COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05-VI-2008
SG-Greffe(2008) D/203543

CONFIDENTIAL
NOT FOR PUBLICATION

[redacted]
Belgian Association of Dealers, Importers & Exporters of Polished Diamonds
Hoveniersstraat 22
B-2018 Antwerpen

By fax: 03/233 77 68

Subject: **Case COMP/39.221/E-2 –De Beers/DTC Supplier of Choice**

Dear [redacted],

I refer to your complaint, lodged with the Commission on 14 July 2005 alleging violations of Articles 81 and 82 of the EC Treaty in connection with the Supplier of Choice system of distribution of rough diamonds ("SOC") applied by the De Beers Group ("De Beers"), including the Diamond Trading Company ("DTC"). I also refer to the Commission decision of 26 January 2007 rejecting your complaint against the SOC system for lack of Community interest ("rejection decision"). The rejection decision related to the two main strands of your complaint, identified as input foreclosure and abusive information gathering, as well as to other claims advanced in your complaint or in later correspondence. On 6 April 2007, your company lodged an appeal against this decision with the Court of First Instance ("CFI") (Case T-104/07).

In the section of the rejection decision concerning the issue of input foreclosure, the Commission relied on the future termination of De Beers' purchases from ALROSA as one element (among others) allowing it to conclude that there was no Community interest to further pursue your complaint. However, on 11 July 2007 a judgment by the Court of First Instance ("the judgment") annulled the Commission decision of 22 February 2006 rendering binding De Beers' commitments to phase out its purchases from ALROSA by the end of 2008 ("the Commitment decision"). Although the Commission has lodged an appeal against this judgment with the European Court of Justice, this prompted the Commission to assess, in a

supplementary procedure based on Article 7 of Regulation (EC) No 773/2004[1], the possible impact of the annulment of the commitment decision on the overall conclusion on input foreclosure, as set out in the rejection decision. As the judgment did not affect the other strands of your complaint, there was no need to re-examine them, and the present proceedings therefore did not reopen the procedure in this regard.

On 13 November 2007 the Commission addressed to you a letter pursuant to Article 7(1) of Regulation (EC) No 773/2004 ("Article 7(1) letter") regarding the above-mentioned case. In this letter, after careful examination of the factual and legal elements put forward in your complaint, the Commission's conclusions in the rejection decision, the factual changes posterior to the adoption of the rejection decision arising from the judgment, and following a supplementary market investigation conducted with major rough diamond suppliers,[2] the Commission took the preliminary view that there were no grounds for the Commission to reconsider its conclusion in the rejection decision that, in relation to the issue of input foreclosure, there is an insufficient degree of Community interest to conduct a further investigation into the alleged infringements. As already indicated, this procedure only concerns the Commission's conclusion as to the issue of input foreclosure, as set out in section II.1 of the rejection decision addressed to you on 26 January 2007, and does not affect the remainder of this decision. By letter dated 15 January 2008 complemented by a letter dated 12 February 2008 you submitted your comments to the Article 7(1) letter and by letter dated 31 March 2008 you submitted further comments on the non-confidential version of ALROSA's response to the Commission's request for information.

Your comments do not introduce any new factual or legal element that may affect the preliminary conclusion reached in the Article 7(1) letter and, as explained below, do not lead to a different assessment.

In this regard, and for the reasons set out below, the Commission considers that there is not a sufficient degree of Community interest to further act on your complaint in relation to the issue of input foreclosure, and rejects it pursuant to Article 7(2) of Commission Regulation (EC) 773/2004.

For avoidance of doubt, the above conclusion is without prejudice to the Commission's statements of objections in Case COMP/E-2/38.381 De Beers-ALROSA, concerning De Beers purchase relationship with ALROSA, which do not relate to downstream input foreclosure, but concerns De Beers' possibility to control, through purchases of material parts of ALROSA's output, rough diamond output and prices beyond the merits of its own production, and impairing ALROSA's incentives to fully compete with it.

