, incorporated in Luxembourg, is a principal holding company of the De Beers Group of companies³.

¹ OJ L 1, 4.1.2003, p.1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L68, 8.3.2004, p.1).

² OJ C 136, 03.06.2005, p. 32-33.

³ On 8 June 2001, De Beers SA (formerly known as De Beers Investments) acquired the entire issued share capital of De Beers Centenary AG and De Beers Consolidated Mines Limited, the two former holding companies of the group.

- (3) De Beers is the largest diamond mining company in the world. It has interests in operations in relation to diamond exploration, mining, recovery, valuation, marketing, trading, cutting and polishing of rough diamonds and jewellery sales, covering in effect the entire diamond pipeline from the mine to the consumer. De Beers' sales encompass rough diamonds acquired from its wholly-owned mines in South Africa, from joint ventures in Botswana, Namibia and Tanzania, and from third parties, in particular ALROSA.
- (4) City West and East Limited ('CWEL'), incorporated in England and Wales, is a private limited company [...]. It is a wholly-owned subsidiary of De Beers.
- (5) De Beers Centenary Aktiengesellschaft ('DBCAG'), incorporated in Switzerland, was one of the holding companies of De Beers before corporate restructuring in 2001 and is now controlled by De Beers SA.

3. INVESTIGATED PRACTICES

- (6) The investigated practices arise from a purchase relationship between De Beers and ALROSA (or its predecessors) which has developed over time and dates back to 1959. The practices concern a Trade Agreement which was entered into on 17 December 2001 by DBCAG and CWEL of the De Beers group, on the one hand, and ALROSA, on the other, and was notified to the Commission ('Trade Agreement').
- (7) ALROSA Company Limited, a joint stock company incorporated in the Russian Federation, is the second largest diamond mining company in the world. ALROSA accounts for over 98% of Russian diamond production, Russia being the second largest diamond producing country in the world, in value, after Botswana. ALROSA has interests in operations throughout the Russian Federation in relation to diamond exploration, mining, recovery, valuation, cutting and polishing of rough diamonds as well as jewellery manufacturing. It is also involved in mining operations in Angola. In addition, it is active in a number of other industrial sectors, including the generation of electricity and the extraction and supply of oil and natural gas needed to support its diamond operations.
- (8) Under the Trade Agreement, De Beers undertook to purchase substantial amounts of rough diamonds (to the value of USD 800 million per annum [...]) from ALROSA during a period of five years. The applicability of the Trade Agreement was conditional upon receiving an approval from the European Commission.
- (9) The Commission also investigated purchases by De Beers from ALROSA in the form of the "willing-buyer-willing-seller" arrangement, which continued pending the decision on compatibility of the Trade Agreement with Article 82 of the EC Treaty and Article 54 of the EEA Agreement, and was never formally notified to the Commission.

4. PROCEDURAL STEPS UNDER REGULATION NO 17/62 AND REGULATION NO 1/2003

- (10) In the course of its investigation in the merger case M.2333 (De Beers/LVMH/Rapids World), which ended in July 2001, the Commission services learnt of the existence of

trade agreements, among others between De Beers and ALROSA (and formerly the Russian State) for the sale of rough diamonds.

- (11) On 5 March 2002, following further investigation by the Commission, CWEL, DBCAG and ALROSA, in accordance with Articles 2 and 4 of Regulation No 17 of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty⁴, jointly applied to the Commission for negative clearance or, failing this, an individual exemption under Article 81(3) of the EC Treaty in respect of the Trade Agreement.
- (12) On 14 January 2003 the Commission opened proceedings by issuing a statement of objections under Article 82 of the Treaty addressed to De Beers SA, CEWL and DBCAG in respect of the Trade Agreement and provided access to the Commission's file.
- (13) On 1 July 2003 a supplementary statement of objections was addressed to the parties, which added Article 54 of the European Economic Area Agreement as additional legal basis to the statement of objections of 14 January 2003.
- (14) On 31 March 2003 De Beers submitted written observations in response to the Commission's objections. An oral hearing was held on 7 July 2003.
- (15) On 25 September 2003 a complaint was lodged with the Commission alleging violation of Article 81 and Article 82 of the Treaty.
- (16) With the entry into force of Regulation (EC) No 1/2003 on 1 May 2004, the application made by De Beers and ALROSA lapsed in accordance with Article 34(1) of that Regulation. However, in accordance with Article 34(2) of that Regulation, the initiation of proceedings under Article 9(3) of Regulation No 17 by Commission Decision of 14 January 2003, which corresponds to that under Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty and Articles 53 and 54 of the EEA Agreement⁵, continued to have effect.
- (17) On 14 December 2004, CWEL and DBCAG submitted commitment proposals to the Commission in response to the Commission's statements of objections of 14 January and 1 July 2003 pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement⁶, which are deemed to constitute the preliminary assessment within the meaning of Article 9(1) of Regulation (EC) 1/2003.
- (18) On 3 June 2005 the Commission published a notice⁷ pursuant to Article 27(4) of Regulation (EC) No 1/2003 inviting interested third parties to submit observations on the proposed commitments by 4 July 2005.

