OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 17 September 2009[1]

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I – Introduction

1. What requirements stem from the principle of proportionality where the European Commission, acting as the competition authority, accepts commitments [2] offered by one undertaking which affect the interests of another undertaking and makes them binding? The present appeal proceedings hinge on this question, which has considerable importance for the future development of European competition law. The answer to the question will determine the scope of the new power to adopt binding decisions on commitments accorded to the Commission under Article 9 of Regulation (EC) No 1/2003. [3] However, the judgment of the Court of Justice could also have an impact on other areas of competition law, in particular the law on State aid and merger control.

2. The background to this dispute is a commitment offered to the Commission by De Beers in 2006 to avert the accusation of abuse of a dominant position (Article 82 EC). As the worldwide market leader in the diamond trade, De Beers undertook in future not to purchase any more rough diamonds from Alrosa, the second largest producer, bringing to an end a long-standing trading relationship between the two groups. By a decision under Article 9 of Regulation No 1/2003, the Commission made that commitment by De Beers binding. [4] Alrosa considers that decision to be disproportionate and also takes the view that its right to be heard has been infringed. Before the Court of First Instance Alrosa obtained the annulment of the decision at issue. [5] The Commission has lodged the present appeal against that judgment.

3. The dispute between the Commission and Alrosa illustrates how difficult it can be in an individual case to strike a fair balance between the interest in effective enforcement of competition law and the individual interests of undertakings while not disregarding either their procedural rights or procedural economy.

2 — Footnote does not apply to the English version.

3 — 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 Treaty (OJ 2003 L 1, p. 1).

4 — Commission Decision 2006/520/EC of 22 February 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), notified under document number C(2006) 521 and summarised in OJ 2006 L 205, p. 24; hereinafter also 'the decision at issue'.

5 — Case T-170/06 *Alrosa* v *Commission* [2007] ECR II-2601, rectified by order of the Court of First Instance of 27 August 2007; hereinafter also 'the contested judgment' or 'the judgment at first instance'.

II – Legal framework

4. The legal framework for this case is formed, in addition to Article 82 EC and Article 54 EEA, by various provisions of Regulation (EC) No 1/2003 and Regulation (EC) No 773/2004. [6]

A – *Regulation No 1/2003*

5. By Regulation No 1/2003, which has applied since 1 May 2004, [7] the law on procedure in competition cases was modernised and the powers of the Commission as the Community's competition authority were enhanced.

6. The Commission's new powers include Article 9 of Regulation No 1/2003, which is entitled 'Commitments' and is worded as follows:

'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.'

7. Reference should also be made to Article 7 of Regulation No 1/2003; that provision is entitled 'Finding and termination of infringement' and Article 7(1) provides:

'Where the Commission, acting on a complaint or on its own initiative, finds that

6 — 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 (OJ 2004 L 123, p. 18).

7 — Second paragraph of Article 45 of Regulation No 1/2003.

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. …'

8. Article 27 of Regulation No 1/2003, which lays down rules on hearing of the parties, complainants and others, states:

'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. Complainants shall be associated closely with the proceedings.

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.'

B – *Regulation No 773/2004*

9. By Regulation No 773/2004, which entered into force on 1 May 2004, the Commission adopted implementing provisions for Regulation No 1/2003. [8]

8 — The legal basis for Regulation No 773/2004 is Article 33 of Regulation No 1/2003; with regard to entry into force see Article 20 of Regulation No 773/2004.

10. Article 10 of Regulation No 773/2004 was worded as follows at the time when the decision at issue was adopted:

'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.

...'

11. Article 15(1) of Regulation No 773/2004 further provided:

'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.'

12. The subsequent amendments to Regulation No 773/2004 [9] entered into force only after the adoption of the decision at issue and are not therefore applicable to the present case.

III – Background to the dispute and administrative procedure

13. According to the findings of the Court of First Instance, [10] the background to the present dispute and the administrative procedure before the Commission are as follows.

14. Alrosa Company Ltd [11] 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 mainly active in Russia, where it is engaged in exploration, mining, valuation and trading activities, and also in the jewellery business.

15. The De Beers group, [12] whose principal holding company is De Beers SA, established in Luxembourg, is active in the world market for the production and supply of rough

9 — Regulation No 773/2004 was amended first by Commission Regulation (EC) No 1792/2006 of 23 October 2006 (OJ 2006 L 362, p. 1) and then by Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ 2008 L 171, p. 3).

10 — Paragraphs 8 to 26 and 179 of the contested judgment.

11 — 'Alrosa'.

12 — Hereinafter also: De Beers.

diamonds, where it occupies the number one position. It operates mainly 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.

16. On 5 March 2002 Alrosa and De Beers notified to the Commission an agreement which had been concluded on 17 December 2001 between Alrosa and two subsidiaries of the De Beers group. By that notification, they were seeking to obtain negative clearance for their agreement or an exemption under Council Regulation No 17, [13] which still applied at the time.

17. The subject-matter of that notified agreement, which was part of a long-standing trading relationship between Alrosa and De Beers, was essentially the supply of rough diamonds. 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 EC or Article 82 EC.

18. Alrosa undertook during that period to sell De Beers natural rough diamonds produced in Russia to the value of USD 800 million a year, while De Beers undertook to buy those diamonds from Alrosa. However, in respect of the fourth and fifth years during which the notified agreement was in force, Alrosa was entitled to reduce that amount to USD 700 million. The amount of USD 800 million, established in accordance with the prices applicable 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 Commonwealth of Independent States (CIS).

19. Following the notification, the Commission opened two parallel proceedings, one based on Article 81 EC and the other on Article 82 EC.

20. On 14 January 2003 the Commission sent a statement of objections to Alrosa 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.

21. On 31 March 2003 Alrosa and De Beers submitted joint written submissions to the

13 — Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1962, p. 87). That regulation was the precursor of Regulation No 1/2003, which replaced it with effect from 1 May 2004.

Commission in response to the statement of objections in Case COMP/E-3/38.381.

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

23. On 7 July 2003 the Commission heard oral submissions from Alrosa and De Beers.

24. On 12 September 2003 Alrosa offered commitments [14] 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. However, Alrosa subsequently withdrew those commitments.

25. On 14 December 2004 Alrosa and De Beers jointly submitted commitments [15] 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; subsequently sales were to be capped at that level.

26. On 3 June 2005 the Commission published a notice in the *Official Journal of the European Union* on those joint commitments by Alrosa and De Beers. [16] In that notice, it invited interested third parties to submit their comments within one month. It also stated that it intended to adopt a decision making the joint commitments binding, subject to the outcome of the market test.

27. Following that publication, 21 interested third parties submitted comments to the Commission. The Commission informed Alrosa and De Beers of those comments on 27 October 2005. At the same time, in the light of the outcome of the market test, the Commission invited the two undertakings 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.

14 — 'Unilateral commitments by Alrosa'.

15 — 'Joint commitments by De Beers and Alrosa'.

16 — OJ 2005 C 136, p. 32.

28. On 25 January 2006 De Beers offered unilateral commitments [17] designed to meet the concerns expressed by the Commission. [18] Under these unilateral commitments, De Beers undertook progressively to reduce its purchases of rough diamonds from Alrosa; the value of such purchases was to go down from USD 600 million in 2006 to USD 400 million in 2008; subsequently purchases were to be discontinued.

29. On 26 January 2006 the Commission sent Alrosa a copy of the unilateral commitments by De Beers and invited it to submit its observations in that regard. At the same time, the Commission provided Alrosa with a copy of the non-confidential versions of the comments from third parties.

30. Subsequently, there was an exchange of views between Alrosa 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, Alrosa provided observations on the unilateral commitments by De Beers and the third-party comments.

31. On 22 February 2006 the Commission adopted the decision at issue, Article 1 of which ordered that 'the commitments as listed in the Annex shall be binding on De Beers'. Article 2 of that decision states: 'The proceedings in the present case shall be brought to an end'. The decision at issue was adopted in the proceedings based on Article 82 EC and Article 54 EEA. The parallel proceedings based on Article 81 EC and Article 53 EEA thus lapsed. [19]

IV – The judicial proceedings

32. On 29 June 2006 Alrosa brought an action against the decision at issue before the Court of First Instance and claimed that it should annul that decision and order the Commission to pay the costs. The Commission, on the other hand, contended that the Court should dismiss the action as unfounded and order Alrosa to pay the costs. An expedited procedure was conducted pursuant to Article 76a of the Rules of Procedure of the Court of First Instance. [20]

33. By the contested judgment, on 11 July 2007 the Court of First Instance granted the application brought by Alrosa. It annulled the

17 — 'Unilateral commitments by De Beers'.

18 — In its appeal, the Commission states that this was the final version of commitments which had been offered for the first time in late November 2005 or early December 2005 and which had undergone some editorial amendments up to 26 January 2006.

19 — According to paragraph 185 of the judgment under appeal, in a letter of 22 February 2006 the Commission informed Alrosa that 'the proceedings involving it' had been brought to an end.

20 — See paragraph 30 of the judgment under appeal.

decision at issue and ordered the Commission to bear its own costs and pay those incurred by Alrosa.

34. By its appeal, lodged at the Registry of the Court of Justice on 24 September 2007, [21] the Commission now claims that the Court should

— set aside the judgment under appeal,

— give final judgment in the matter by dismissing the application for annulment in Case T-170/06 as unfounded, and

— order the applicant in Case T-170/06 to pay the costs incurred by the Commission in the proceedings at first instance and the present appeal.

35. Alrosa contends that the Court should

— dismiss the appeal,

— order the Commission to pay the judicial and extra-judicial costs and expenses incurred by Alrosa in connection with this case, and

— take whatever other measures it may consider necessary.

36. Before the Court of Justice, first written submissions on the appeal were made and then, on 3 June 2009, oral argument was presented.

V – Assessment of the grounds of appeal

37. The Commission puts forward two grounds of appeal against the judgment at first instance, the first of which concerns substantive points connected with the operation of the principle of proportionality, while the second relates to the right to be heard in administrative proceedings.

A – *First ground of appeal: substantive points connected with the principle of proportionality*

38. By its first ground of appeal, the Commission essentially claims that the Court of First Instance misinterpreted and misapplied the principle of proportionality in the present case. In this connection it also argues that the Court of First Instance misinterpreted Article 9 of Regulation No 1/2003 and Article 82 EC and committed errors of reasoning, distorted facts and exceeded the limits of judicial review.

21 — The original appeal, which was first lodged by fax, was lodged at the Court Registry on 26 September 2007.

39. The dispute takes place against the background of the question whether in the present case the Court of First Instance was right to assume that there were possible alternatives to the unilateral commitments by De Beers – namely the joint commitments by De Beers and Alrosa – which would have had a less detrimental effect on Alrosa's interests and which should not have been disregarded by the Commission.

1. Preliminary remark on the applicability of the principle of proportionality

40. In antitrust prsoceedings the Commission pursues the aim of ensuring that competition in the internal market is not distorted (Article 3(1)(g) EC). To that end, the Commission takes action, first, against agreements, decisions and concerted practices which have an anti-competitive object or an anti-competitive effect (Article 81 EC, Article 53 EEA) and, second, against abuses of dominant positions (Article 82 EC, Article 54 EEA). In order to address the concerns expressed by the Commission, undertakings are free to offer commitments which the Commission may make binding by a decision pursuant to Article 9 of Regulation No 1/2003.

41. There is essentially common ground between the parties that Commission decisions under Article 9 of Regulation No 1/2003 must comply with the principle of proportionality.

42. Article 9 of Regulation No 1/2003, unlike Article 7, does not contain any express reference to proportionality. As a general principle of Community law, however, the principle of proportionality is a criterion for the lawfulness of any act by the Community institutions, [22] including decisions taken by the Commission in its capacity as the competition authority. [23]

43. If commitments offered by one or more undertakings prove to be disproportionate having regard to the Commission's aim of ensuring that competition is not distorted, it must not make those commitments binding. Instead, it must point out to the undertaking(s) that the commitments are disproportionate and, if necessary, suggest changes. If a package of commitments is divisible, there is also nothing to prevent the

22 — See inter alia Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81; Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 28; and Case C-45/05 *Maatschap Schonewille-Prins* [2007] ECR I-3997, paragraph 45.

