

The European Court of Justice confirms approach in De Beers commitment decision

by Harald Mische and Blaž Višnar ⁽¹⁾

Introduction

On 29 June 2010, the Grand Chamber of the European Court of Justice ('ECJ') ⁽²⁾ set aside the General Court's ('GC') judgment of 11 July 2007, ⁽³⁾ which had annulled the 2006 Commission Decision that rendered commitments binding on De Beers. ⁽⁴⁾ The commitments by De Beers, the world's largest producer of rough diamonds, implied phasing out De Beers' systematic purchases of rough diamonds from the Russian Alrosa Company Ltd (hereafter: 'Alrosa'), the second largest producer of rough diamonds, which had raised concerns under Article 102 TFEU. Alrosa appealed the 2006 Commission Decision as a directly affected third party. It argued that the commitments were disproportionate to the competition concerns and deprived Alrosa of its most important customer. It also claimed that its rights of defence had been infringed.

This is the first ECJ judgment dealing with the application and interpretation of Article 9 of Regulation 1/2003 ⁽⁵⁾ (hereafter 'Article 9'). The ECJ found serious legal errors in the GC's judgment, reversed it and dismissed Alrosa's appeal as unfounded. In its judgment, the ECJ shed light on how to apply the principle of proportionality in the context of Article 9, in particular when the protection of third parties' interests is at stake. It clarified the scope of the right of third parties to be heard. Lastly, it confirmed the Commission's application of Article 102 of the Treaty on the Functioning of the European Union ('TFEU') (formerly Article 82 of the EC Treaty) to this case.

This article briefly summarises the Commission investigation into De Beers' purchase relationship with Alrosa and the 2006 commitment decision.

Then, after summarising the main findings of the GC related to Alrosa's pleas in law, it examines the ECJ judgment. Certain aspects of the ECJ judgment may be clearer if read in conjunction with the opinion of Advocate General Kokott's ('AG Kokott'). Her opinion, dated 17 September 2009, is included in the discussion. Lastly, the article highlights some conclusions to draw from the ECJ judgment.

De Beers-Alrosa purchase relationship and the 2006 Commission decision⁶

In 2006, the Commission decision rendered binding De Beers' commitments to end its decades-long purchase relationship with Alrosa (and its legal predecessors). This relationship had started in 1959, but was only unearthed in 2001 during a merger investigation by the Commission. In March 2002, after further investigation, De Beers and Alrosa notified their five-year Trade Agreement concluded in 2001 for clearance or exemption under Article 101(3) TFEU (formerly Article 81(3) of the EC Treaty). The Trade Agreement provided that De Beers would buy the vast majority of Alrosa's rough diamonds destined for export from Russia and thereby continue its *de facto* exclusive distribution of Alrosa rough diamonds sold on the world market.

In January 2003, the Commission issued a statement of objections to De Beers under Article 102 TFEU. In parallel, the Commission issued a statement of objections to De Beers and Alrosa under Article 101 TFEU. Pending the Commission's proceedings, De Beers purchased an amount of Alrosa's rough diamonds more or less corresponding to the amount agreed in the Trade Agreement under a so-called 'willing-buyer-willing-seller' arrangement.

According to the Commission's preliminary analysis in the statement of objections, the product market covered the full range of rough diamonds suitable for cutting and polishing for the jewellery industry, on which De Beers was dominant. For much of the 20th century, De Beers had, as a 'custodian', controlled over 80% ⁽⁷⁾ of the world

⁽¹⁾ The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ Judgment in Case C-441/07 P *Commission v. Alrosa* of 29 June 2010, which followed Advocate General Kokott's opinion of 17 September 2009.

⁽³⁾ Judgment of the General Court in Case T-170/06 *Alrosa v. Commission* of 11 July 2007 (through expedited procedure pursuant to Article 76a(1) of its Rules of Procedure).

⁽⁴⁾ 'De Beers' refers to the De Beers group of companies including City West and East limited and De Beers Centenary Aktiengesellschaft, which are under the control of De Beers SA.