⁴ OJ L 13, 21.2.1962, p. 204.

⁵ OJ L 123, 27.4.2004, p. 18.

⁶ ALROSA submitted reciprocal commitments in response to the Commission's statements of objections under Article 81 of the EC Treaty and Article 53 of the EEA Agreement of 14 January 2003 and 1 July 2003, which were also addressed to De Beers SA, CWEL and DBCAG. Commitments submitted by CWEL and DBCAG were also aimed at addressing the concerns raised under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. These separate proceedings have been closed.

⁷ OJ C 136, 03.06.2005, p. 32–33.

- (19) On 27 October 2005 the Commission informed De Beers of the observations received from interested third parties following the publication of the notice. On 25 January 2006 De Beers SA submitted an amended commitment proposal.
- (20) On 10 February 2006 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On the same day, the Hearing Officer issued his final report.

5. PRELIMINARY ASSESSMENT

5.1. Relevant market

- (21) In the Commission's preliminary assessment, the relevant product market was identified as production and supply of "rough diamonds", suitable for the cutting and polishing industry and, ultimately, the jewellery industry. The product market of rough diamonds comprises the full range of diamonds. Rough diamonds are distinct from other precious stones due to product characteristics, such as hardness, clarity and reflection of light. Such diamonds typically have different characteristics concerning caratage, colour, clarity and (potential) cut. This preliminary view of the product market definition was based on the fact that from the point of view of product characteristics there was no clear way to distinguish any particular group of diamonds. With respect to supply and demand side, diamonds are traded in a grouped form comprising a large range of diamonds of different sizes and qualities.
- (22) In the Commission's preliminary assessment, the relevant geographic market was identified as being worldwide, based on the fact that rough diamonds are priced and traded worldwide. In fact, rough diamonds are mined in some 25 countries around the world and processed in around 30 countries.

5.2. Dominance

- (23) In its preliminary assessment, the Commission took the view that De Beers is dominant within the meaning of Article 82 of the EC Treaty and Article 54 of the EEA Agreement on the worldwide rough diamond market and therefore in the EEA. The Commission reached this preliminary view based on a number of considerations.
- (24) For much of the 20th century, De Beers controlled over 80% of the worldwide supply of rough diamonds. In a highly concentrated market (HHI index is above 2600) De Beers, with diamonds from its own production and its joint ventures, holds a market share of around [...] % (if purchases from ALROSA are not taken into account), which is the size of [...] the next competitor, ALROSA. Other competitors hold a market share of below [...] %. The competition that De Beers faces in the rough diamond market is fragmented. De Beers has always supplemented the production of its own mines by entering into joint ventures with governments, by purchasing diamonds from its competitors, and by buying up diamonds on the open market.
- (25) Historically, De Beers has taken the role of "custodian" of the market. At least until a few years ago, De Beers controlled the market by imposing quotas on its production partners and keeping large stocks.
- (26) De Beers is still considered the price leader of the diamond industry today. Its vertical integration and highly sophisticated distribution system provide it with a unique

knowledge of the diamond pipeline. De Beers operates the world's most efficient mines, and has the widest access to a variety of diamond sources including its stocks. As a market maker, by aggregating the output of numerous mines and its other sources of rough diamonds, De Beers is able to smooth out fluctuations in the composition of its production and provide a much more consistent product range to its customers than any of its competitors. The Commission took the preliminary view that the ability to offer a consistent product range of diamonds is key in the rough diamond market.

- (27) In its preliminary assessment the Commission considered that for the foreseeable future the strong position of De Beers will be protected from competition by high barriers to entry. Natural resources are limited, and risky, high-cost investments are required to detect and explore mines, thus preventing any significant market entry that would lead to a significant change in the market structure.