23 — See, for example, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* ('*Magill*') [1995] ECR I-743, paragraph 93; and Case C-202/06 P *Cementbouw Handel & Industrie* v *Commission* ('*Cementbouw*') [2007] ECR I-12129, paragraph 52.

Commission making the commitments binding only in part. [24]

44. However, there is considerable dispute between the parties as to what precise requirements stem from the principle of proportionality in relation to decisions on commitments under Article 9 of Regulation No 1/2003.

2. Requirements relating to the proportionality of decisions on commitments (first part of the first ground of appeal)

45. The question whether the Court of First Instance applied the correct criteria in examining the proportionality of the decision at issue is a question of law, which can be raised on appeal. [25]

46. According to settled case-law, the principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; 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. [26]

47. The judgment under appeal is based on the assumption that the principle of proportionality has the same effect in decisions on commitments under Article 9 of Regulation No 1/2003 as in decisions on prohibitions under Article 7 of that regulation. [27] In the view of the Court of First Instance, Article 7 and Article 9 have the same objective, the only distinctive feature of Article 9 being that the Commission is not required to pursue the regulatory procedure laid down under Article 85 EC and, in particular, to prove the infringement. [28]

48. The Commission rightly objects to this approach taken by the Court of First Instance.

49. The Court of First Instance fails to recognise fundamental differences between Article 9 and Article 7 of Regulation No 1/2003 which are of considerable

24 — See also paragraphs 88 and 139 of the judgment under appeal.

25 — See Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 40; Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* ('*Impala*') [2008] ECR I-4951, paragraph 117; and Case C-47/07 P *Masdar (UK)* v *Commission* [2008] ECR I-9823, paragraph 77.

26 — See the case-law cited in footnote 22.

27 — See in particular paragraphs 101, 103, 104 and 140 of the judgment under appeal.

28 — Paragraphs 87 and 95 of the judgment under appeal.

importance in examining the proportionality of the relevant Commission decisions.

50. Unlike Article 7, Article 9 of Regulation No 1/2003 is not an instrument for establishing infringements of competition law, [29] but merely gives the Commission the possibility of effectively addressing concerns over competition for the future.

51. Article 9 of Regulation No 1/2003 is characterised by a concern for procedural economy. The Commission resolves the competition problems identified by it without first establishing an infringement [30] in cooperation with the undertakings concerned on the basis of their voluntary commitments. In the context of a decision under Article 7, on the other hand, it would possibly have to identify remedies itself, which would require it to undertake much more extensive and lengthy investigations and also a fuller assessment of the facts.

52. The distinctive features of Article 9 of Regulation No 1/2003 affect the examination of the proportionality of decisions on commitments adopted under that provision in two ways.

53. First, higher demands are to be made in the context of Article 9 of Regulation No 1/2003 as regards the *appropriateness* of the commitments which have been made binding. If such commitments are not *manifestly appropriate* for eliminating the competition problems identified by the Commission, the Commission is entitled to reject them. Only in this way is it possible to meet the objective of Article 9 of Regulation No 1/2003, which is to ensure a quick and effective resolution of the competition problems while avoiding a considerable investigation and assessment effort on the part of the Commission. The Commission is not required to agree to commitments the appropriateness of which could be assessed only after a thorough examination by the Commission.

54. Second, in examining the *necessity* of the commitments for addressing the competition problems identified by the Commission a distinction must be drawn according to whether the interests of the undertaking which has offered the commitments are affected or the interests of third parties.

55. Whilst necessity may be presumed as a matter of course in relation to the interests of the undertaking which has offered the

29 — The statement in paragraph 87 of the judgment under appeal that the effect of a decision under Article 9 of Regulation No 1/2003 is to 'bring to an end the proceedings to establish and penalise an infringement of the competition rules' is at least unclear.

30 — See the second sentence of recital 13 in the preamble to Regulation No 1/2003.

commitments (in this case De Beers), [31] such a presumption cannot be made where the interests of third parties (in this case Alrosa) are affected. The commitments do not originate from them, which means that the voluntary nature of the commitments offered cannot be any guarantee that their interests will be safeguarded. Rather, it is always necessary to examine, having regard to the interests of third parties, whether the commitments go beyond what is necessary in order to address the competition problems in question.

56. The Commission is not required, in relation to decisions under Article 9 of Regulation No 1/2003, itself to seek less onerous alternatives to the commitments offered to it. Nevertheless, it must review all the alternatives to such commitments – in this case in particular the joint commitments by De Beers and Alrosa – known to it in order to ascertain whether they constitute less onerous means of resolving the competition problems identified, by which the interests of third parties are not affected or are affected less severely.

57. However, in this connection the Commission is required to take into consideration only alternatives which are *equally appropriate* as the commitments offered to it with a view to resolving the competition problems identified. Both the commitments actually offered and any alternatives to those commitments must therefore be *manifestly* appropriate for resolving the competition problems. [32]

58. The Court of First Instance is therefore wrong to criticise the Commission for not taking 'less onerous alternative solutions for the undertakings' into consideration on the basis of the alleged difficulty in determining them.' [33] In accordance with the spirit and purpose of Article 9 of Regulation No 1/2003, the assessment of alternatives is not intended to require any extensive and lengthy investigations or evaluations. In proceedings under Article 9 the Commission need not take into consideration alternatives whose appropriateness could not be established with sufficient certainty without such efforts.

59. Contrary to the view taken by the Court of First Instance, [34] it is perfectly conceivable for the Commission to dismiss certain solutions in the context of Article 9 which it would have had to investigate in the context of Article 7 of Regulation No 1/2003. On account of the desired procedural economy, the

31 — See, with reference to merger control proceedings, my Opinion in *Cementbouw*, cited in footnote 23, point 69.

32 — See above, point 53 of this Opinion.

33 — Paragraph 154 of the judgment under appeal.

34 — See in particular paragraphs 101, 140 and 154 of the judgment under appeal.

choice of possible means of resolving a competition problem in the context of Article 9 will tend to be smaller than it might have been in the context of Article 7.

60. The general interest in finding an optimum solution from the point of view of speed and procedural economy justifies restricting the choice of possible measures in the context of Article 9 of Regulation No 1/2003. Undertakings which offer commitments consciously accept that their concessions may go beyond what the Commission itself might impose on them following a thorough examination in a decision under Article 7 of Regulation No 1/2003. In return, with the termination of the antitrust proceedings initiated against them, they are quickly given legal certainty and can avoid the finding of an infringement of competition rules which would be detrimental to them and possibly an impending fine.

61. Third parties will also generally benefit from the fact that an undertaking makes relatively far-reaching concessions to the Commission in order to avoid a decision imposing a prohibition. As the present case clearly illustrates, however, commitments under Article 9 of Regulation No 1/2003 may sometimes work to the detriment of the interests of a third party. This is the case in particular where the third party has relied on the continued existence of a practice of a dominant undertaking which gives rise to concerns from the point of view of competition law. However, such reliance deserves at most limited protection, having regard to the general interest in undistorted competition.

62. By failing to take into consideration these distinctive features of the procedure under Article 9 of Regulation No 1/2003, the Court of First Instance applied an excessively strict proportionality test to the decision at issue and thereby committed an error of law. That error of law was a basis for the annulment of the decision at issue. The first part of the first ground of appeal is therefore well founded and justifies the setting aside of the contested judgment.

3. Specific examination of the proportionality of the decision on commitments (second part of the first ground of appeal)

63. Furthermore, the Commission levels a number of detailed criticisms against the judgment under appeal relating to the specific application of the principle of proportionality to the present case. The criticism concerns the assessment by the Court of First Instance of the alternatives to the unilateral commitments by De Beers which were made binding. The Court of First Instance took the

view that the Commission should have taken those alternatives into consideration. [35]

64. Alrosa first of all categorically contests the admissibility of the Commission's claims, as they question only the assessment of the facts made by the Court of First Instance.

65. It is correct that an appeal is limited to points of law and the Court of Justice may not substitute its own assessment of facts and evidence for that of the Court of First Instance. [36] Under Article 225(1) EC and the first paragraph of Article 58 of the Statute of the Court of Justice, the Court of First Instance has exclusive jurisdiction to find the facts – except where the substantive inaccuracy of its findings is apparent from the documents submitted to it – and to assess those facts. [37]

66. It does indeed appear at first glance as if the Commission wished to use this second part of its first ground of appeal merely as a pretext to question the assessment of facts and evidence made by the Court of First Instance, which is inadmissible in appeal proceedings.

67. On closer examination, however, it is possible to infer from the Commission's complaints – which are set out in a circuitous manner – inter alia the allegation that in examining the proportionality of the decision at issue the Court of First Instance exceeded the limits of judicial review. This point, on which I shall now focus (see section a), is a point of law [38] which may be examined on appeal. I shall then briefly consider the Commission's other criticisms (see section b).

(a) The exceeding of the limits of judicial review by the Court of First Instance

68. The Commission argues that the Court of First Instance exceeded the limits of judicial review by substituting its own assessment of the market conditions for the assessment by the Commission. This complaint is

35 — See in particular paragraph 154 of the judgment under appeal.

36 — Case C-62/01 P *Campogrande* v *Commission* [2002] ECR I-3793, paragraph 24; Case C-24/05 P *Storck* v *OHIM* [2006] ECR I-5677, paragraphs 34 and 35; and Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 137.

37 — Consistent case-law, see 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 48; Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51; Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 41; and Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 137.

38 — Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraphs 37 to 49; Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraphs 56 to 61; and *Impala*, cited in footnote 25, paragraphs 135 to 150, in particular paragraph 143.

directed in particular at paragraphs 134, 135, 138 and 153 of the judgment under appeal, in which the Court considers the possible alternatives to the unilateral commitments by De Beers. Those alternatives are, first, the joint commitments by De Beers and Alrosa and, second, Alrosa's proposal to auction a proportion of its rough diamonds to the highest bidder each year.

69. In order to ascertain whether that complaint is well founded, it must be examined, first, whether the Commission enjoyed a margin of assessment in the present case in assessing the commitments offered by De Beers and, second, whether the Court of First Instance infringed that margin of assessment.

(i) Existence of a margin of assessment enjoyed by the Commission

70. The examination whether certain measures are appropriate and necessary in order to address competition problems identified by the Commission requires an appraisal of complex economic matters. In this regard the Commission enjoys a margin of assessment. [39]

71. Contrary to the position taken by the Court of First Instance, [40] there is no fundamental difference as regards the assessment of commitments offered by undertakings between proceedings under Article 9 of Regulation No 1/2003 and merger control proceedings. In both cases the Commission is called to give a decision in the nature of a forecast, in which it has to assess the shape future market activities will take in the light of the commitments. The fact that in the context of Article 9 of Regulation No 1/2003 'existing practices' constitute the reason for the proceedings does not affect the need for a future-oriented 'prospective economic analysis' of the expected effects of commitments on market activities.

72. The Court of First Instance was therefore required to grant the Commission the same margin of assessment in the context of Article 9 of Regulation No 1/2003 which

39 — A fundamental judgment with regard to the margin of assessment enjoyed by the Commission in competition proceedings was given in Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 34; see also Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1987] ECR 4487, paragraph 62, and *Aalborg Portland and Others* v *Commission*, cited in footnote 37, paragraph 279.

40 — Paragraphs 108 to 110 of the judgment under appeal.

it enjoys, according to case-law, in connection with the assessment of commitments in merger control. [41]

73. This is not affected by the Court of First Instance's finding that in the present case the Commission 'did not carry out a complex economic assessment' at all. [42] This finding of the Court refers solely to 'the identification of alternative solutions', something which the Commission refused to do in the view of the Court of First Instance. As has already been mentioned, however, the Commission is not required at all, in the context of Article 9 of Regulation No 1/2003, itself to identify such alternatives to the commitments offered to it.

74. The crucial factor – which the Court of First Instance fails to recognise – is that before any decision under Article 9 of Regulation No 1/2003 is adopted the Commission must carry out an *assessment of the market situation* in which the commitments offered are embedded. It must examine what effects those commitments will have on future market activities and whether the alternatives known to it are equally appropriate for addressing the competition problem identified. This alone requires an appraisal of complex economic matters. The Court of First Instance did not find that in the present case the Commission had failed to carry out such an appraisal of market activities and of the alternatives to the unilateral commitments offered by De Beers which were known to it.