⁽⁵⁾ OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L68, 8.3.2004, p. 1).

⁽⁶⁾ With respect to the Commission commitment decision see also Mische/Višnar, 'De Beers: commitments to phase out diamond purchases from the most important competitor', Competition Policy Newsletter No 2, 2006, pp. 30-32.

⁽⁷⁾ In 2003, its share was lower than that.

supply of rough diamonds in all ranges, and thus acted as a price leader. It had always supplemented the production of its own mines by entering into joint ventures, purchasing diamonds from its competitors and buying up diamonds on the open market. Its market position and strategies even inspired case studies in textbooks on industrial organisation.⁽⁸⁾

The Commission investigation revealed that De Beers had established its long-standing purchase relationship with Alrosa in order to regulate the volume, assortment and prices of rough diamonds sold on the world market. The rationale behind the planned purchases under the Trade Agreement appeared to be the same and an important factor contributing to De Beers' future market-maker role. In its preliminary assessment, the Commission took the view that De Beers' purchases hindered Alrosa from competing fully with De Beers and from acting as an alternative and independent supplier on the rough diamond market. In its preliminary assessment, such practices constituted a recourse to methods different from those of normal competition, and therefore an abuse of dominant position.

After receiving the statement of objections, De Beers and Alrosa extensively discussed with the Commission various forms of commitments with the aim of addressing the competition concerns. On 12 September 2003, Alrosa unilaterally offered to gradually reduce its sales of rough diamonds to De Beers and stop sales in 2013. It later withdrew these commitments.

In December 2004, De Beers and Alrosa jointly offered commitments entailing that De Beers would gradually reduce, over a period of five years, the amount of rough diamonds purchased from Alrosa to USD 275 million a year by 2010. Subsequently, in June 2005, the Commission market tested these commitments by inviting interested third parties to submit their observations.⁽⁹⁾ The Commission received 21 observations. The vast majority argued that only a complete phasing-out of De Beers' purchases could allay the competition concerns.

On 27 October 2005, the Commission advised De Beers and Alrosa of the results of the market test and provided a summary of the submissions from third parties. The Commission informed De Beers and Alrosa that, at this stage of the proceedings, closing the investigation through an Article 9 decision would require a commitment to completely phase out De Beers' purchases from Alrosa. In view

of the time elapsed since the statement of objections was issued and the need to accelerate the procedure, such commitments would have to be proposed before the end of November 2005. De Beers met this deadline and proposed phasing out its purchases to address the competition concerns raised in the Article 102 TFEU proceedings. Following further technical improvements, it submitted a final version of its commitments on 25 January 2006.

De Beers committed to gradually reducing its purchases of rough diamonds until 2008 to a maximum of USD 400 million. As of 2009, it would stop purchasing Alrosa diamonds altogether.

Still in November 2005, the Commissioner responsible for competition policy met Alrosa to inform it of De Beers' proposal and to hear its views as to its willingness to submit a corresponding amended commitment proposal. Alrosa failed to do so and instead requested access to the market test submissions. On 26 January 2006, the Commission granted Alrosa access to the non-confidential versions of the third party submissions and again invited it to submit its views on De Beers' amended commitment proposal. Alrosa did so in its reply of 6 February 2006.

On 22 February 2006, the Commission rendered De Beers' commitments binding through a decision pursuant to Article 9 as they were found to address the Commission's concerns under Article 102 TFEU. It then closed the proceedings.

Alrosa appealed this decision on 29 June 2006. The main arguments of its appeal, of the GC's 2007 annulment of the Commission decision and of the ECJ's subsequent reversal of that judgment are set out and analysed below.

The Grand Chamber of the ECJ set aside the GC's judgment of 2007 and confirmed the 2006 Commission decision

Alrosa raised three pleas before the GC. In two pleas, Alrosa claimed infringement of Article 9, which would not allow commitments to which an undertaking has not voluntarily subscribed to be made binding on it, *a fortiori* for an indefinite period. Secondly, Alrosa cited the excessive nature of commitments that were made binding, in breach of Article 9, Article 102 TFEU, freedom of contract and the principle of proportionality. Its third plea cited infringement of the right to be heard.