1. THE COMPLAINT

In your complaint and the subsequent correspondence, you essentially alleged that De Beers has, through the introduction of the SOC system for distribution of rough diamonds, excluded "pure" rough dealers (i.e. diamond operators whose prevailing business is the rough diamond

[1] 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, Official Journal L 123, 27.04.2004, pages 18-24

[2] Requests for information have been addressed to [redacted] ALROSA, [redacted], De Beers, [redacted] and [redacted] [redacted] did not reply.

trade and not cutting/polishing) and thereby prevented the secondary market manufacturers (non-sightholders) from receiving sufficient supplies of rough diamonds (input foreclosure). According to your complaint, this put the latter at a competitive disadvantage to sightholders, thereby reducing competition between them in breach of Articles 81 and 82 of the EC Treaty. For more detail, reference is made to section I of the rejection decision.

By letter dated 15 January 2008 complemented by a letter dated 12 February 2008 you replied to the Article 7(1) letter, disagreeing with the Commission's preliminary view that there is not a sufficient degree of Community interest to conduct a further investigation into the alleged infringements and advanced a number of arguments that are addressed below.

2. ALLEGED INFRINGEMENTS OF PROCEDURE

2.1. The legality of the supplementary procedure pursuant to Article 7 of Regulation 773/2004

2.1.1 Legal basis of the supplementary procedure

In your response to the Article 7(1) letter, you question the legality of the procedure followed by the Commission in issuing the Article 7(1) letter. You state that Article 7 is not a useful legal basis for such a procedure, since it does not foresee any possibility for reopening a case - pending before the CFI by supplementary proceedings.

I disagree with your position for the following reasons. The Commission's right to review, amend or withdraw its decisions does not derive from concrete provisions of Regulation 773/2004 but from a general principle of law, accepted by the Community Courts. The possibility of re-examining and, if need be, withdrawing – *ex proprio motu* or at the request of a party – an administrative measure of an individual nature has been firmly established in the Community law.[3] It is a general principle of law that a body which has the power to adopt a particular legal measure has also the power to abrogate or amend it, unless such power is expressly conferred upon another body.[4]

It is acknowledged that the conditions for withdrawing or amending an administrative measure are stricter when that measure confers rights on individuals. The stricter conditions are dictated by the need to protect the legitimate expectations of the addressees of the measure. In such a case, the measure can only be withdrawn if it is contrary to the law and only if the withdrawal occurs within a reasonable period of time.[5] Conversely, where the measure is not favourable for its addressees but imposes a burden on them, it does not create legitimate expectations that need to be safeguarded. In such a case the Community institution is entitled at any time to re-examine its measure.[6]

---

[3] See the Opinion of Advocate General Ruiz-Jarabo in Case C-310/97 P Commission v AssiDomän Kraft Products and Others [1991] ECR I-5363, at para 66.

[4] See Case T- 251/00 Lagardère SCA et Canal +SA v Commission [2002] ECR II-4825.

[5] See the Opinion of Advocate General Riuz-Jarabo in Case C-310/97 P, paras 66; Judgment in Joined Cases 7/56 and 3-7/57 Algera and Others v Common Assembly [1957-58] ECR 39; Case C-90/95 P De Compte v Parliament [1997] ECR I-1999.

[6] See the Opinion of Advocate General Ruz-Jarabo in Case C-310/97 P, para 67.

The rejection decision is not an act favourable to you and in this respect it does not create legitimate expectations for you that the Commission should safeguard. Therefore, the Commission has not been under any legal constraints to re-examine its original rejection decision. Moreover, it was for the purpose of ensuring the maintenance of competition and, in your best interest as a complainant, that the Commission took steps to re-examine its rejection decision. This re-examination was triggered by the new factual situation brought about by the annulment of the Commitment decision in Case T-170/06 – a fact which the Commission did not know, and could not have taken into account at the time of the adoption of its rejection decision. Since the additional information collected in the process of the supplementary market investigation did not show sufficient grounds for amending the rejection decision, the Commission issued a supplementary letter pursuant to Article 7(1) of Regulation (EC) 773/2004 informing you of its preliminary conclusion that there are no grounds to reconsider its rejection decision. Article 7(1) is the only provision on the basis of which complainants can be invited to submit their views on the Commission's preliminary assessment that there are no grounds to act on the complaint.