75. The fact therefore remains that in the present case the Commission enjoyed and also utilised a margin of assessment. It will be considered below whether the Court of First Instance infringed that margin of assessment, as the Commission alleges.

(ii) Infringement by the Court of First Instance of the margin of assessment enjoyed by the Commission

76. The Court of First Instance found 'that the [decision at issue] is vitiated by an error of assessment which, moreover, is manifest.' [43] It must be examined whether with that finding the Court of First Instance satisfies the legal requirements or has exceeded the limits of judicial review with regard to Commission decisions.

41 — Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraph 78, and Case T-158/00 *ARD* v *Commission* [2003] ECR II-3825, paragraph 328; see also my Opinion in *Cementbouw*, cited in footnote 23, point 67.

42 — Paragraphs 123 to 125, in particular paragraph 125, of the judgment under appeal.

43 — Paragraph 126 of the judgment under appeal.

77. The existence of a margin of assessment in economic matters does not mean that the Community judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. Rather, it has the power to examine the material lawfulness of Commission decisions with a view to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment. [44] It must not only establish whether the evidence relied on is factually accurate, reliable and consistent but also examine whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. [45]

78. The Court of First Instance was therefore entitled to examine whether the facts ascertained by the Commission were capable of substantiating the conclusion drawn by it, namely that the unilateral commitments by De Beers were not only appropriate, but also necessary, for addressing the competition problem identified.

79. As the Court of First Instance rightly stated in this regard, the principle of proportionality requires the Commission, before a decision on commitments, to examine the appropriateness of measures that are less onerous and are known to it; only if those less onerous measures prove not to be appropriate for addressing the concerns identified by it may it adopt the more onerous approach. [46]

80. It is not disputed in the present case that alternative solutions with less onerous effects on Alrosa's interests were known to the Commission, in particular the joint commitments by De Beers and Alrosa. [47] However, the Commission concluded, not least in the light of the results of the market test conducted by it, that such alternative solutions were not appropriate for addressing the competition problems identified by it. [48]

81. Only if that conclusion by the Commission were not based on the facts ascertained by it

44 — *Impala*, cited in footnote 25, paragraph 144.

45 — *Commission* v *Tetra Laval*, cited in footnote 38, paragraph 39, and *Impala*, cited in footnote 25, paragraph 145. This case-law, first developed in connection with merger control, now has importance far beyond that area of law and can apply whenever Commission decisions are to be reviewed for manifest errors of assessment; see *Spain* v *Lenzing*, cited in footnote 38, paragraph 57; Case C-405/07 P *Netherlands* v *Commission* [2008] ECR I-8267, paragraph 55; and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank* v *Commission* [2006] ECR II-3567, paragraph 67.

46 — To that effect, see also paragraph 131 of the judgment under appeal.

47 — Paragraph 132 of the judgment under appeal.

48 — See recitals 41 and 42 in the preamble to the decision at issue.

could the Court of First Instance have established a manifest error of assessment.

82. The judgment under appeal does not satisfy those requirements.

83. At no point does the Court of First Instance hold that the conclusion drawn by the Commission is not supported by the facts ascertained. The Court merely puts forward its own variant assessment in relation to whether alternative solutions are appropriate to the competition problems identified by the Commission.

84. However, it is not sufficient, in order to assume a manifest error of assessment, for the Court of First Instance merely to take a different opinion to the Commission. If the factual and evidential position reasonably allows different assessments, there can be no legal objection if the Commission adopts one of them, even if it is not the one which the Court considers to be preferable. A manifest error of assessment exists only where the conclusions drawn by the Commission are no longer justifiable in the light of the factual and evidential position, [49] that is to say if no reasonable basis can be discerned. [50]

85. The Court of First Instance does not demonstrate in the judgment under appeal that the conclusions drawn by the Commission were unjustifiable. Rather, the Court simply makes vague presumptions and provisional assessments. For example it states that the joint commitments by De Beers and Alrosa 'were, prima facie, capable of addressing the concerns expressed by the Commission', [51] that it would have been 'difficult' for De Beers to influence the prices set by Alrosa, and that it would be 'difficult to conceive' how De Beers and Alrosa could have coordinated their pricing policies. [52]

86. It is not clear from the statements made by the Court of First Instance whether the joint commitments by De Beers and Alrosa

49 — See my Opinion in *Impala*, cited in footnote 25, point 240.

50 — See my Opinion in Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, point 77; see also Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 72, according to which there is no manifest error of assessment where the institution in question could 'reasonably' make certain assumptions in taking its decision; see also my Opinion in *Spain* v *Lenzing*, cited in footnote 38, point 71, in which I stated that a prognosis is manifestly erroneous only if it would not be 'justifiable from any conceivable point of view'.

51 — Paragraph 133 of the judgment under appeal.

52 — Paragraph 134 of the judgment under appeal.

were *manifestly appropriate* for addressing the competition problems identified by the Commission, nor whether they were *equally appropriate* as the unilateral commitments by De Beers which were ultimately made binding by the Commission. On the contrary, the Court of First Instance appears to argue that it is sufficient that an alternative solution 'reduced the risks of distortion of competition' [53] and would not 'necessarily have imperilled' the objectives targeted by the Commission. [54] However, the Court should have made a positive finding that the joint commitments by De Beers and Alrosa were sufficient to rule out the risks of distortion of competition and to achieve the objectives targeted by the Commission with a view to the protection of competition.

87. The statements made by the Court of First Instance do not therefore satisfy the abovementioned legal requirements for an examination of proportionality in the context of Article 9 of Regulation No 1/2003. [55]

88. With its statements on the joint commitments by De Beers and Alrosa, the Court of First Instance leaves the realms of a review of the lawfulness of a Commission decision and in reality carries out its own appraisal of complex economic matters. That is the case, for example, with the statement made by the Court of First Instance that reducing sales of rough diamonds by Alrosa to De Beers from 2009 to 35% of the quantity sold in 2004 (with a value of USD 275 million) would have 'given third parties effective access to an alternative and independent source of supply'. [56] The same is true of the appraisal of Alrosa's proposal to auction a proportion of its rough diamonds each year to the highest bidder. [57] If such statements were to be more than mere assertions, they would have required a thorough analysis of market conditions, for which the Court of First Instance is not competent, however, but the Commission.

89. It is not the task of the Court of Justice in appeal proceedings to act as arbitrator over the conflicting economic views taken by the Court of First Instance and the Commission and to assess whether the preference should be given to one or the other with regard to whether alternative solutions are appropriate. This would mean that the Court of Justice unlawfully substitutes its own assessment for that of the Commission and of the Court of First Instance and carries out an appraisal of complex economic matters.

90. What is decisive is simply that in the present case the Court of First Instance substituted its own assessment for that of the Commission and thus wrongly encroached on the margin of assessment enjoyed by the

53 — Last sentence of paragraph 153 of the judgment under appeal.

54 — First sentence of paragraph 153 of the judgment under appeal.

55 — See above, point 57 of this Opinion.

56 — Paragraph 134 of the judgment under appeal.

57 — Paragraphs 138 and 153 of the judgment under appeal.

Commission. [58] The Commission's complaint must therefore be upheld. Because this error in law made by the Court of First Instance was a basis for the annulment of the decision at issue, it also justifies the setting aside of the judgment under appeal.

(b) The other criticisms raised by the Commission regarding the approach taken by the Court of First Instance

91. Below I will address the remaining criticisms raised by the Commission in connection with the second part of the first ground of appeal.

(i) The alleged 'distortion of the scope of the preliminary assessment'

92. The Commission complains that the Court of First Instance 'distorts the scope of its preliminary assessment'. It disregarded the fact that, completely irrespective of the planned contractual agreement, there also continued to be 'ad hoc sales' between De Beers and Alrosa in the form of 'willing-buyer/willing-seller' arrangements. The Court regarded such ad hoc sales merely as past practices between the two undertakings, but did not take into consideration their present effects.

93. This complaint is admissible because it constitutes an allegation of a distortion of facts or evidence. [59]

94. However, the allegation of distortion of facts and evidence is unfounded on the merits. There is such distortion only where, without recourse to new evidence, the assessment of the existing evidence appears to be clearly incorrect. [60] That is not the case here.

95. In the judgment under appeal, the Court of First Instance did in places mention the 'existence of long-standing relations' between

58 — *Impala*, cited in footnote 25, paragraph 145, according to which, where the Commission enjoys a margin of assessment, the Court of First Instance must not substitute its own economic assessment for that of the Commission.

59 — Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 36; Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 35; and Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 104.

60 — *PKK and KNK* v *Council*, cited in footnote 59, paragraph 37; Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraph 60; Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 37; Case C-304/06 P *Eurohypo* v *OHIM* [2008] ECR I-3297, paragraph 34; and the order of 3 June 2009 in Case C-394/08 P *Zipcar* v *OHIM*, paragraph 40.

De Beers and Alrosa in connection with ad hoc sales and referred to the 'past practices' of the two undertakings. [61] However, the judgment does not contain any clear indication to suggest that the Court regarded ad hoc sales *exclusively* as a phenomenon of the past and not also as an ongoing practice by both undertakings.

96. This complaint raised by the Commission must therefore be rejected.

(ii) The unbalanced consideration of Alrosa's claims and interests

97. The Commission further claims that the judgment under appeal disregards the results of the market test. The Court of First Instance takes Alrosa's interests and observations into consideration in an unbalanced manner and attaches excessive importance to them, while it disregards the interests of competition. The judgment does not give any consideration to the numerous arguments put forward by the Commission and essentially retreats to the statement that the examination of proportionality has an objective character. [62]

98. As the Commission makes clear in its reply, it would like this claim to be construed as a complaint of inadequate reasoning. It considers that the judgment under appeal is contradictory and contains an inadequate statement of reasons.

99. The question whether the grounds of a judgment of the Court of First Instance are contradictory or inadequate is a question of law which, as such, may be raised on appeal. [63]

100. Substantively, the requirement that the Court of First Instance give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by a party. [64] Rather, it is regarded as sufficient if the statement of the reasons on which a judgment is based clearly and unequivocally discloses the Court of First Instance's thinking, so that the persons concerned can be apprised of the justification for

61 — Paragraphs 115 and 150 of the judgment under appeal.

62 — In paragraph 99 of the judgment under appeal, the Court of First Instance states that 'the review of the proportionality of a measure is ... an objective review ...'

63 — Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 53; *Sumitomo Metal Industries and Nippon Steel* v *Commission*, cited in footnote 25, paragraph 77; and Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland* v *Commission* [2009] ECR I-6155, paragraph 71.

64 — Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 121; *Aalborg Portland and Others* v *Commission*, cited in footnote 37, paragraph 372; Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 30; Case C-440/07 P *Commission* v *Schneider Electric*, cited in footnote 59, paragraph 135.

the decision taken and the Court of Justice can exercise its power of review. [65]

101. The Court of First Instance satisfied these requirements in the present case. It is easy for the reader to understand the reasons for which the Court of First Instance granted the application brought by Alrosa. In addition, the Commission had no difficulties in understanding the reasoning stated in that judgment and in challenging the judgment with a lengthy appeal.

102. In actual fact, it appears to me that the Commission's criticism is directed less at the adequate reasoning and thus at the formal lawfulness of the contested judgment than at its substantive accuracy. However, the fact that the Court of First Instance, on the merits, arrived at a different conclusion from the appellant cannot in itself vitiate the judgment for failure to state reasons. [66]

103. The complaint of inadequate reasoning is therefore unfounded.

(iii) Erroneous legal classification of the notice pursuant to Article 27(4) of Regulation No 1/2003

104. The Commission further claims that the Court of First Instance misunderstood its notice in the Official Journal pursuant to Article 27(4) of Regulation No 1/2003. [67] Its criticism is directed at paragraphs 136 and 192 of the judgment under appeal. The Court concluded from the mere existence of the publication of that notice that even the Commission considered that the joint commitments by De Beers and Alrosa 'addressed prima facie' the concerns. The Commission considers that this is either a distortion of facts or an erroneous legal classification of its notice in the Official Journal.