5.3. Practices raising concerns

- (28) In the preliminary view of the Commission, 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 trade 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.
- (29) This purchase relationship led De Beers to conclude the Trade Agreement, which, according to De Beers, has never been implemented. However, pending the Commission's proceedings concerning the Trade Agreement, De Beers has agreed to purchase substantial amounts of rough gem diamonds from ALROSA under a “willing-buyer-willing-seller” arrangement.
- (30) In its preliminary assessment, the Commission took the view that De Beers' continuous purchase relationship with ALROSA constituted a recourse to methods different from those consistent with normal competition and had the effect of hindering the maintenance of the degree of competition existing in the market or the growth of that competition and of maintaining De Beers' control over the rough diamonds market.
- (31) With respect to the terms of the notified Trade Agreement, the Commission took the preliminary view that this agreement would lead to *de facto* distribution exclusivity to the benefit of De Beers. ALROSA would be obliged to sell [...] outside the Commonwealth of Independent States (“CIS”) to De Beers. As a consequence, De Beers would eliminate an alternative and independent source of supply for potential customers.
- (32) The Commission also took the preliminary view that De Beers' purchases under the “willing-buyer-willing-seller” arrangement hinder ALROSA from competing fully with De Beers and from acting as an alternative and independent supplier on the rough diamond market outside the CIS member states.

5.4. Effect on trade between EEA Contracting Parties

- (33) In its preliminary assessment, the Commission considered that trade between EEA Contracting Parties may be appreciably affected by De Beers' practices. De Beers trades its diamonds through its Diamond Trading Company "DTC" in London and to a large extent to its European customers. In the absence of this purchase relationship, those customers could buy diamonds directly from ALROSA.

6. COMMITMENTS PROPOSED ON 14 DECEMBER 2004

- (34) On 14 December 2004 CWEL and DBCAG⁸ submitted a set of commitments within the meaning of Article 9(1) of Regulation (EC) No 1/2003.
- (35) The commitments contain provisions on sales of rough diamonds from ALROSA to De Beers and implementation and monitoring provisions.

6.1. Sales of rough diamonds from ALROSA to De Beers

- (36) Acting on behalf of De Beers, CWEL and DBCAG undertook to gradually decrease the value of purchases of rough diamonds from ALROSA, whereby the maximum amount of rough diamonds purchased from ALROSA annually would not exceed the amounts specified in the following table:

Year	Maximum supply cap (USD million)
2005	700
2006	625
2007	550
2008	475
2009	400
2010	275

- (37) Furthermore, for 2011 and onwards, De Beers undertook that the maximum amount of diamonds purchased from ALROSA annually would not exceed USD 275 million.

6.2. Implementation

- (38) De Beers undertook to implement its commitments by concluding a trade agreement similar in principle (in particular pricing provisions, sorting and valuation) to the notified Trade Agreement, but including an obligation on ALROSA not to sell to De Beers and an obligation on De Beers not to purchase from ALROSA rough diamonds in volumes greater than those specified in recitals (36) and (37).

6.3. Monitoring

- (39) In order to verify compliance with its commitments, De Beers undertook to appoint an independent third party as a monitoring trustee. The appointment and mandate of this independent third party would be subject to the Commission's approval. A report on De Beers' compliance with the commitments would be submitted annually to the Commission.

⁸ See footnote 6.

7. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) AND AMENDED COMMITMENTS

- (40) On 3 June 2005 a notice according to Article 27(4) of Regulation (EC) No 1/2003 was published in the *Official Journal of the European Union*⁹. It invited interested third parties to submit their observations on the commitments within one month following the publication date.
- (41) In response to the notice pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received 21 observations from interested third parties, of which 2 were submitted by industry associations, 5 by diamond bourses and 14 by market operators active downstream of De Beers, notably diamond manufacturers and traders. A large majority of the observations confirmed the Commission's competition concerns, as expressed in its preliminary assessment, but indicated that the Commission's competition concerns would be insufficiently addressed with the proposed commitments. No relevant new concerns were identified. The observations aimed at enhancing the commitments, either by increasing their scope or by improving their wording. Among others, the following observations were considered relevant:
- It was observed that the proposed supply caps would not bring about significant, if any, reductions to levels of De Beers' purchases from ALROSA.
 - It was also mentioned that the possibility for De Beers to continue a long-term supply relationship with ALROSA after 2010 would allow De Beers to hinder ALROSA from becoming a fully independent competitor, by exercising control over a significant part of ALROSA's available production, by reducing incentives for ALROSA to price independently etc.
 - A vast majority of interested third parties stated that there should be no purchase relationship between De Beers and ALROSA whatsoever. However, a transitional period was mentioned as necessary before efficient competition to De Beers is established.
 - It was also suggested that the wording of the ban on direct and indirect purchases on the secondary market and the definition of rough diamonds should be tightened up in order to prevent possible circumvention.
- (42) These observations, together with the Commission's own analysis, led the Commission to suggest amendments to the proposed commitments.
- (43) On 25 January 2006, De Beers SA submitted commitments amending the proposal of 14 December 2004, duly taking into account the relevant issues resulting from the consultation pursuant to Article 27(4) of Regulation (EC) 1/2003. Whereas the commitment proposal of 14 December 2004 was submitted by CWEL and DBCAG, the amended commitments were offered by the holding company De Beers SA, which was also an addressee of the Commission's statements of objections, with a view to ensuring that the commitments would be incumbent on all companies of the De Beers group.

⁹ OJ C 136, 03.06.2005, p. 32-33.

- (44) In its amended commitments, De Beers undertakes not to purchase any rough diamonds as of the beginning of 2009, following a transitional period, whereby De Beers commits not to purchase from ALROSA more than USD 600 million of rough diamonds in 2006, USD 500 million in 2007 and USD 400 million in 2008. The amended definition of rough diamonds also includes semi-processed diamonds, whereas the amended provision on illicit indirect purchases contains a list of criteria for determining such purchases. The amended commitments contain some other drafting changes.

8. CONCLUSION

- (45) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the *preliminary* view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.
- (46) In this case the Commission's main concern regarding the practice identified in the preliminary assessment 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 from competing fully with De Beers. The observations received from third parties following the publication of the notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 were not such as to make the Commission reconsider its concerns.
- (47) In its commitments, De Beers has undertaken to modify its market conduct in various ways. The Commission considers that these commitments are sufficient to address the competition concerns identified in its preliminary assessment. In particular, following a transitional period from 2006 to 2008 during which De Beers' purchases will be reduced and which is necessary to build a competitive distribution system for the quantities of diamonds previously sold by De Beers, De Beers undertakes to refrain from all purchases of rough diamonds from ALROSA as of 2009. By freeing up the portion of diamonds from ALROSA previously resold by De Beers and, upon lapse of the transitional period, by discontinuing De Beers' purchase relationship with ALROSA entirely, the commitments address the concern of reducing access to a viable source of alternative supply of rough diamonds and hindering the second biggest competitor from fully competing with De Beers.
- (48) In the light of the commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) 1/2003, the proceedings in this case should therefore be brought to an end.

- (49) The Commission retains full discretion to investigate and open proceedings under Article 82 of the EC Treaty and Article 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The commitments as listed in the Annex shall be binding on De Beers SA.

Article 2

The proceedings in the present case shall be brought to an end.

Article 3

This Decision is addressed to:

De Beers SA
9, rue Sainte Zithe
L-2763 Luxembourg
Luxembourg

Done at Brussels, 22 II 2006

For the Commission
Neelie KROES
Member of the Commission

ANNEX

COMP/B-2/38.381: De Beers/ALROSA Trade Agreement

Commitments for De Beers

Pursuant to Article 9 of Council Regulation (EC) No 1/2003 De Beers SA, a company organised under the laws of Luxembourg (“De Beers SA”) hereby gives the following commitments (the “Commitments”) to the European Commission on behalf of itself and, where relevant, other present and future members of De Beers SA’s group of companies¹ with a view to meeting the concerns expressed by the European Commission about the notified Trade Agreement between ALROSA Company Limited (“ALROSA Limited”) and De Beers Centenary AG and City and West East Limited (Case COMP/E-2/38.381) concerning rough diamonds produced by ALROSA Limited.

The Commitments shall take effect upon the date of notification of a decision pursuant to Article 9 of Council Regulation (EC) No 1/2003 by which the Commission makes the Commitments binding on De Beers (the “Commitment Decision”).

This text shall be interpreted in the light of the Commitment Decision, in the general framework of Community law, and in particular in the light of Articles 81 and 82 of the Treaty and Council Regulation (EC) No 1/2003.