The GC annulled the Commission decision on all three pleas, whereas the ECJ set aside the GC judgment. It followed AG Kokott's opinion, and rejected all pleas put forward by Alrosa.

⁽⁸⁾ See Cabral, Luís, Introduction to industrial organisation (2000), pp. 132; Church, Jeffrey, Industrial Organisation — Strategic Approach (2000), pp. 120.

⁽⁹⁾ Through a Notice pursuant to Article 27(4) of Reg. (EC) 1/2003 published in the OJ C 136, 3.6.2005, p. 32-33.

Findings related to Article 9, the principle of proportionality, Article 102 TFEU and freedom of contract

Main substantive findings of the GC

On 11 July 2007, in a ruling issued under an accelerated procedure, the GC held that the contested decision was impaired by a manifest error of assessment, and disproportionate: *'It [was] 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.'*⁽¹⁰⁾

The GC interpreted the principle of proportionality under Article 9 by referring to remedies that can be adopted as part of a prohibition decision pursuant to Article 7 of Regulation 1/2003 (Thereafter 'Article 7'). It held that the Commission cannot make binding commitments that go further than such remedies. The Commission would infringe the law by making binding under Article 9 proposed commitments that address its concerns, if interests of third parties are affected and less onerous commitments exist. Before making binding commitments, it should investigate less onerous solutions. The principle of proportionality *'required in this case that there should be an appraisal in concreto of the viability'* of intermediate commitment solutions, even if not offered by De Beers.⁽¹¹⁾ De Beers had not, in fact, offered any such intermediate commitment solutions.

In its judgment, the GC applied a full judicial review, thereby rejecting discretion. It reasoned that Article 9 decisions would not be prospective in nature like merger decisions; instead, the commitments only concern existing practices and thus are subject to a full judicial review. The GC considered that the Commission had not carried out a complex economic assessment.⁽¹²⁾ The GC did not accept the Commission's arguments that De Beers' commitments essentially extended to the future and that compliance of the commitments with competition law had to be assessed in view of future market conditions, which obviously fluctuate.

The GC carried out a full review and ruling under an accelerated procedure without analysing evidence of the file, and evaluated a number of alternative solutions, which in its view were manifestly less onerous. The Court stated that it would have been less onerous and appropriate 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.'⁽¹³⁾ The GC moreover concluded that *'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.'*⁽¹⁴⁾ In its findings, the GC did not consider the negative outcome of the market test.

The GC found 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.'*⁽¹⁵⁾ However, the GC also held that the Commission cannot simply change its assessment of the viability of commitments. In its view, the Commission was required, and had *'failed to explain in what way the joint commitments did not address the concerns expressed in its preliminary assessment.'*⁽¹⁶⁾ Any change in assessment had to be based on new facts.⁽¹⁷⁾

On the interpretation of Article 102 TFEU, the GC ruled that *'the Commission cannot require an undertaking in a dominant position to refrain from making purchases [from its direct competitor] which allow it to maintain or to strengthen its position on the market.'*⁽¹⁸⁾ Moreover, *'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.'*⁽¹⁹⁾

The ECJ quashed the GC's substantive findings and rejected Alrosa's pleas

The Commission appealed these findings. First it submitted that the GC misinterpreted and misapplied Article 9 and the principle of proportionality in the context of that provision.

Secondly, the Commission argued that, in examining whether the commitments were proportionate, the GC misinterpreted Article 102 TFEU, ignored the proper scope of judicial review, distorted the content of the contested decision and the factual record, and failed to give adequate reasons at several stages of the judgment.

Accepting the Commission's arguments on the first point, the ECJ held that Article 9 was fundamentally

⁽¹⁰⁾ T-170/06, paragraph 126.

⁽¹¹⁾ T-170/06, paragraph 156.

⁽¹²⁾ T-170/06, paragraphs 110 and 125.