105. Both a possible distortion of facts and the legal classification of facts are amenable to review on appeal. [68] This complaint raised by the Commission is therefore admissible.

65 — Case C-259/96 P *Council* v *de Nil and Impens* [1998] ECR I-2915, paragraphs 32 and 33; *Aalborg Portland and Others* v *Commission*, cited in footnote 37, paragraph 372; *France Télécom* v *Commission*, cited in footnote 64, paragraph 29; and *Commission* v *Schneider Electric*, cited in footnote 59, paragraph 135.

66 — Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 80.

67 — With regard to that notice, see point 26 of this Opinion.

68 — With regard to distortion of facts, see the case-law cited in footnote 59; with regard to the legal classification of facts, see the order in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 39, *Sumitomo Metal Industries and Nippon Steel* v *Commission*, cited in footnote 25, paragraph 39, and *Commission* v *Schneider Electric*, cited in footnote 59, paragraph 191.

106. The Commission's complaint is also correct on the merits.

107. In paragraphs 136, 192 and 194 of the contested judgment, the Court of First Instance attempts to keep the Commission to its initial assessment of the joint commitments by De Beers and Alrosa. It sees that assessment as evidence that the joint commitments would have been appropriate for addressing the competition problems identified by the Commission.

108. In so doing the Court of First Instance fails to understand that a notice in the Official Journal pursuant to Article 27(4) of Regulation No 1/2003 can only ever be based on a preliminary assessment by the Commission. The spirit and purpose of that notice is to give interested third parties an opportunity, in connection with a market test, to comment on commitments offered. In the light of the results of that market test, the Commission has to review its preliminary assessment of the market situation and to re-appraise whether the commitments are appropriate for addressing the competition problems identified by it. The market test does not necessarily have to uncover new facts or concerns; the results of the market test may give rise to a re-assessment of already known facts and ultimately of the situation as regards competition. The market test would be a farce if it could not result in a change in the Commission's initial position.

109. If the Court of First Instance may not even make a statement of objections the benchmark for examining the lawfulness of a Commission decision, [69] that must apply all the more to a notice under Article 27(4) of Regulation No 1/2003. Such a notice likewise reflects only a preliminary assessment by the Commission, is moreover very much less detailed, and is based only on a summary examination of the case.

110. In the present case it is also clear from the wording of the notice in the Official Journal [70] that the Commission had not yet carried out any final assessment of the joint commitments offered to it by De Beers and Alrosa. Even though the Court of First Instance certainly took note of that wording, [71] in the judgment under appeal it does not draw the necessary inferences in respect of the preliminary nature of the assessments made by the Commission contained in the notice.

69 — *Impala*, cited in footnote 25, in particular paragraphs 64, 65, 73 and 76; in this regard, the Court of Justice did not follow my Opinion in that case (see in particular points 171 to 176).

70 — Paragraph 16 of the notice in the Official Journal states: 'The Commission intends, *subject to the outcome of this market test*, to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 …' (my emphasis).

71 — Second sentence of paragraph 136 and first sentence of paragraph 192 of the judgment under appeal.

111. The Court of First Instance thus made an incorrect legal classification of the facts when it took the Commission's notice in the Official Journal as evidence that the joint commitments by De Beers and Alrosa were appropriate.

112. The Commission's complaint relating to the notice in the Official Journal is therefore well founded. However, that error in law cannot in itself lead to the setting aside of the judgment under appeal, because the reference to that notice was just one of several arguments on which the Court of First Instance based its statements on the existence and the appropriateness of alternative solutions. [72]

(iv) The alleged infringements of Article 82 EC

113. Lastly, the Commission alleges that the Court of First Instance committed two infringements of Article 82 EC in connection with its examination of proportionality.

114. These complaints concern the statements made by the Court of First Instance regarding possible alternatives to the unilateral commitments by De Beers which were made binding. The Commission attacks paragraphs 152 and 153 in particular of the judgment under appeal, in which the Court comments on Alrosa's proposal to auction a proportion of its rough diamonds each year to the highest bidder. First, according to the Commission, the Court of First Instance completely disregarded the fact that De Beers is not only the largest buyer on the market for rough diamonds, but also the largest producer on that market. Second, according to the Commission, the Court of First Instance failed to recognise that even auctions to the highest bidder cannot prevent abuse of a dominant position by an undertaking when bids are submitted.

115. Unlike Alrosa, I do not consider these complaints to be inadmissible. They are certainly not merely a pretext for questioning the assessment of the facts and evidence made by the Court of First Instance. Rather, this claim raises the legal question whether the Court applied the correct criteria in interpreting and applying Article 82 EC [73] and whether it disregarded legally relevant aspects.

72 — Paragraphs 132 to 154 of the contested judgment.

73 — See above, point 45 of this Opinion, with the case-law cited in footnote 25.

– Disregard of De Beers' position as a producer

116. The first complaint based on Article 82 EC is directed specifically at paragraph 153 of the judgment under appeal, in which the Court of First Instance describes De Beers as 'the largest buyer on the market' without addressing the fact that De Beers is also the largest producer on the same market.

117. The Commission rightly criticises this approach.

118. The Court of First Instance was indeed perfectly well aware that both De Beers and Alrosa are producers of rough diamonds. [74] However, it completely disregarded this fact in examining possible alternatives to the unilateral commitments by De Beers which were made binding. In the relevant parts of the grounds of the judgment, De Beers is described only as the largest buyer on the market, to which Alrosa should continue to have access, in the view of the Court of First Instance. [75]

119. In this connection, the Court of First Instance fails to take account of the fact that it makes a considerable difference as regards the assessment, for purposes of competition law, of a longstanding supply relationship between two undertakings whether or not there exists a current or potential competitive relationship between those two undertakings.

120. 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 – or at least a considerable proportion of it – in particular where the buyer holds a dominant position. This was also acknowledged by Alrosa in response to a question at the hearing before the Court of Justice.

121. An undertaking in a dominant position certainly has the right to protect its own commercial interests. However, Article 82 EC precludes behaviour by an undertaking in a dominant position if its purpose is to strengthen that dominant position and abuse it. [76]

122. There is reason to fear precisely such abuse if an undertaking in a dominant position buys up the production of another

74 — See the factual findings in paragraphs 8 and 9 and the quotation from the decision at issue in paragraph 116 of the judgment under appeal, which mentions a 'purchase relationship between De Beers and its most important competitor Alrosa'.

75 — Paragraphs 138 and 153 of the judgment under appeal.

76 — Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 189; Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I-7139, paragraph 50; and Case C-52/07 *Kanal 5 and TV 4* [2008] ECR I-9239, paragraph 26.

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 have detrimental consequences for the market structure and ultimately also for consumers, especially since competition on the relevant market is already weakened in view of the presence of the dominant undertaking. There is a danger that by buying up the production of the other producer, the dominant undertaking influences sales and thus ultimately also prices on the relevant market, to the detriment of consumers. Such behaviour has nothing to do with the protection of the legitimate interests of the dominant undertaking, which is lawful in principle.

124. By disregarding this important aspect, the Court of First Instance erred in law in its examination of proportionality. That error of law justifies the setting aside of the judgment under appeal because it forms the basis for the Court of First Instance's view that in the present case there were appropriate alternative solutions which would have been less onerous for the undertakings concerned.

– Disregard of the possibility of abusive behaviour by bidders in connection with auctions

123. The Court of First Instance did not demonstrate special circumstances which might exceptionally rule out the existence of abuse in the present case. On the contrary, 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, even though this had been pointed out by the Commission. [77] It would have been essential to take this dual role into consideration, however, in order to be able to assess meaningfully whether the annual auction of a proportion of Alrosa's diamonds to the highest bidder might be appropriate for addressing the competition problems identified by the Commission having regard to Article 82 EC.

125. The second complaint based on Article 82 EC is directed at paragraphs 152 and 153 of the judgment under appeal, in which the Court of First Instance states that if ad hoc sales were met by Alrosa by way of auction to the highest bidder, that could not of itself contravene the competition rules, even if the result would be that De Beers maintains or strengthens its role as market-maker.

126. The Commission rightly objects to these statements made by the Court of First Instance.

77 — See, for example, paragraphs 58, 63 and 68 of the Commission's defence at first instance and paragraph 74 of the judgment under appeal.

127. In its judgment the Court of First Instance restricts itself to finding that there is no reason to fear that preferential treatment would be given to De Beers by Alrosa in connection with auctions, since there is no evidence of the use of subjective award criteria by Alrosa ('criteria other than the value of the offer'). [78]

128. The Court of First Instance thus fails to understand that auctions can lead to abusive behaviour not only on the part of the seller, but also on the part of the buyers. If an undertaking which itself produces and markets goods competing with the auctioned products and which also has a dominant position on the relevant market participates in an auction, there may be predation. A situation may arise where the dominant undertaking artificially pushes up bids in order to safeguard control over the production of its – present or potential – rival while squeezing out other potential buyers; this may lead to a scarcity of supply on the market and ultimately to artificially inflated price levels, to the detriment of consumers. Such behaviour constitutes abuse within the meaning of Article 82 EC and has nothing to do with the protection of the legitimate interests of the dominant undertaking on the market. [79]

129. Of course, an overall assessment of the circumstances of the individual case must determine whether bidders actually have reason to fear such abusive behaviour on the part of a dominant undertaking. However, 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 the Commission's statements had given it reason to do so. Thus, the Commission had stressed the 'market-maker' role held by De Beers on several occasions and pointed out previous efforts by De Beers to regulate production on the diamond market. [80]

130. The Court of First Instance simply stated in the present case that, if the auctions proposed by Alrosa were implemented, there was no risk of abuse on the part of the *seller* in connection with the acceptance of bids. However, it is not possible on this basis alone to rule out abusive bidding behaviour by a dominant undertaking as a *buyer*.

131. By disregarding this important aspect, the Court of First Instance erred in law in its examination of proportionality. That error in law justifies the setting aside of the judgment under appeal because it forms the basis for the Court of First Instance's view that in the present case there were appropriate alternative solutions which would have been less onerous for the undertakings concerned.

78 — Paragraph 153 of the judgment under appeal.

79 — See point 121 of this Opinion and the case-law cited in footnote 76.

80 — Recitals 25, 26, 28 and 30 in the preamble to the decision at issue, and paragraphs 64 and 65 of the Commission's defence in the proceedings at first instance; see also paragraph 83 of the judgment under appeal.

B – *Second ground of appeal: Right to be heard in administrative proceedings*

132. By its second ground of appeal, the Commission essentially alleges that the Court of First Instance committed errors of law in connection with the right to be heard in administrative proceedings. Furthermore, it claims that the Court ruled *ultra petita* and again complains of inadequate reasoning in the judgment under appeal.

1. Preliminary question: Is the second ground of appeal nugatory?

133. Alrosa takes the view that this second ground of appeal raised by the Commission is nugatory because it is directed at statements in the contested judgment which the Court of First Instance made only for the sake of completeness.

134. It is correct that a complaint raised by an appellant which is directed against a ground which was included in the judgment at first instance purely for the sake of completeness cannot lead to the judgment being set aside and is therefore to be rejected as nugatory or inoperative. [81] However, that is not the case here.

135. The Court of First Instance did describe its statements on the infringement of the right to a fair hearing extremely misleadingly as being made 'for the sake of completeness'. [82] However, this does not mean that they would be merely *obiter dicta*. Rather, those statements constitute a separate second pillar of the judgment on which the annulment of the decision at issue is based. This is particularly clear from paragraph 204 of the judgment under appeal, where the plea in law raised by Alrosa relating to the infringement of the right to a fair hearing is expressly held to be well founded. The statements concerning the right to a fair hearing are therefore primary grounds on which the operative part of the judgment under appeal is based.

136. The objection raised by Alrosa that the second ground of appeal is inoperative must therefore be rejected.

81 — Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991, paragraph 31; Case C-122/01 P *T. Port* v *Commission* [2003] ECR I-4261, paragraph 17; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 148; and Case C-443/05 P *Common Market Fertilizers* v *Commission* [2007] ECR I-7209, paragraph 137.