In view of the above consideration, your claim that the Commission's supplementary Article 7(1) procedure has no legal basis is unfounded.

2.1.2. The relationship between the supplementary procedure under Article 7 of Regulation 773/2004 and the proceedings in Case T-104/07

I disagree with your position that with the issuance of the Article 7(1) letter the Commission unduly interferes with the CFI's proceedings pursuant to Case T-104/07 and that the Commission's position with regard to the connection between the supplementary Article 7 procedure and the pending court proceedings in case T-104/07 is unclear.

For the sake of clarity, I would like to emphasise that re-opening a file does not necessarily mean, nor does it require, withdrawing the original rejection decision. As already pointed out, the Commission has the right to re-examine its position, but the final outcome – withdrawing, amending or affirming its original decision, depends on the result of the re-examination it carries out.

The supplementary Article 7(1) procedure had the purpose of verifying the Commission's rejection decision – a verification which the Commission initiated on its own motion in the interest of the public, but also in your interest. Since the annulment of the Commitment decision by the CFI in case T-170/06 affected one of the arguments upon which the Commission's rejection decision was based, namely the commitments offered by De Beers, the Commission took steps to verify whether its initial rejection decision would stand even in view of the new factual situation i.e. absence of these commitments. That said, since all other facts and the Commission's arguments in the original rejection decision remained intact and valid, there were no legal grounds for the Commission to withdraw the rejection decision in its entirety. Such a withdrawal would have been disproportionate in view of the limited scope of the objectives pursued by the supplementary procedure. Moreover, in these circumstances, reopening the entire file would have been contrary to the requirement of procedural economy and the principle of good administration.

I also do not see any contradiction in the Commission's position regarding the connection between the supplementary letter procedure and the procedure in case T-104/07. The procedures are connected to the extent that the supplementary procedure verifies if the rejection decision, now subject to an appeal in Case T-104/07, needs to be reviewed. If the

supplementary market investigation had shown that in the absence of the commitments offered by De Beers there would have been indications that it would be in the Community interest to carry out a full enquiry, and therefore the original rejection decision should have been withdrawn, the proceedings under Case T-104/07 would have become devoid of purpose. In this respect, there can be said to be a connection between the two proceedings. Moreover, provided that you wish to contest the Commission's supplementary rejection decision, you can do so by enlarging your *petitum* in Case T-104/07 in which you contested the original rejection decision.[7] Again, in this respect, there is a connection between the two proceedings. These relations may answer your question as to why the Commission requested the CFI to extend the deadline for the lodging of the Commission's defence pursuant to case T-104/07 with the view to awaiting your comments on the supplementary Article 7(1) letter.

That said, there is certainly no overlap between the two proceedings. The supplementary procedure has very limited and specific scope. It reopens the investigation only partially and does not affect the rest of the rejection decision, subject to an appeal. The supplementary procedure in addition takes into account and assesses a new factual situation, which has not been taken into account in the rejection decision and therefore is not subject to the pending court proceedings. In this respect, the supplementary procedure is independent from the pending one. The supplementary procedure is separate also because the act to which it leads i.e. the supplementary rejection decision can be challenged in a separate action before the CFI.

2.2 Access to documents on which the preliminary assessment is based

You submit that you have been given limited access to the documents and that you have been prevented from fully exercising your rights as complainant. In particular, you state that the Commission did not provide you with access to all non-confidential versions of De Beers' replies and that the Commission should have granted you access to written pleadings in case T-170/06 and to the Commission's appeal filed on 26 September 2007 in case C-441/07.