⁽¹³⁾ T-170/06, paragraph 128.

⁽¹⁴⁾ T-170/06, paragraph 132.

⁽¹⁵⁾ T-170/06, paragraph 130.

⁽¹⁶⁾ T-170/06, paragraph 129.

⁽¹⁷⁾ Or be the result of incorrect information, T-170/06, paragraph 194.

⁽¹⁸⁾ T-170/06, paragraph 146.

⁽¹⁹⁾ T-170/06, paragraph 152.

different from Article 7. Article 9 was introduced in the interest of procedural economy to ensure that competition rules are applied effectively. Commitments provide a more rapid solution to the identified competition problems.

The ECJ rejected as incorrect the GC's proposition that applying the principle of proportionality would have the same effect in relation to Article 9 compared to Article 7. It held that applying the principle of proportionality in the context of Article 9 is confined to requiring the Commission to verify that the commitments address the expressed competition concerns and that the undertaking had not offered less onerous commitments that adequately address those concerns. Thus, under Article 9, the Commission is not required to seek less onerous solutions than the commitments offered. Therefore, in this case, the Commission had to ascertain only whether the joint commitments offered in proceedings initiated under Article 101 TFEU were sufficient to address the concerns identified in the proceedings initiated under Article 102 TFEU. In view of the results of the market test, the Commission was entitled to conclude that the joint commitments were not appropriate. However, when assessing the commitments, the Commission must take into consideration the interests of third parties.

The ECJ ruled that the GC erred in holding that Regulation 1/2003 would prohibit the Commission from adopting a decision under Article 9(1), if that decision were disproportionate to the infringement, if established under Article 7(1).⁽²⁰⁾ The ECJ found that the aim of Article 7 is to put an end to an identified *infringement* and Article 9 aims to address the Commission's *concerns* following its preliminary assessment. Under Article 9, the Commission is not required to make a finding of an infringement, but only to examine the commitments offered by the undertaking concerned. Therefore there would be no reason why any proposal going beyond a potential Article 7 measure should automatically be regarded as disproportionate under Article 9. On the contrary, undertakings offering commitments consciously accept that their concessions may go beyond what the Commission could itself impose on them under Article 7 following a thorough examination. In return, closing the procedure allows undertakings to avoid a potential finding of a competition law infringement and a resulting fine.

The ECJ defined the scope of the Commission's discretion and rejected the GC's view of the

standard of review by clarifying that judicial review is limited to reviewing whether the Commission's assessment is manifestly incorrect. Consequently, it rejected the GC's discussion of other options for commitments, as the GC had failed to reach a finding that the Commission committed a manifest error of assessment or that its conclusions were manifestly unfounded. It held that the GC breached law, because it '*examined other less onerous solutions for the purpose of applying the principle of proportionality, including possible adjustments of the joint commitments.*'⁽²¹⁾ It '*expressed its own differing assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission, before concluding [...] that alternative solutions [...] were less onerous.*'⁽²²⁾ The ECJ concluded that '*by doing so, the General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment. That error of the General Court in itself justifies setting aside the judgment under appeal.*'⁽²³⁾

In view of these findings, the ECJ did not need to examine the remaining legal arguments, namely the GC's interpretation of Article 102 TFEU. However, the ECJ implicitly followed Advocate General Kokott's analysis. Had the GC been correct in its interpretation, De Beers could not possibly have infringed Article 102 TFEU. As a result, the Commission would have erred in raising those competition concerns under Article 102 TFEU, which it had identified in its preliminary assessment and committed a manifest error in accepting corresponding commitments. It is therefore interesting to take a closer look at AG Kokott's opinion on the applicability of Article 102 TFEU to De Beers' practices.