82 — See paragraphs 158 and 204 of the judgment under appeal.

2. Examination of the second ground of appeal

(a) Inadequate reasoning (first part of the second ground of appeal)

137. First of all, the Commission alleges that the judgment under appeal contains inadequate reasoning having regard to the defects established in relation to the right to be heard. The Court of First Instance replaces reasoning with mere suspicion. In paragraphs 201 and 203 of the judgment under appeal it fails to explain why it could not have been possible for Alrosa to give an 'effective' reply to the documents submitted to it for access [83] and to exercise the right to be heard 'fully'. Furthermore, no causal link was proven between the irregularity established and the outcome of the proceedings, that is to say the decision on commitments.

138. I do not find these arguments convincing.

139. The reasoning of a judgment at first instance may be implicit on certain points on condition that the reasoning as a whole discloses the considerations of the Court of First Instance so clearly and unambiguously that the persons concerned can see why the Court of First Instance took the decision and the Court of Justice can exercise its power of review. [84]

140. In the present case it is sufficiently clear from the judgment under appeal that the Court of First Instance considered Alrosa's right to a fair hearing to be infringed on account of the belated transmission of documents. According to the findings of the Court of First Instance, the Commission did not supply a non-confidential version of the third-party comments '*until* 26 January 2006, that is to say, *more than six weeks* after the date of [Alrosa's] formal request in that regard and *more than three months* after the meeting of 27 October 2005'; the Court also objects that those documents were supplied to Alrosa '*at the same time as* the copy of the individual commitments offered by De Beers'. [85] The Court infers that Alrosa was not given the opportunity to exercise its right to be heard 'fully'. [86]

141. The Commission may take a different view to the Court of First Instance. It may consider that the documents in question were not submitted belatedly and in any case in good time to allow Alrosa to give an effective reply. Unlike the Court of First Instance, the Commission may also believe that Alrosa's right to be heard was not infringed or that

83 — The documents submitted were the comments made by third parties in connection with the market test and a copy of the unilateral commitments by De Beers (see point 29 of this Opinion).

84 — *Aalborg Portland and Others* v *Commission*, cited in footnote 37, paragraph 372; *Bouygues and Bouygues Télécom* v *Commission*, cited in footnote 37, paragraph 42; and *Commission* v *Schneider Electric*, cited in footnote 59, paragraph 135.

85 — Paragraph 201 of the judgment under appeal (my emphasis).

86 — Paragraph 203 of the judgment under appeal.

any infringement did not affect the substance of the decision at issue. But in so doing it is not in fact complaining at the formal unlawfulness of the judgment under appeal on account of inadequate reasoning, but doubting the soundness of the Court's reasoning and thus the material (substantive) lawfulness of the judgment.

142. However, the fact that the Court of First Instance, on the merits, arrived at a different conclusion from the appellant cannot in itself vitiate the judgement for failure to state reasons. [87]

143. The complaint of inadequate reasoning must therefore be rejected.

(b) The *ultra petita* rule and the right to a fair hearing (second part of the second ground of appeal)

144. The Commission also complains that in the contested judgment an infringement of the right to be heard was established on entirely different grounds from those put forward by Alrosa in its action for annulment at first instance. At first instance, Alrosa merely complained that the Commission did not inform it of the reasons for its change of opinion following the market test and did not afford it an opportunity to submit observations on its re-assessment of the case. The questions relating to the right to be heard which the Court of First Instance considered to be crucial had never been raised by Alrosa. The judgment under appeal was not based on Alrosa's complaint before the Court of First Instance, but even expressly rejected that complaint. [88]

145. The Commission takes the view that by this course of action the Court of First Instance ruled *ultra petita* and, moreover, breached the principle of a fair hearing.

(i) The *ultra petita* rule

146. It is undisputed, first of all, that it would be *ultra vires* for the Community judicature to rule *ultra petita*. [89] This principle is an expression of the notion that the subject-matter of a

87 — *Wunenburger* v *Commission*, cited in footnote 66, paragraph 80.

88 — The Commission refers to paragraph 130 of the judgment under appeal.

89 — Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 52; Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 24; and Case C-240/03 P *Comunità montana della Valnerina* v *Commission* [2006] ECR I-731, paragraph 43; see also Joined Cases 46/59 and 47/59 *Meroni* v *High Authority* [1962] ECR 411.

case is delimited by the parties and the court may go no further than that subject-matter.

147. The Commission now appears to understand the *ultra petita* rule to mean that the Community courts may establish an infringement of the right to be heard only if the pleas put forward by the applicant at first instance hold.

148. However, that view is excessively restrictive. Under the *ultra petita* rule, the scope of the annulment may not go further than that sought by the applicant. [90] But, the court cannot confine itself to the arguments put forward by the parties in support of their claims, as otherwise it might be forced to base its decision on erroneous legal considerations. [91] As Advocate General Léger has rightly stated, the role of the court is not a passive one and it cannot be expected to be merely 'the mouthpiece of the parties.' [92]

149. In the present case, with one of its pleas at first instance Alrosa alleged an infringement of its right to be heard. Contrary to the view taken by the Commission, the Court of First Instance did not therefore establish the infringement of the right to be heard of its own motion, but on an application by the applicant. The fact that in ruling on that plea the Court of First Instance relied on arguments other than those put forward by Alrosa does not mean in itself that there is any departure from the subject-matter of the case at first instance or therefore that it ruled *ultra petita*. [93]

(ii) The right to a fair hearing

150. The Commission also complains that the defects relating to the right to be heard ultimately established by the Court of First Instance were never discussed between the parties. It considers this to be a breach of the right to a fair hearing.

151. In order to ensure a fair hearing, the Court of First Instance must in particular respect the rights of defence of the parties to the case. The principle of respect for the rights of the defence is a fundamental principle of

90 — *Commission* v *AssiDomän Kraft Products and Others*, cited in footnote 89, paragraph 52, and *Comunità montana della Valnerina* v *Commission*, cited in footnote 89, paragraph 43.

91 — Orders of 27 September 2004 in Case C-470/02 P *UIER* v *M6 and Others*, paragraph 69, and of 13 June 2006 in Case C-172/05 P *Mancini* v *Commission*, paragraph 41.

92 — Opinion of Advocate General Léger in Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421, point 36.

93 — See *Parliament* v *Gutiérrez de Quijano y Lloréns*, cited in footnote 92, paragraph 34, and order in *UIER* v *M6 and Others*, cited in footnote 91, paragraph 74.

Community law. [94] That principle is infringed where a judicial decision is based on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to comment. [95] In other words, respect for the rights of the defence therefore ensures that the parties are not confronted by unexpected decisions by the Court of First Instance. [96]

152. Of course, an unexpected decision may occur not only where the Court of First Instance relies on facts or evidence which were not known to the parties or to one of them. An assessment of the facts made by the Court may also be unexpected for the parties if the Court relies on facts which were known to the parties, but which were as such never discussed in the judicial proceedings. [97]

153. That was the situation in the present case with the transmission of certain documents to Alrosa. It is undisputed at what times those documents were submitted. However, it is apparent from the file that the belated submission of documents to which the Court of First Instance took objection in the present case [98] had not been raised by either of the parties in the written procedure at first instance. Nor was this issue discussed at the hearing, according to the statements made by the Commission which are not disputed by Alrosa. The issue was also not the subject of written questions from the Court of First Instance, and the Court did not consider it necessary to order the reopening of the oral procedure to discuss it. [99]

154. As the defendant, the Commission was not compelled, on its own initiative, to make observations on this issue for the sake of completeness. This is the case especially since the expedited procedure conducted at first instance imposes specific constraints on the parties, both as regards the scope of their submissions and in relation to the procedural time-limits to be observed. [100]

155. Under these circumstances, it was an unexpected decision for the Court of First Instance to justify the defects established by

94 — Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 27; Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-44/06 *Gerlach* [2007] ECR I-2071, paragraph 38; Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich and Austria* v *Commission* [2007] ECR I-7141, paragraph 36; specifically with regard to respect for the rights of the defence in court proceedings, see Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 19.

95 — Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53, at p. 84; Case C-480/99 P *Plant and Others* v *Commission and South Wales Small Mines* [2002] ECR I-265, paragraph 24; and *Corus UK* v *Commission*, cited in footnote 94, paragraph 19.

96 — See also my Opinion in *PKK and KNK* v *Council*, cited in footnote 59, point 67.

97 — It can be inferred from the order in *UER* v *M6 and Others*, cited in footnote 91, paragraph 74, that the judgment at first instance may not be based on a '*nouvelle thèse inspirée par le Tribunal*'.

98 — See paragraph 201 of the judgment under appeal and point 140 of this Opinion.

99 — Article 62 of the Rules of Procedure of the Court of First Instance.

100 — See Article 76a of the Rules of Procedure of the Court of First Instance and *Royal Philips Electronics* v *Commission*, cited in footnote 41, paragraph 205.

it relating to the right to be heard specifically on grounds of the belated transmission of documents by the Commission. It was an infringement of the rights of the defence and thus a procedural error for the Court of First Instance not to give the Commission any opportunity, before delivering its judgment, to comment on this aspect.

156. The complaint raised by the Commission in this regard is therefore well founded. Since it cannot be ruled out that, if the problem of belated transmission had been discussed in the proceedings at first instance, the Commission would have put forward arguments which would have led the Court of First Instance to a different conclusion, its procedural error justifies the setting aside of the judgment under appeal.

(c) The effects on the Commission's decision of a possible defect relating to the right to be heard (fourth part of the second ground of appeal)

157. The Commission further complains that the Court of First Instance erred in law by failing to show what effects the possible infringement of Alrosa's right to be heard had on the decision at issue.

158. It is consistent with settled case-law that a procedural error justifies the annulment of a Commission decision only where the outcome of the administrative procedure might have been different without that procedural error. [101] In other words, it cannot have been ruled out that the procedural error affected the content of the Commission decision so that the decision might have been substantively different. [102]

159. In the present case the Court of First Instance established a defect relating to the right to be heard, but at the same time stated that 'the extent to which such an irregularity might have affected the Commission's decision cannot be precisely determined in the present case.' [103]

160. This somewhat misleading wording – at least at first glance – indeed leads one to suspect that the Court of First Instance annulled the decision at issue because of a procedural error without first giving sufficient consideration to whether that procedural error could have had any effects on the content of the decision.

101 — Case 30/78 Distillers Company v Commission [1980] ECR 2229, paragraph 26, and Case C-301/87 France v Commission [1990] ECR I-307, paragraph 31; similarly, *Aalborg Portland and Others* v *Commission*, cited in footnote 37, paragraph 73, and Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraphs 97 and 98.

102 — Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 47, and Case 150/84 *Bernardi* v *Parliament* [1986] ECR 1375, paragraph 28.

103 — Paragraph 203 of the judgment under appeal.

161. On closer inspection, however, this wording reflects the Court's conviction *that* the defect established by it relating to the right to be heard could have affected the outcome of the administrative proceedings. Only the specific *extent* of such effects could not be precisely determined in the view of the Court of First Instance.

162. The Court of First Instance thus complies with the legal requirements governing the annulment of a decision on grounds of procedural errors, despite the misleading wording chosen by it. Such annulment does not depend on the precise extent to which the content of the decision was influenced by the procedural errors.

163. If the procedural error established by the Court of First Instance consists in an infringement of the right to a fair hearing, it would in any case be difficult to ascertain to what extent this affected the content of the Commission's decision. It can never be completely ruled out that an identical decision would have been adopted even if the parties had been duly heard.

164. By being heard, the parties are intended to be given an opportunity to submit observations and thus to influence the substance of the Commission's decision-making process. The mere possibility that a defect relating to the right to be heard affected the content of the decision therefore justifies its annulment.

165. The fourth part of the second ground of appeal is thus unfounded.

(d) The scope of Alrosa's right to be heard (third part of the second ground of appeal)

166. Lastly, the Commission alleges that in the present case the Court of First Instance misinterpreted the scope of Alrosa's right to be heard.