1 Definitions

In these Commitments:

“ALROSA” means ALROSA Limited, its legal or economic successor and any company that at present or in the future controls² or is controlled by ALROSA Limited.

“De Beers” means De Beers SA, its legal or economic successor and any other company that at present or in the future controls or is controlled by De Beers SA.

“Effective date” means the date of notification of the Commitment Decision.

"Rough Diamonds" means gem quality diamonds, excluding Technical Diamonds, which have not yet been fully prepared or polished for the purpose of jewellery manufacture.

¹ For this purpose, the De Beers SA group of companies comprises De Beers SA and those companies included within the definition of De Beers set out in Clause 1.

² For the purpose of these Commitments, control means the possibility solely or jointly to exercise decisive influence on an undertaking within the meaning of the EC Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004).

"Technical Diamonds" means rough diamonds below sieve No.3 and boart and drilling.

"Trade Agreement" means the Trade Agreement that was signed on 17 December 2001 by ALROSA and City and West East Limited and De Beers Centenary AG.

"Trustee" means one or more legal entities, independent from both ALROSA and De Beers, who is approved by the Commission and appointed by De Beers and who has received from De Beers the exclusive Trustee Mandate to monitor the Commitments.

2 Rough Diamonds traded between ALROSA and De Beers

2.1 De Beers undertakes that the maximum amount of Rough Diamonds that De Beers directly or indirectly purchases from ALROSA until the end of 2008 will not exceed the amounts specified in the following table:

Year	Maximum annual purchase cap (US\$m)
2006	600
2007	500
2008	400

2.2 De Beers further undertakes that, in 2009 and thereafter, De Beers will not directly or indirectly purchase any Rough Diamonds from ALROSA.

2.3 De Beers shall, in good faith, take all such steps as are reasonably practicable to ensure that it does not indirectly purchase Rough Diamonds originating from and sold by ALROSA to parties other than De Beers in circumvention of these Commitments.

2.4 For the purpose of this Clause, an indirect purchase of Rough Diamonds from ALROSA shall occur where De Beers knows, or ought (on the basis of its diamond industry expertise) to know, that:

2.4.1 the Rough Diamonds originate from ALROSA; and

2.4.2 the third party from whom it purchases the Rough Diamonds makes the sale:

(i) on behalf of ALROSA; or

(ii) at ALROSA's instigation; or

(iii) with ALROSA's prior knowledge.

2.5 For the purpose of this Clause, an indirect purchase of Rough Diamonds from ALROSA shall also occur where De Beers purchases from a third party Rough Diamonds where:

2.5.1 De Beers knows, or ought (on the basis of its diamond industry expertise) to know, that the Rough Diamonds originate from ALROSA; and

2.5.2 the third party has purchased those Rough Diamonds:

- (i) on behalf of De Beers; or
- (ii) at De Beers' instigation; or
- (iii) with De Beers' prior knowledge.

2.6 Insofar as the preceding provisions of this Clause 2 concern purchases of Rough Diamonds from, or originating from, an entity that jointly controls, or is jointly controlled by, ALROSA Limited, those provisions shall only apply where De Beers knows or ought (on the basis of its diamond industry expertise) to know that that relationship of joint control exists.

3 Implementation

De Beers undertakes that:

- (i) any contract for the supply of Rough Diamonds that is concluded with ALROSA will comply with these Commitments; and
- (ii) if it wishes to bring the Trade Agreement into effect, it will not do so unless the Trade Agreement is first modified to ensure that it complies with these Commitments.

4 Review clause

Pursuant to Article 9.2(a) of Regulation No 1/2003, De Beers may request the Commission to reopen the proceedings with a view to modifying the present Commitments where there has been a material change in any of the facts on which the Commitment Decision is based.

5 Monitoring

5.1 Without prejudice to the Commission's powers of investigation under Council Regulation (EC) No 1/2003, De Beers agrees to appoint a Trustee to carry out the monitoring of the Commitments provided herein in accordance with the provisions set out in the Annex, which forms an integral part of these Commitments.

5.2 The implementation provisions regarding the Trustee, as set out in the Annex, as well as the Trustee Mandate are subject to the Commission's approval.

6 Publicity

De Beers will publish and keep updated the text of these Commitments, including the Annex, as well as the Trustee Mandate and the Trustee's contact details in a prominent way on its website.