With regard to these comments, it is important to recall that the Community courts have never recognised a right of access to the entire file for a complainant; this right is only accorded to undertakings who are the addressees of a Statement of Objections in furtherance of their defence.[8] A complainant's right to give its views on agreements or behaviour in which it has a sufficient interest entitles it to view *only* the documents in the file upon which the Commission's preliminary assessment is based.[9]

I refer you to our letters, dated 14 January 2008, 4 February 2008 and the letter of the Hearing Officer dated 7 February 2008. As explained in these letters, you have been given access to all non-confidential versions of documents, which are contained in the Commission's file. For the sake of clarity I would reiterate that the supplementary market investigation was carried out in order to examine the possible effects of the judgment on the rejection decision. The

---

[7] In this regard, see Case 14/81 Alpha Steel v Commission[1982] ECR749, para 8, Joined cases 351/85 and 360/85 Fabrique de Fer de Charleroi and Dillinger Hüttenwerke v Commission[1987]ECR 3639, para 11, Case 103/85 Stahlwerke Peine-Salzgitter v Commission [1988 ECR 4131, para 11, 12; Joined Cases T-46/98 AND t-15/98 CCRE v Commission [2000] ECR II -167, para 33, and Case T-228/02 Organisation des Modjahedines du people d' Iran v Council [2006] ECR II- 4665, para 28.

[8] See Case T-65/96, *Kish Glass Co Ltd v. Commission* [2000] ECR II-1885, paras 33-34; Case C-241/00P, *Kish Glass Co Ltd v. Commission* [2001] ECR I-7759.

[9] See Article 27(2) of Regulation 1/2003 and Article 8 of Regulation 773/2004.

documents that were attached to the Commission supplementary Article 7(1) letter of 13 November 2007, complemented by the non-confidential version of the reply by ALROSA which the Commission received later in the procedure and was sent to you on 14 March 2008, comprise the entirety of the new information received in the course of the supplementary investigation. Any right you may have pursuant to Regulation 1/2003 is limited to the accessible file in Case COMP/ 39.221, to which you have already had access at the time the Commission rejected your original complaint. This access has been supplemented by access to the documents attached to the Commission's letter of 13 November 2007. All the other documents you refer to are not documents on which the Commission has based its provisional assessment

Therefore, your assertions that you have been deprived of the possibility to exercise fully your rights as complainant are unfounded.

In view of these considerations, your allegations that the Commission has infringed the rules of procedure in following the supplementary Article 7 procedure cannot be accepted.

3. THE REJECTION DECISION

The Commission's conclusion concerning the issue of input foreclosure was based on a number of elements set out in its Article 7(1) letter of 4 August 2006 and in the rejection decision.

3.1. Availability of non-De Beers rough diamond production

The Commission took the view that any possible foreclosure impact on non-sightholders would be limited by the availability of rough diamonds produced by suppliers other than De Beers. In its Article 7(1) letter of 4 August 2006 and in the rejection decision, the Commission identified three main sources of supplies:

(i) additional supplies from ALROSA following the adoption of the Commission decision of 22 February 2006 making binding De Beers' commitments to phase out purchases from ALROSA by the end of 2008;

(ii) rough diamonds produced by ALROSA that have been progressively sold outside De Beers since the initiation of Commission proceedings in 2003.

(iii) supplies from other competing producers such as [redacted].

3.2. Availability of De Beers' rough diamond production

In addition, the Commission established that rough diamonds produced by De Beers are available to non-sightholders through the following two sources:

(i)sightholders resell on average 15-20% of their supplies under the SOC distribution system. Amongst them are several sightholders whose principal business is to trade rough diamonds.

(ii)around 10% of all De Beers rough diamonds are sold to non-sightholders through Diamdels.