(i) Preliminary remark

167. Under Article 41(2) of the Charter of Fundamental Rights of the European Union,[104] every person has the right to be

104 — The Charter of Fundamental Rights was solemnly proclaimed first in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and then again in Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1).

heard, before any individual measure which would affect him or her adversely is taken. That fundamental right is to be respected in the interpretation and application of Regulation No 1/2003. [105]

168. The right to a fair hearing is at the same time part of the rights of the defence, the observance of which 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. [106]

169. For antitrust proceedings the right to a fair hearing is given concrete expression inter alia in Article 27 of Regulation No 1/2003 and in Articles 10 and 15 of implementing Regulation No 773/2004.

105 — Recital 37 in the preamble to Regulation No 1/2003. Although the Charter of Fundamental Rights as such still does not have any binding legal effects comparable with primary law, it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order, particularly where a Community measure makes express reference to it; see Case C-540/03 *Parliament* v *Council* ('family reunification') [2006] ECR I-5769, paragraph 38, and point 108 of my Opinion of 8 September 2005 in that case.

106 — See the case-law cited in footnote 94; specifically on the observances of the rights of the defence in administrative proceedings concerning competition law, see for example Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 32, and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 26.

(ii) The complaint raised by the Commission

170. The Commission essentially alleges that the Court of First Instance wrongly treated Alrosa as an 'undertaking concerned'.

171. In actual fact, the Court of First Instance states that only De Beers could be an 'undertaking concerned' in the proceedings under Article 82 EC, but that Alrosa is not a mere 'interested third party'. [107] In support of its view, the Court refers to the manner in which the Commission initiated the two sets of proceedings relating to the agreement between De Beers and Alrosa. [108] It also stresses, citing examples, that the two parallel sets of proceedings under Article 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'. [109] Against this background, the Court of First Instance concludes that Alrosa should be 'accorded, as regards the proceedings taken as a whole, the rights given to an "undertaking concerned" within the meaning of Regulation No 1/2003', even though, strictly speaking, Alrosa did not fall to be so classified in the proceedings relating to Article 82 EC. [110]

172. These arguments are not convincing.

107 — Paragraphs 176 and 177 of the judgment under appeal.

108 — Paragraph 178 of the judgment under appeal.

109 — Paragraph 186 of the judgment under appeal.

110 — Paragraph 187 of the judgment under appeal.

173. With regard to the right to a fair hearing as laid down in ordinary legislation, the Community legislature has deliberately made graduations in Article 27 of Regulation No 1/2003 and in Articles 10 and 15 of implementing Regulation No 773/2004 between the various persons who may be involved in one way or other in antitrust proceedings. The rights of the parties to the administrative proceedings (also known as 'undertakings concerned') extend further than the rights of third parties who have an interest in the outcome of the proceedings, but will not themselves be the addressees of the decision to be adopted by the Commission.

174. It is common ground that in the present case the Commission conducted two parallel sets of administrative proceedings, one based on Article 81 EC and the other on Article 82 EC. In the former set of proceedings, Alrosa, as a party to the notified agreement, like De Beers, had the status of an undertaking concerned. In the latter set of proceedings, on the other hand, that status was held only by De Beers as the presumed dominant undertaking, and not by Alrosa.

175. In the proceedings under Article 82 EC, which were concluded with the decision at issue, Alrosa therefore enjoyed only the less extensive rights of an interested third party.

176. Only if it transpired that in the present case the Commission arbitrarily, i.e. without an objective reason, made a single factual situation the subject of two separate sets of proceedings would Alrosa have to be accorded the rights enjoyed by an undertaking concerned 'as regards the proceedings taken as a whole', to use the words of the Court of First Instance. [111]

177. However, the Court of First Instance did not find that the Commission misused its powers in that way in the present case. Nor was there any evidence in support of that view. On the contrary, it was objectively justified to conduct two separate sets of administrative proceedings in view of their different material legal bases – Article 81 EC (Article 53 EEA), on the one hand, and Article 82 EC (Article 54 EEA), on the other. With regard to Article 82 EC (Article 54 EEA), only De Beers, as the presumed dominant undertaking, could be the addressee of the statement of objections and the Commission's final decision.

178. The Court of First Instance therefore erred in law in assuming that Alrosa had to be treated as an undertaking concerned in relation to the proceedings under Article 82 EC.

179. Alrosa objects that the decision at issue is equivalent, in terms of its practical

111 — Paragraph 187 of the judgment under appeal.

effects, to a prohibition addressed to it under Article 7 of Regulation No 1/2003. It will be prevented from doing business with De Beers in the future.

180. It should be noted that the operative part of the decision at issue is addressed only to De Beers and makes binding its voluntary abandonment of purchases from Alrosa. The effects on future business relations to which Alrosa refers stem at best *indirectly* from the decision at issue. Such mere *reflex effects* of decisions on commitments are not typical of undertakings concerned (parties), however, but of interested third parties.

181. Contrary to the view taken by Alrosa, that undertaking also cannot be regarded as an undertaking concerned in relation to Article 82 EC because the Commission previously rejected the joint commitments by De Beers and Alrosa. The joint commitments were not rejected in the proceedings under Article 82 EC, which are relevant here, but in the parallel proceedings under Article 81 EC. Consequently, the rejection of the joint commitments is not the subject-matter of the decision at issue in the proceedings under Article 82 EC; rather, the joint commitments were merely a factor to be taken into consideration by the Commission in its examination of proportionality having regard to Alrosa's interests as an interested third party.

182. The Court of First Instance therefore erred in law by treating Alrosa as an undertaking concerned. That legal error is also reflected in the further statements made by the Court in the judgment under appeal, up to the annulment of the decision at issue. [112] In particular, it forms the basis for the Court's view that the Commission should have granted Alrosa access to the file. [113] The right of access to the file is enjoyed only by the parties to the administrative proceedings (second sentence of Article 27(2) of Regulation No 1/2003) and can be exercised only after the notification of the statement of objections (second sentence of Article 15(1) of Regulation No 773/2004). Because Alrosa was not a party to the administrative proceedings under Article 82 EC which are relevant here, but only a party to the parallel administrative proceedings under Article 81 EC, it had no right of access to the file before the decision at issue was adopted.

183. Against this background, the third part of the second ground of appeal is well founded and justifies the setting aside of the judgment under appeal.

112 — Paragraphs 197 to 203 of the judgment under appeal.
113 — Paragraph 197 of the judgment under appeal.

C – *Interim conclusion*

184. Even though some of the complaints raised by the Commission are unfounded, it must be concluded, in summary, that its appeal should be upheld and that the judgment under appeal should be set aside in its entirety.

VI – Assessment of the action brought at first instance by Alrosa

185. Under the first paragraph of Article 61 of its Statute, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

186. That is the situation in the present case. All points of fact and law which are relevant to a decision on the action brought by Alrosa have already been discussed before the Court of First Instance, and the parties had the opportunity to exchange their arguments. The matter does not therefore need to be referred back to the Court of First Instance; the Court of Justice is able itself to decide the action brought by Alrosa for the annulment of the decision at issue.

A – *The formal lawfulness of the decision at issue (first plea)*

187. With its first plea at first instance, Alrosa alleges that its right to a fair hearing has been infringed.

1. Alrosa's right to a fair hearing

188. In its defence at first instance, the Commission appears to question whether Alrosa had any right to a fair hearing in the present case.

189. Such a view would be devoid of any legal basis.

190. As has been mentioned, [114] Alrosa was not a party ('undertaking concerned') to the proceedings under Article 82 EC which are relevant here. However, there is no doubt that Alrosa had a legitimate interest in the outcome of the proceedings. That interest stems from the fact that Alrosa was the prospective contractual partner of the presumed dominant undertaking. Such a contractual partner must be heard by the Commission on its request, before a decision on commitments which makes binding the cessation of any supply relationship between the dominant undertaking and its contractual partner can be adopted.

192. However, it is also clear that, as an interested third party, Alrosa had less extensive rights than an 'undertaking concerned' or a party within the meaning of Article 9(1) and Article 27(1) and (2) of Regulation No 1/2003. In particular, Alrosa had no right to be notified of the statement of objections or a comparable document, or to access the file (see Article 27(2) of Regulation No 1/2003 and Article 10(1) and (2) and Article 15(1) of Regulation No 773/2004).

2. Object of Alrosa's right to be heard

191. For the purposes of the present dispute, however, there is no need to answer the question whether Alrosa had to be heard as an interested third party within the meaning of second sentence of Article 27(3) of Regulation No 1/2003. [115] According to case-law, the fundamental right to a fair hearing must be guaranteed even in the absence of any rules governing the proceedings in question. [116] Because the decision on commitments constituted an individual measure which would affect Alrosa adversely, Alrosa had to be heard in any case if it so requested. This is also supported by the view of the legislature which is apparent in Article 27(4) of Regulation No 1/2003.

193. The parties are in dispute, above all, as to the object of Alrosa's right to be heard.

194. Alrosa requests clarification about the reasons for the rejection of the commitments it offered jointly with De Beers and would like to make observations in this regard.

195. However, the joint commitments by De Beers and Alrosa were offered not in the proceedings under Article 82 EC, but in the

114 — See above, points 174 and 175 of this Opinion.

115 — The position of the third paragraph of Article 27 of Regulation No 1/2003 behind the first paragraph indicates that it is intended to apply only with regard to the adoption of decisions under Articles 7, 8, 23 and 24(2) of that regulation.

116 — See the judgments cited in footnote 106.

parallel proceedings under Article 81 EC. They are not therefore the subject-matter of the decision at issue; nor were they rejected in that decision, but merely considered by the Commission in assessing the case from the point of view of competition law. However, the decision at issue concerned only the unilateral commitments by De Beers, which the Commission made binding.

196. Consequently, Alrosa had to be heard only with regard to the unilateral commitments by De Beers and the Commission's intention to make those commitments binding. Ultimately, it was from those unilateral commitments that the alleged adverse effect on Alrosa followed: the cessation of any selling relationship with De Beers in relation to rough diamonds.

197. However, all this certainly does not mean that the joint commitments by De Beers and Alrosa were irrelevant when Alrosa was heard prior to the decision at issue.

198. In order to allow interested third parties like Alrosa to comment meaningfully, the Commission must inform them of the content of its intended decision, or at least the broad lines of that decision. This includes not only information about the substance of the commitments which are to be made binding, but also information on the main reasons for which the Commission has accepted those commitments.

199. In the present case, the Commission therefore had to inform Alrosa about the substance of the unilateral commitments by De Beers, which consisted in a gradual reduction of rough diamond purchases from Alrosa and in the complete cessation of such purchases from 2009, and also explain to Alrosa the main reasons for which it intended to make binding those unilateral commitments.

200. It is evident that the Commission also had to explain that the joint commitments by De Beers and Alrosa which it had previously received were not sufficient to address the competition problems identified by it. Only in that way could Alrosa be placed in a position to comment meaningfully on the proportionality of the intended decision having regard to its own commercial interests. From that perspective, Alrosa is correct to state that the decision at issue is closely connected with the Commission's previous rejection of the joint commitments.

201. Against this background it must be examined below whether the Commission observed Alrosa's right to be heard.

3. No infringement of Alrosa's right to be heard

202. Alrosa claims that it was not provided by the Commission with the revised assessment of the facts on which the Commission ultimately based its rejection of the joint commitments and its acceptance of the unilateral commitments by De Beers in the decision at issue. Alrosa was also not given any opportunity to comment meaningfully on this reassessment of the facts by the Commission.

203. However, as can be seen from the factual findings of the Court of First Instance, [117] the Commission informed Alrosa and De Beers on 27 October 2005 at a meeting on the outcome of its market test. At the same time, the Commission invited both undertakings 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, in the light of the outcome of the market test.

204. Alrosa was thereby made aware that the Commission no longer considered that the joint commitments by De Beers and Alrosa were sufficient to address the competition problems identified by it. Furthermore, from that meeting Alrosa knew that the Commission considered that a continuation of the trading relationship between Alrosa and De Beers, as envisaged in the notified agreement and also in the joint commitments, was not (or no longer) acceptable and that the Commission was only prepared to accept commitments intended to lead to a complete cessation of the trading relationship between both undertakings.