AG Kokott argued that it was '*certainly not unreasonable for the Commission to take the view that a continuing supply relationship between Alrosa and De Beers could lead to abuse of the dominant position held by De Beers.*'⁽²⁴⁾ In her view, the GC had erroneously disregarded De Beers' position as a producer and its competitive relationship with Alrosa. She explained, '*if both undertakings are active on the same market as producers, it is not as a rule consistent with normal competitive behaviour for one of them regularly to buy up the production of the other... Article 82 EC precludes behaviour by an undertaking in a dominant position if its purpose is to strengthen that dominant position and abuse it. There is reason to fear precisely such abuse if an undertaking in a dominant position buys up the production of another producer active on the same market. That other producer is then not required to develop its own distribution system and to compete with the dominant undertaking. This may*

⁽²⁰⁾ Under Article 7, the Commission may impose on the undertakings concerned any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

⁽²¹⁾ Case C-441/07, paragraph 65.

⁽²²⁾ Case C-441/07, paragraph 66.

⁽²³⁾ Case C-441/07, paragraphs 67 and 68.

⁽²⁴⁾ AG Kokott's opinion, paragraph 235.

have detrimental effect for the market structure and ultimately also for consumers... There is a danger that ... the dominant undertaking influences sales and thus ultimately also prices... Such behaviour has nothing to do with the protection of the legitimate interests of the dominant undertaking, which is lawful in principle... the Court completely failed to address the dual role of De Beers as the world's largest producer and largest buyer on the market for rough diamonds'.⁽²⁵⁾

AG Kokott also dismissed the GC's considerations on auctions. The GC had erroneously '*simply stated*' that with auctions, there was '*no risk of abuse on the part of the seller*', although, in AG Kokott's opinion, it was not possible on this basis to rule out abusive bidding such as predation by the dominant undertaking as the buyer. She criticised that '*the judgment under appeal does not contain any indication that the Court of First Instance had given even the slightest consideration to this question*', even though it had reasons to do so,⁽²⁶⁾ because such conduct constitutes an abuse within the meaning of Article 102 TFEU.⁽²⁷⁾

AG Kokott opined that De Beers only exercised its (negative) freedom not to conclude contracts, and that the Commission decision merely defined the limits of contractual (positive) freedom which follow, for all economic operators, from the directly applicable competition rules.⁽²⁸⁾ On the duration of the commitments, AG Kokott argued that the Commission was not required to apply a time limit in view of the possibility of the case being re-opened under Article 9(2)(a).⁽²⁹⁾

The ECJ overruled the GC's judgment and dismissed Alrosa's plea, claiming an infringement of its right to be heard

The GC found that Alrosa had to be given rights of an undertaking concerned within the meaning of Regulation 1/2003 for 'the proceedings as a whole', i.e. not only the proceedings under Article 101 but also those under Article 102 TFEU, in the latter of which Alrosa was not formally an undertaking concerned. The GC based itself on the following considerations. First, although it was not the dominant undertaking under investigation pursuant to Article 102 TFEU, Alrosa was the contracting partner of De Beers in the context of a long-standing bilateral trading relationship, which the decision brought to an end. Second, the Commission would have treated the proceedings under Article 101 and 102 TFEU always *de facto* as a single set of proceedings. Third, Alrosa was involved in both sets of proceedings. Fourth, the decision expressly referred to Alrosa,

and last, was liable to adversely affect it.⁽³⁰⁾ From this, the GC derived a number of rights for Alrosa, namely that it should have been informed of, and been given the chance to comment on, the essential facts on the basis of which the Commission required new commitments.⁽³¹⁾ The Court ruled that Alrosa did not have the opportunity to fully exercise its right to be heard on the individual commitments proposed by De Beers, because the third-party observations were supplied to Alrosa only at the same time as De Beers' final commitments. Alrosa was therefore unable to give an effective reply and propose new joint commitments with De Beers.⁽³²⁾

The Commission appealed the GC's ruling based on a number of reasons, including that the GC misinterpreted the extent of Alrosa's right to be heard and that it gave no reasons for finding that this right would have been infringed.