The five sources of rough diamonds available to non-sightholders were clearly set out and extensively discussed in the Article 7(1) letter of 4 August 2006, pages 6 to 8. Moreover, the Commission took the view that a reduction in the number of sightholders does not necessarily entail a reduction of competition between them. According to the Commission's assessment, it was unclear whether your claim that SOC favours manufacturing sightholders and excludes rough dealers to the detriment of certain non-sightholder manufacturers would, as such, also imply a reduction of competition in the market.

Amongst other points, the Commission also referred to indications suggesting that the alleged past shortages of rough diamonds and price rises, which in your view are a result of input foreclosure due to the SOC, could on the contrary be of a cyclical nature as demand depends to a large extent on economic or luxury goods cycles. They would therefore not be of a permanent nature.

On the basis of all the elements briefly summarised above in a non-exhaustive manner, the Commission reached the conclusion that there appeared to be no appreciable anti-competitive effects that would warrant, also in the light of the limited significance of alleged anti-competitive practices, a reopening of the SOC proceedings within the meaning of the administrative letter of 17 January 2003. More generally, the Commission took the view that that there is not sufficient Community interest to further investigate your claims as to the input foreclosure.

4. ASSESSMENT OF THE CONSEQUENCES OF THE JUDGMENT FOR THE COMMISSION'S CONCLUSION ON LACK OF COMMUNITY INTEREST

This section sets out the Commission's assessment of the consequences of the changes to the rejection decision's factual basis due to the annulment of the commitment decision for the Commission's conclusion on lack of Community interest. In this context, and with respect to the points raised in your complaint, the Commission carefully assessed (a) the specific weight of the commitments in the Commission's reasoning on input foreclosure; and (b) the question of observable changes resulting from the judgment, and other market developments.

As a preliminary remark, the Commission would like to recall that the entirety of its assessment concerns the question whether there is sufficient Community interest for the Commission to pursue the part of your complaint in relation to input foreclosure and not whether there has been an infringement of Articles 81 and/or 82 EC.

(a) Specific weight of the commitments in the Commission's reasoning on input foreclosure

As summarised above, the Commission's conclusion that there is a low likelihood of finding anti-competitive input foreclosure relied on 5 identified sources of supply other than SOC (ALROSA's existing sales outside De Beers, the future ALROSA freed volume due to De Beers' commitments, Diamdels, trading by sightholders, other rough diamond producers). As the assessment generally relied on the combined effects of the supply through these rough diamond sources, none of them was considered an indispensable element of the Commission's conclusion. As to the ALROSA freed volumes, the Commission took the view that "[u]*pon lapse of the transitional period, complete termination of De Beers' purchases from ALROSA will, in our view, <u>further advance</u> competition in the supply of rough diamonds through*

alternative distribution systems competing with the SOC and thus enhance the availability of rough diamonds outside De Beers' control on the market [...]" (emphasis added).

Hence, contrary to what you claim in your response to the Article 7(1) letter, the Commission viewed the ALROSA volumes that would be "freed" through termination of purchases as an additional future improvement to the availability of rough diamonds, and not as a necessary precondition for its rejection decision. Therefore, the question whether the annulment of the commitment decision could modify the conclusion of the Commission in the rejection decision with regard to the issue of input foreclosure deserves a specific assessment and cannot be simply inferred from the rejection decision itself, as you seem to suggest in your response to the Article 7(1) letter. In this assessment, the Commission will consider whether the specific weight of the ALROSA supplies that would have been definitely freed by the commitments would be so significant that the potential absence thereof would lead to a different view on the overall availability of rough diamonds outside SOC.

ALROSA's sales outside De Beers

For the purpose of the present section (a), it will be assumed that De Beers would restore its pre-commitment purchase levels from ALROSA of about USD [redacted] However, it is to be noted from the outset that such reversal of De Beers' purchase policy is unlikely. Following the annulment of the commitment decision, the Commission's case against De Beers' purchase relationship with ALROSA is formally pending as the closure of the administrative procedure which was opened with the original Statements of Objections depended on the commitment decision. It should be emphasised again that this case concerns exclusively De Beers purchase relationship with ALROSA, and does not relate to downstream input foreclosure.