205. If it is borne in mind that as a party to the parallel proceedings under Article 81 EC, Alrosa was very familiar with the market conditions and the background to the proceedings, even such oral explanations by the Commission could suffice to allow Alrosa to submit meaningful comments concerning its own commercial interests as well as the proportionality – lacking in its view – of a complete cessation of its trading relationship with De Beers. As an interested third party, Alrosa had no right in any event to any written information, let alone to a document which would be comparable in scope with a statement of objections.

206. Therefore Alrosa had an opportunity effectively to assert its position with regard to a complete cessation of the trading

117 — Paragraph 21 of the judgment under appeal; see also point 27 of this Opinion.

relationship with De Beers from the meeting on 27 October 2005.

207. Alrosa also availed itself of that opportunity. It is clear from the papers before the Court that by letter of 6 December 2005 the undertaking explained its position to the member of the Commission responsible for competition matters. [118] By letter of 6 February 2006, Alrosa also made observations on the unilateral commitments by De Beers and on the third-party comments arising from the market test. [119]

208. As an interested third party, Alrosa could not lay claim to any more than such an opportunity to make observations.

209. The complaint made by Alrosa that its right to a fair hearing was infringed is therefore to be rejected as unfounded.

210. It should be mentioned for the sake of completeness that the right to be heard enjoyed by interested third parties does not imply any kind of right to submit new commitments to the Commission prior to the adoption of a decision. Only undertakings concerned within the meaning of Article 9(1) of Regulation No 1/2003 can effectively offer commitments. [120] No defect relating to the right to be heard can therefore follow from the fact that it was impossible for Alrosa – for reasons of time, for instance – to 'propose new joint commitments with De Beers'. [121] This is misunderstood by the Court of First Instance in paragraph 201 of the judgment under appeal, and also by Alrosa, when it concurs with the Court of First Instance in this regard.

B – *The substantive lawfulness of the decision at issue (second and third pleas)*

211. The substantive lawfulness of the decision at issue is the subject of two further pleas, by which Alrosa alleges, at first instance, infringements of Article 82 EC, Article 9 of Regulation No 1/2003 and the principles of contractual freedom and proportionality.

118 — Alrosa itself submitted this letter to the Court of First Instance as Annex 14 to its application at first instance.

119 — Paragraph 24 of the judgment under appeal; see also point 30 of this Opinion.

120 — See immediately below, points 214 to 216 of this Opinion.

121 — Paragraph 201 of the judgment under appeal.

1. Infringement of Article 9 of Regulation No 1/2003 (second plea)

212. By its second plea at first instance, Alrosa claims that Article 9 of Regulation No 1/2003 does not provide a sufficient legal basis for the decision at issue. In this connection, Alrosa relies on a strict interpretation of that provision. First of all, in the view of Alrosa, the Commission could have accepted only joint commitments by De Beers and Alrosa. Secondly, a time-limit should have applied to the decision on commitments.

213. Neither argument is sound.

(a) The right to offer commitments under Article 9 of Regulation No 1/2003

214. Commitments within the meaning of Article 9 of Regulation No 1/2003 may be offered only by 'undertakings concerned'. As has already been mentioned, [122] these are the only parties to the respective antitrust proceedings. In proceedings under Article 82 EC like the present case, only the presumed dominant undertaking [123] may possibly be regarded as an undertaking concerned. Only that undertaking may offer commitments with legal effect.

215. The Commission could therefore accept unilateral commitments by De Beers, the presumed dominant undertaking, in proceedings under Article 82 EC and make those commitments binding under Article 9(1) of Regulation No 1/2003. [124] It was by no means restricted to accepting joint commitments by De Beers and Alrosa. Rather, joint commitments could be offered only in the parallel proceedings under Article 81 EC.

216. It would certainly have been conceivable for the Commission to continue its efforts, in those parallel proceedings under Article 81 EC, to find a solution to the competition problems identified by it, together with both undertakings, De Beers and Alrosa. However, in the final analysis it is not a question of law whether this path or the path of unilateral commitments in proceedings under Article 82 EC was preferable, but a question

122 — See above, points 174 and 175 of this Opinion.

123 — Even several undertakings together can be dominant ('collective dominant position').

124 — See also to this effect paragraphs 89 and 90 of the judgment under appeal.

of expedience, which the Community courts do not have jurisdiction to assess.

(b) Imposing a time-limit on the validity of a decision on commitments

217. As regards the period of validity of its decision on commitments, under Article 9(1) of Regulation No 1/2003 the Commission is not required to apply a time-limit. Unlike the Commission proposal [125] for Regulation No 1/2003, Article 9(1) does not specifically provide that a time-limit must be imposed on the decision. [126]

218. If it cannot be foreseen that an undertaking like De Beers will lose its dominant position in the short or medium term, it would also make little sense to impose a time-limit on the decision on commitments.

219. However, even in the case of a decision on commitments with no time-limit the undertakings concerned and third parties are not left without protection. Under Article 9(2)(a) of Regulation No 1/2003, where there has been a material change in any of the facts the proceedings may be reopened. Such a material change could be taken to exist, for example, if the market conditions changed over time in such a way that the formerly dominant undertaking loses its primacy on the market.

220. In accordance with the principle of good administration, [127] the Commission is required to examine without delay any substantiated indication of a material change in the facts and to take a decision on the reopening of proceedings.

(c) Interim conclusion

221. Because a strict interpretation of Article 9 of Regulation No 1/2003, as envisaged by Alrosa, is not successful, the second plea at first instance is therefore unfounded.

125 — Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ('Regulation implementing Articles 81 and 82 of the Treaty'), presented by the Commission on 27 September 2000 (COM(2000) 582 final, published in OJ 2000 C 365E, p. 284); see in particular the second sentence of the first paragraph of Article 9 of that proposal.

126 — See also paragraph 91 of the judgment under appeal.

127 — The right to good administration found its way into Article 41 of the Charter of Fundamental Rights of the European Union, to which reference is made in recital 37 in the preamble to Regulation No 1/2003.

2. Infringement of Article 82 EC, Article 9 of Regulation No 1/2003 and the principles of contractual freedom and proportionality (third plea)

222. With its third plea at first instance, Alrosa claims that the 'absolute and potentially indefinite prohibition on De Beers acquiring rough diamonds directly or indirectly from Alrosa' which forms the basis of the decision at issue infringes Article 82 EC and Article 9 of Regulation No 1/2003 in conjunction with the fundamental principles of contractual freedom and proportionality.

223. This plea should be assessed first from the perspective of contractual freedom and secondly from the point of view of proportionality.

(a) Contractual freedom (first part of the third plea)

224. Alrosa claims that the decision at issue could not be based on Article 82 EC and Article 9 of Regulation No 1/2003 because it breaches the principle of contractual freedom. The Commission prescribed a *de facto* boycott of Alrosa.

225. Contractual freedom is one of the general principles of Community law. It stems from the freedom to act for persons. It is also inseparably linked to the freedom to conduct a business. [128] [129]In a Community which must observe the principle of an open market economy with free competition, [130] contractual freedom must be guaranteed. The case-law of the Court of Justice also recognises that economic operators must enjoy contractual freedom. [131]

226. In adopting competition decisions the Commission is required to take account of the principle of contractual freedom and the freedom to conduct a business. [132]

128 — In his Opinion in Case C-7/97 *Bronner* [1998] ECR I-7791, point 56, Advocate General Jacobs stated that 'the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification.'

129 — Article 16 of the Charter of Fundamental Rights of the European Union.

130 — Article 4(1) EC and Article 98 EC; see also Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 4.

131 — Case C-518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraph 66; see also Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraphs 45 and 46, and Case C-277/05 *Société thermale d'Eugénie-les-Bains* [2007] ECR I-6415, paragraph 21.

132 — See Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraphs 51 to 53, and – in relation to the freedom to conduct a business – Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 180.

227. However, contractual freedom implies not only the freedom to conclude contracts (positive contractual freedom), but also the freedom not to conclude contracts (negative contractual freedom).

228. By its unilateral commitments made to the Commission, De Beers exercised its negative contractual freedom. The undertaking *voluntarily* decided not to conclude contracts with Alrosa in the future.

229. The voluntary nature of that decision is also not affected by the fact that De Beers offered its commitments in the course of ongoing antitrust proceedings with the aim of averting a decision imposing a prohibition and including a finding that it had a dominant position. The simple announcement of antitrust proceedings or their continuation by the Commission, even up to a prohibition decision and a possible fine, is not unfair, but a completely lawful means by which the Commission pursues the legitimate aim of effectively protecting competition against distortion. [133]

230. It is true that this has meant that Alrosa has lost its desired contractual partner for the future. However, this is one of the risks which must be borne by Alrosa, like any other economic operator in an open market economy. This does not impair the contractual freedom enjoyed by Alrosa. [134]

231. Nor did the Commission infringe the principle of contractual freedom by the fact that it made binding the unilateral commitments and thus the decision taken by De Beers not to engage in a future trading relationship with Alrosa. Rather, in the decision at issue, it merely defined the limits of contractual freedom which follow, for all economic operators, from the directly applicable competition rules of the EC Treaty and the EEA Agreement. The limit of (positive) contractual freedom of undertakings lies where a contract with an anti-competitive object or an anti-competitive effect within the meaning of Article 81 EC (Article 53 EEA) is concluded

133 — See my Opinion in *Cementbouw*, cited in footnote 23, point 71.

134 — There is nothing in the present case to suggest that there exists any obligation to contract under which De Beers would continue to be required to purchase certain quantities of rough diamonds from Alrosa. I would point out merely for the sake of completeness that at the hearing before the Court of Justice there was a discussion with the parties of the 'essential facilities doctrine' having regard to the De Beers' distribution network. However, as Alrosa itself has acknowledged, such a distribution network cannot be regarded as so vital that it would constitute an essential facility to which De Beers would necessarily have to grant other market operators access. Even if it were not economically viable for Alrosa to create its own distribution system, in accordance with the case-law of the Court of Justice there would not be any obligation to contract on the part of De Beers (Case C-7/97 *Bronner* [1998] ECR I-7791, paragraphs 41 to 46, in particular paragraph 45; with regard to the 'essential facilities doctrine' see also '*Magill*', cited in footnote 23, paragraphs 49 to 57, and Case C-418/01 *IMS Health* [2004] ECR I-5039).

or where an undertaking abuses its dominant position within the meaning of Article 82 EC (Article 54 EEA) by means of a contract.

232. Alrosa objects that in its decision the Commission did not actually oppose abusive behaviour, but manifestly lawful behaviour. The mere purchase or sale of a product, even by a dominant undertaking, cannot be abusive as such unless the transaction was based on unfair terms. In support of its argument, Alrosa cites case-law, in particular the judgment in *Langnese-Iglo* v *Commission*, [135] according to which the conclusion of exclusive purchasing agreements may not be prohibited generally and indefinitely.

233. However, this line of argument does not go far enough. Alrosa fails to recognise that De Beers is not only a buyer on the market for rough diamonds, but also the world's largest producer on that market. The supply relationship between Alrosa and De Beers envisaged by the notified agreement would not therefore be vertical, but horizontal, i.e. an agreement between competitors. This represents a crucial difference to the *Langnese-Iglo* case, which concerned vertical exclusive purchasing agreements. [136]

234. As has already been mentioned above, it is generally not consistent with normal competitive behaviour for one undertaking regularly to buy up the production of its largest competitor – or at least a considerable proportion of it – in particular if it holds a dominant position. [137] This was also acknowledged by Alrosa in response to queries at the hearing before the Court of Justice.

235. Moreover, De Beer's role as a 'market-maker', which is known from past experience, and its efforts to regulate production on the diamond market are also relevant in the present case. [138] In view of these factors 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. In order to avoid this risk to competition, the Commission was permitted

135 — Alrosa relies in particular on Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraphs 206 and 207, confirmed by the judgment in Case C-279/95 P *Langnese-Iglo* v *Commission* [1998] ECR I-5609, paragraph 74.

136 — Case T-7/93 *Langnese-Iglo* v *Commission*, cited in footnote 135, paragraphs 4 and 5.

137 — See above, points 119 to 122 of this Opinion.