ANNEX

Implementation provisions regarding the Trustee

I. Appointment Procedure

1. De Beers shall appoint a Trustee to carry out the monitoring of the Commitments provided herein.
2. The Trustee shall be independent of both ALROSA and De Beers (and be different from either company's current external auditors), possess the necessary qualifications to carry out its Mandate and shall neither have nor become exposed to a conflict of interest. The Trustee may not be employed by either ALROSA or De Beers until after the expiry of a three-year period following the end of this Trustee Mandate.

Proposal by the Parties

3. No later than 15 days after the Effective Date, De Beers shall submit a list of one or more legal entities (including, in particular, international auditing firms) whom De Beers proposes to appoint as Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in point I.2 and shall include:

- (a) the full terms of the proposed Mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
- (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
- (c) an indication whether the proposed Trustee will appoint an expert to fulfil its assigned tasks;
- (d) a detailed explanation why De Beers considers the proposed Trustee to be independent and possessing the necessary qualifications. Any on-going or previous activities for ALROSA and De Beers should be reported.

Approval or rejection by the Commission

4. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed Mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one legal entity is approved, De Beers shall appoint the legal entity concerned as Trustee, in accordance with the Mandate approved by the Commission. If more than one legal entity is approved, De Beers shall be free to choose the Trustee to be appointed from among the legal entities approved including by way of competitive tender. The Trustee shall be appointed

within two weeks of the Commission's approval, in accordance with the Mandate approved by the Commission.

New proposal by the Parties

5. If all the proposed Trustees are rejected, De Beers shall submit the names of at least two legal entities within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in points I.2 and I.4.

Trustee nominated by the Commission

6. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom De Beers shall appoint, in accordance with a Trustee Mandate approved by the Commission.

II. Functions of the Trustee

1. The Trustee shall assume its specified duties in order to monitor De Beers' compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or De Beers, give any reasonable instructions to the Trustee in order for it to monitor compliance with the Commitments provided herein in the fulfilment of its duties as Trustee.

Duties and obligations of the Monitoring Trustee

2. The Trustee shall:

(i) each year conduct such inquiries as are reasonably required to enable it to render the report required by Clause II(2)(iii);

(ii) on any other occasion, at the request of the Commission or at its own discretion, conduct such inquiries as are reasonably required to enable it to render the report required by Clause II(2)(iv);

(iii) provide to the Commission, a written report once a year, no later than 30 March of each year, commencing in 2006, of the implementation of the Commitments. The report shall cover the detailed implementation of the Commitments as set out in clauses 2, 3 and 4 of these Commitments;

(iv) In addition to these yearly reports, the Trustee shall promptly report in writing to the Commission if it concludes on reasonable grounds that De Beers is failing to comply with these Commitments.

3. The Commission shall, promptly following its review of any report received under Clause II(2)(iii) or (iv), send De Beers a non-confidential version of such report.

4. The Trustee is bound to respect the confidentiality of all information provided to it or obtained by it in the course of the exercise of its Mandate. This obligation shall not prevent the Trustee from providing all such information to the Commission. This obligation remains valid after the expiry of its Mandate as long as the information

remains commercially sensitive such information remaining commercially sensitive unless otherwise agreed to by De Beers.

III. Duties and obligations of De Beers

1. The Trustee and any support that it may reasonably require shall be remunerated by De Beers in a way that does not impede the independent and effective fulfilment of its Mandate.

2. De Beers shall provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access (subject to reasonable notice) to any of De Beers' books, records, documents, management or other personnel, facilities, sites and technical information, save for legally privileged advice, as the Trustee might reasonably require for the fulfilment of its duties under the Commitments and De Beers shall provide the Trustee upon request with copies of any such document etc. De Beers shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information as is reasonably necessary for the performance of its tasks.

3. De Beers shall provide the Trustee with all managerial and administrative support that it may reasonably request.

4. At the expense of De Beers, the Trustee may appoint experts, subject to De Beers' approval (such approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such experts to be reasonably necessary or appropriate for the performance of its tasks under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should De Beers refuse to approve the experts proposed by the Trustee, the Commission may approve the appointment of such experts instead, after having heard De Beers.

IV. Replacement, discharge and reappointment of the Trustee

1. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:

(a) the Commission may, after hearing the Trustee, require De Beers to replace the Trustee; or

(b) De Beers, with the prior approval of the Commission, may replace the Trustee.

2. If the Trustee is removed according to point IV.1, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in Section I.