De Beers has announced that it will continue to abide by its commitments until the end of 2008, while it has not yet decided on its purchase policy as of 2009[10]. Since De Beers voluntarily offered these commitments to phase down, and even phase out, its purchases from ALROSA, it could not reasonably be expected that it would now resume purchases at previous levels, in particular since purchases of significant volumes would likely lead the Commission to actively pursue actions against De Beers, which is not ruled out by the judgment. Moreover, ALROSA has been progressively building up its distribution channels, with a sight system foreseen for 2008.[11] However, in order to assess all possible ramifications of your complaint, the Commission opts to rely on the most conservative assessment of the value of ALROSA's rough diamonds available outside De Beers.

Based on the information submitted by ALROSA in its reply to the request for information of 10 October 2007, these sales from ALROSA outside De Beers amounted to USD [redacted] in 2005 and to USD [redacted] in 2006. These supplies are available for customers locally present in Russia, as well as, for manufacturers outside Russia. It should be noted that the amount of sales for 2005 and 2006 includes both sales to De Beers and other customers. The value of the sales to De Beers only in 2006 amounts approximately to USD [redacted]. Should De Beers restore its purchases from ALROSA to pre-commitment levels (USD [redacted]), there

[10] See footnote 5 of the non-confidential version of De Beers' reply to the request for information of 9 October 2007.

[11] See e.g. "An ALROSA Sight System in Sight – to Be in Place in 2008", Edahn Golan, 16 October 2007, Idex, available at: http://idexonline.com/portal_FullNews.asp?id=28482

would be a difference of only [redacted] in comparison with the value of the actual sales in 2006. In view of this slight difference of [redacted], it can be well expected that ALROSA's sales outside De Beers would still be close to [redacted] in the following year.

For the purpose of clarity, I would like to refer to the point you make in your letter dated 31.03.2008 as regards discrepancies in the information submitted by ALROSA to the Commission pertaining to the value of ALROSA's export and the value of its sales in Russia (question 7 and 9 of the Commission's request for information) and the information published in ALROSA's Annual Reports for 2005 and 2006. The assessment of the value of ALROSA's sales outside De Beers' channel is based on the figures related on the total sales from which the sales to De Beers for 2005 and 2006 are deducted. Since the Commission considers the sales worldwide, the figures pertaining to the precise value of exports from Russia and domestic production in Russia are irrelevant and do not affect the Commission's conclusion as regards the value of sales from ALROSA outside De Beers' channel. Furthermore, I cannot share your concern with regard to the fact that the figures pertaining to ALROSA's sales are greater than the figures pertaining to its production. The difference between production and sales figures may have a logical explanation, for example, realisation of stock sales or re-sales of purchased diamonds. With regard to your complaint that ALROSA has kept confidential information pertaining to the value of sales in 2007, it should be pointed out that ALROSA has not yet published its Annual Report for 2007 and therefore ALROSA's projections for the value of these sales submitted to the Commission cannot be revealed to you. However, the published tentative estimation of ALROSA's production for 2007 amounting to USD 2362.4 million[12] does not suggest that the figure of the value of sales for 2007 would be capable of affecting the Commission's conclusion with regard to the availability of ALROSA's sales outside De Beers' channels.

In your response to the Article 7(1) letter you contend, as you did in your response to the Article 7(1) letter of 4 August 2006, that rough diamonds sold by ALROSA outside De Beers' channels would be of lower quality. While this issue has already been fully addressed in the first rejection decision, I would like to point out that you do not provide any evidence to support your claims apart from your statement that this information would be derived from "market contacts", without further specification.