138 — Recitals 25, 26, 28 and 30 in the preamble to the decision at issue, and paragraphs 64 and 65 of the Commission's defence in the proceedings at first instance; see also paragraph 83 of the judgment under appeal.

to make binding the unilateral commitments by De Beers which envisaged the complete cessation of that supply relationship.

236. Alrosa further claims that it will be denied access to the largest purchaser on the market. Alrosa takes the view that the Commission should have permitted it at least ad hoc sales to De Beers, for example by way of auctions to the highest bidder. I have already explained above that none of these arguments is sound. [139]

237. Furthermore, Alrosa expresses the fear that without De Beers as a buyer it no longer has any certainty that it can sell its rough diamonds at economically attractive prices. The negotiating power of the remaining buyers would increase, with the result that only lower prices could be achieved, leading to a distortion of competition to the detriment of Alrosa.

238. However, in an open market economy each economic operator must itself bear the sales risk for its own products. If it were intended to allow a supply relationship which is questionable from the point of view of Article 82 EC to continue for the benefit for certain undertakings, ultimately that would shield competitors from competition and accord priority to the interests of the undertakings concerned at the expense of the public interest in undistorted competition (Article 3(1)(g) EC). However, the objective of European competition law must be to protect competition and not competitors, because indirectly that is of benefit also to consumers and the public at large. [140]

239. It is a reflection not of less, but of more competition that Alrosa must now, unlike previously, conduct more intensive price negotiations with the remaining buyers on the market for rough diamonds. Furthermore, as the Commission argues, without being contradicted on this point, the market is characterised by a large number of comparatively small buyers, whose negotiating power must not be overestimated.

240. Lastly, Alrosa claims that the decision at issue will have detrimental effects on competition because it will create a considerable risk of reducing production if Alrosa can no longer find any buyers for its rough diamonds. However, as the Commission rightly contends, such a scenario is unlikely, assuming that demand for diamonds on the downstream markets remains constant. Alrosa itself has not put forward any arguments to suggest falling demand on those downstream markets.

139 — See points 119 to 123 and 128 to 130 of this Opinion.

140 — See point 71 of my Opinion in Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529.

241. All in all, it must be concluded that the decision at issue does not infringe the principle of contractual freedom. The first part of the third plea at first instance is thus unfounded.

(b) Proportionality (second part of the third plea)

242. Alrosa claims that the decision at issue could not be based on Article 82 EC and Article 9 of Regulation No 1/2003 because it infringes the principle of proportionality.

243. Alrosa essentially argues that an absolute prohibition on De Beers acquiring rough diamonds from Alrosa was not necessary for two reasons. First, the notified agreement in any case reserved no more than 50% of Alrosa's diamond production for De Beers. Second, the Commission has in front of it a less restrictive alternative to a total sales prohibition in the form of the joint commitments by De Beers and Alrosa.

244. These arguments cannot justify the annulment of the decision at issue.

245. First of all, it should be borne in mind that the examination of whether commitments are appropriate and necessary with a view to a decision under Article 9 of Regulation No 1/2003 requires the Commission to undertake an appraisal of complex economic matters, in which regard it enjoys a margin of assessment. [141]

246. Within the scope of that margin of assessment the Commission had to decide in the present case, first, whether the notified agreement gave grounds for concerns and, second, whether the joint commitments by De Beers and Alrosa could be taken into consideration as less onerous measures compared with the unilateral commitments by De Beers.

247. As has already been mentioned, [142] the Community judicature has the power to examine the substantive lawfulness of such a Commission decision with a view to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment. It must not only establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which was to be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

141 — See above, points 70 to 75 of this Opinion.
142 — See above, point 77 of this Opinion.

248. It is only disputed in the present case whether the facts ascertained by the Commission could support the conclusions drawn by it, namely that the notified agreement gave grounds for concerns having regard to Article 82 EC and that the joint commitments by De Beers and Alrosa did not constitute an appropriate alternative to the unilateral commitments which were made binding.

(i) The existence of a competition problem

249. As far as the existence of a competition problem is concerned, Alrosa confined itself to stating succinctly that in the past exclusive supply relationships with dominant undertakings on a scale comparable with the notified agreement (approximately 50% of Alrosa's total production) have been regarded as unlikely to raise competition concerns

250. There is no need to examine in the present case whether this assertion which was made by Alrosa and not further substantiated is correct, as the present case is in any event characterised by a number of distinctive features.

251. First, the roughly 50% of Alrosa's annual diamond production which was to be the subject of the notified agreement with De Beers represented its entire production intended for export at that time. [143] Second, De Beers is not just any buyer of Alrosa's goods, but the world's leading producer of rough diamonds, that is to say a competitor of Alrosa, and also dominant on the market according to the preliminary assessment by the Commission. [144] Third, according to the Commission's findings, there was evidence that the notified agreement would enable De Beers to regulate production on the diamond market as a 'market-maker'. [145]

252. In these circumstances, there can be no objection to the Commission's conclusion that the notified agreement gave grounds for competition concerns as regards its compatibility with Article 82 EC. The Commission could reasonably assume that that agreement would lead to an abuse of the dominant position held by De Beers.

143 — Paragraph 13 of the judgment under appeal.

144 — Paragraphs 9 and 14 of the judgment under appeal; recitals 23 to 27 in the preamble to the decision at issue.

145 — Recitals 28 and 30 in the preamble to the decision at issue.

(ii) The appropriateness and necessity of the unilateral commitments by De Beers

253. As regards the appropriateness and necessity of the unilateral commitments by De Beers which were made binding and envisaged the complete cessation of the trading relationship with Alrosa, the following points should be made.

254. It is correct that the joint commitments by De Beers and Alrosa were before the Commission as supposedly less onerous means. The Commission was therefore required to examine whether those joint commitments were equally appropriate as the much further-reaching unilateral commitments by De Beers for addressing the competition problem identified by it. For the purpose of that examination, the Commission relied on a market test and documented the results of that test in the decision at issue, albeit extremely briefly. [146]

255. Alrosa criticised the results of the market test established by the Commission [147] in the administrative proceedings, but did not challenge them in its action before the Court of First Instance. Before the Community judicature Alrosa claimed for the first time at the appeal stage that the observations submitted by the 21 third parties were not meaningful. [148] Such a course of action is inadmissible because the subject-matter of the dispute in the proceedings may not be extended compared with the proceedings at first instance by new pleas in law (Article 42(2) in conjunction with Article 118 of the Rules of Procedure of the Court of Justice). [149] I will therefore base the following considerations on the Commission's findings on the results of the market test, which Alrosa did not challenge in good time before a court.

256. The comments made by third parties in the market test amongst other things gave voice to the concern that a continuation of the long-term purchase relationship would allow De Beers to hinder Alrosa from becoming a fully independent competitor. [150] Furthermore, a vast majority of interested third parties stated that there should be no purchase relationship between De Beers and Alrosa whatsoever. [151]

146 — Recitals 41 and 42 in the preamble to the decision at issue.

147 — See recital 41 in the preamble to the decision at issue.

148 — Paragraphs 67 and 77 of the response and paragraph 17 of the rejoinder submitted by Alrosa. In particular, Alrosa complained that most of the negative comments from third parties were based on a standard model answer and would not raise any competition problems relevant to the present proceedings.

149 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59; *Storck* v *OHIM*, cited in footnote 36, paragraph 45; *PKK and KNK* v *Council*, cited in footnote 59, paragraph 61; and *France Télécom* v *Commission*, cited in footnote 64, paragraph 60.

150 — Second indent of recital 41 in the preamble to the decision at issue.

151 — Third indent of recital 41 in the preamble to the decision at issue.

257. In these circumstances, there can be no objection to the Commission's conclusion that the joint commitments by De Beers and Alrosa, which were intended to permit continued quantitatively limited sales by Alrosa to De Beers, were not appropriate for addressing the competition problems identified by the Commission. In any case, it was not unreasonable to assume that the joint commitments by De Beers and Alrosa were not equally appropriate to the unilateral commitments by De Beers for meeting the concerns having regard to Article 82 EC.

258. Unlike in *Automec*,[152] to which Alrosa refers on several occasions, in the present case there were not therefore several equally possible solutions to the competition problem identified by the Commission. Consequently, the findings in the judgment in *Automec* v *Commission* cannot be transposed to the present case.

259. All in all, it must therefore be concluded that even knowledge of the joint commitments by De Beers and Alrosa could not prevent the Commission from making binding the further-reaching unilateral commitments by De Beers.

(iii) Proportionality in the narrower sense

260. Alrosa further claims that a prohibition on any sales to De Beers would affect its interests excessively. Alrosa's freedom to enter into agreements with its most important customers at the time will be completely removed, for a potentially indefinite period.

261. This argument overlaps with the first part of the second plea, which relates to contractual freedom. For the reasons mentioned in that connection[153] it is to be rejected.

(iv) Alleged discrimination against Alrosa

262. Finally, Alrosa claims that the decision at issue is arbitrary and discriminates against the undertaking compared with other suppliers who would be able in future to sell rough diamonds to De Beers without having to compete with Alrosa.

152 — *Automec* v *Commission*, cited in footnote 132, in particular paragraph 52.

153 — See above, points 224 to 241 of this Opinion.

263. Alrosa has not produced any evidence to show that other producers actually sell to De Beers to any appreciable extent. However, such a substantiated demonstration would have been necessary in view of the fact that sales between competitors cannot automatically be regarded as normal market behaviour. [154]

264. However, even if it is assumed that such sales will be made, Alrosa will not suffer discrimination compared with other producers as a result of the decision at issue.

265. According to settled case-law, the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [155]

266. In the present case, Alrosa and the other producers of rough diamonds active on the world market are not necessarily in a comparable situation. According to the findings of the Court of First Instance, [156] Alrosa occupies the number two position in the worldwide diamond business and would like to enter into a long-term supply agreement with De Beers, which occupies the number one position. A supply relationship between De Beers and Alrosa is to be assessed differently, simply on account of the prominent market position of those two undertakings, from a potential supply relationship between De Beers and another, much smaller producer of rough diamonds.

267. In addition, the notified agreement was intended to continue an exclusive supply relationship between Alrosa and De Beers which had existed for decades, and which was used by De Beers to safeguard its role as a 'market-maker' and to regulate production on the world market. [157] This historical context also distinguishes the situation of Alrosa from that of other producers on the market.

268. There is therefore no infringement of the general principle of equal treatment and non-discrimination. Contrary to the assertion made by Alrosa, the decision at issue was not arbitrary either, but was based on objective

154 — See above, points 119 to 122 and 234 of this Opinion.

155 — Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56; and Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 74.

156 — Paragraphs 8 and 9 of the judgment under appeal; see also points 14 and 15 of this Opinion.

157 — Recitals 25, 26, 28 and 30 in the preamble to the decision at issue, and paragraphs 64 and 65 of the Commission's defence in the proceedings at first instance; see also paragraph 83 of the judgment under appeal.

considerations, in particular the results of a market test conducted by the Commission.

269. I would add, merely for the sake of completeness, that the decision at issue may not be construed as a licence for possible rough diamond purchases by De Beers from producers other than Alrosa. On the contrary, supply relations between De Beers and other producers would naturally have to be assessed in the light of the circumstances of the individual case in accordance with Articles 81 EC and 82 EC and Articles 53 EEA and 54 EEA.

(v) Interim conclusion

270. All in all, the second part of the third plea at first instance is therefore unfounded.

C – *Interim conclusion*

271. Because none of the pleas raised by Alrosa at first instance is successful, the action brought by it for the annulment of the decision at issue must be dismissed.

VII – Costs

272. Under the first paragraph of Article 122 of its Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs.

273. Under Article 69(2) in conjunction with Article 118 of the 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 applied for Alrosa to be ordered to pay the costs, and Alrosa has been unsuccessful with its claims in both instances, it must be ordered to pay the costs relating to both sets of proceedings.

VIII – Conclusion

274. On the basis of the above considerations, I propose that the Court should:

(1) set aside the judgment of the Court of First Instance of 11 July 2007 in Case T-170/06 *Alrosa* v *Commission*;

(2) dismiss the action by which Alrosa applied to the Court of First Instance for the annulment of Commission Decision 2006/520/EC of 22 February 2006;

(3) order Alrosa to pay the costs relating to both sets of proceedings.