The ECJ found that the GC misinterpreted the concept of 'undertaking concerned' within the meaning of Regulation 1/2003 by comparing Alrosa's legal position in the proceedings relating to Article 102 TFEU with that of De Beers. The ECJ ruled that Alrosa could not have the status of 'undertaking concerned' in the proceedings related to Article 102 TFEU concerning De Beers' unilateral practices and therefore only had the less extensive rights of an interested third party.⁽³³⁾

According to the ECJ, the GC '*based its reasoning on the incorrect proposition that the Commission was required to give reasons for rejecting the joint commitments and to suggest to Alrosa that it offer new joint commitments with De Beers.*'⁽³⁴⁾ The ECJ held that the Commission did not have to give Alrosa the opportunity to prepare new joint commitments together with De Beers. In addition, Alrosa did not have the right to comment on the outcome of the market test before De Beers submitted individual commitments.

Consequently, the ECJ dismissed Alrosa's plea related to its rights to be heard as unfounded.

Conclusions

The ECJ's judgment clarified the interpretation and application of Article 9, in particular with respect to the principle of proportionality and the rights of interested third parties to be heard.

In the context of Article 9, the principle of proportionality requires the Commission only to ascertain that commitments as offered by undertakings concerned address the competition problems it has

⁽²⁵⁾ AG Kokott's opinion, paragraphs 120-122.

⁽²⁶⁾ AG Kokott's opinion, paragraph 129.

⁽²⁷⁾ AG Kokott's opinion, paragraphs 128 and 130.

⁽²⁸⁾ AG Kokott's opinion, paragraphs 225-241.

⁽²⁹⁾ AG Kokott's opinion, paragraphs 217-220.

⁽³⁰⁾ T-170/06, paragraphs 176, 177, 186, 187 and 191.

⁽³¹⁾ T-170/06, paragraph 196.

⁽³²⁾ T-170/06, paragraphs 201 and 203.

⁽³³⁾ Case C-441/07, paragraphs 88 and 91.

⁽³⁴⁾ Case C-441/07, paragraph 95.

identified and that these commitments in any case do not manifestly go beyond what is necessary. The Commission does not have to compare the commitments offered with measures it would itself have imposed in an infringement decision, and to reject as disproportionate any commitment which goes beyond those measures. Undertakings which offer commitments consciously accept that the concessions they offer may go beyond what the Commission could impose on them in an Article 7 decision. However, undertakings benefit from a commitment decision by avoiding the risk that the Commission finds an infringement and imposes a fine. The rationale of Article 9 commitment decisions is procedural efficiency. It is meant to provide an effective future remedy to identified competition problems.

Third parties, in particular trading partners of presumably dominant undertakings, are often affected by a change in conduct resulting from commitments of such undertakings. However, there is no breach of the principle of proportionality if the Commission accepts proposed commitments without seeking to identify less onerous solutions, which would also address its competition concerns. Otherwise, the Commission would be forced to investigate all other solutions to its competition concerns. The Commission is not obliged to find the least onerous solution. This important clarification of the Commission's obligations in applying Article 9 is key to procedural efficiency and effectiveness, which is precisely the legislative purpose of the commitment procedure. The ECJ's judgment recognises and protects this.

In appeals against commitment decisions, interested third parties have to demonstrate an error of law or a manifest error of assessment or breach of the principle of proportionality. The principle of proportionality is only breached if commitments go manifestly beyond what is necessary to address the concerns expressed by the Commission in its preliminary assessment.

With respect to the right to be heard, interested third parties are not addressees of the preliminary assessment or the statement of objections in Article 102 TFEU proceedings. Consequently, they benefit only from rights accorded to interested third parties and not from rights of concerned parties. The ECJ's judgment confirms the careful balance of Regulation 1/2003 between an efficient procedure and protecting the rights of parties concerned and of interested third parties.

The ECJ also implicitly confirmed that an undertaking may not strengthen its dominant position through abusive behaviour inconsistent with normal competition. In this case, the ECJ thereby maintains the economic rationale of prohibiting abuse of dominant position under Article 102 TFEU, and strengthens, to the benefit of consumers, the Commission's work to enforce it. This case has shown that an abuse of dominant position may exist when dominant companies strengthen their position by buying up their competitors' output, at least when such purchases are significant for competition.