DTC rough diamonds available outside SOC

- Traded by sightholders

Based on the Commission's market investigation in 2004, the rejection decision identified the existence of a significant proportion of supplies by DTC which were traded by sightholders. Correspondingly, the Commission established that a number of sightholders were active as rough traders. The value of DTC rough traded by sightholders was estimated to represent 15-20% of DTC sales. In 2004, such trade would amount to about USD 770 mil to 1,020 mil[13]. In

[12] See ALROSA http://eng.alrosa.ru/profile/?PHPSESSID=fc135e5e2b46b1e77fae756dd639fc4d

[13] DTC sales in 2004 were USD 5.69billion. See DTC's 2004 Annual Review available at http://www.debeersgroup.com/NR/rdonlyres/88BCEF2A-BA91-461F-9719-137B4A6C660A/1288/DTCAR04_Full.pdf ; with the 10% allocation to Diamdels, the DTC sales to SOC amounted to approximately USD 5.12billion.

2005, the corresponding range would be USD 880 mil to 1,180 mil[14]. In its reply to the request for information as part of the supplementary market investigation, De Beers states that the level of trading has increased even further.[15]

In your response to the Article 7(1) letter you claim, as you did in your response to the Article 7(1) letter of 4 August 2006, that sightholders' resale of De Beers rough diamonds is not a reliable source of supply for non-sightholders and that rough dealers are *de facto* excluded from the SOC. This has been already discussed in the Article 7(1) letter of 4 August 2006 and the rejection decision. The Commission takes note that you do not provide any additional argument to prove your allegations.

- *Sold by Diamdels*

In the rejection decision, the Commission established that around 10% of DTC rough diamonds is sold to Diamdels. Diamdels are, like DTC, subsidiaries of the De Beers Group, and specialise in sales to non-sightholders which amount to roughly USD 500mil of DTC rough diamonds.

Other rough diamond producers

In its preliminary assessment, the Commission identified other sources of rough diamonds, such as [redacted] without however quantifying them in view of other arguments. For the sake of completeness, and to better demonstrate the relative value of ALROSA rough supplies concerned by the commitments as compared to the total non-SOC supplies, the output from other sources of supply should also be taken into account.

The rejection decision relied, amongst others, also on information contained in an article by Mr Even Zohar, which analyses the entire diamond value chain for the year 2005.[16] ALROSA diamonds are mined in Russia, while the overwhelming part of De Beers' rough diamonds is currently mined in South Africa, Botswana and Namibia. This also means that the vast majority of production from Australia (mainly [redacted]), Angola (mainly [redacted]), DR Congo ([redacted]) and Canada (mainly [redacted]) is not distributed by either De Beers or ALROSA (see replies to questions 1-6 of the Commission's request for information). According to the article the overall rough diamond production in these countries amounted to USD 4 billion in 2005. This was broadly confirmed by the Commission's supplementary market investigation, pointing to production amounting to USD 3-4 billion in these countries, the divergence being attributable to lower transparency in sales of rough diamonds from Angola and the DR Congo. The supplementary market investigation also showed that De

[14] DTC sales in 2005 were USD 6.54billion. See DTC's 2005 Annual Review available at http://www.debeersgroup.com/NR/rdonlyres/CD7C88C6-C5E7-4BB8-80F5-8E3A29445EEE/1742/DTCAR05_Full.pdf ; with the 10% allocation to Diamdels, the DTC sales to SOC amounted to approximately USD 5.9billion.

[15] See p. 5 of the non-confidential version of De Beers' reply to the request for information of 9 October 2007.

[16] See "The 2005 pipeline: Signs of Losing Confidence", Chaim Even-Zohar, published in Idex Online (idexonline.com) on 21 May 2006.

Beers has been selling off some of its smaller mines in South Africa, the aggregate output of which could amount to as much as 2.5 mil carats[17].

Aggregate availability

The supplementary market investigation established that the value of the world-wide market for the supply of rough diamonds was around USD 13 billion, while De Beers, including its purchases from ALROSA, accounted for around USD 6.5 billion. The aggregation of the value of rough diamond sources outside SOC as identified above exceeds USD 7 billion, possibly even USD 8 billion. Access to the non-SOC supplies is determined by demand-side competition, i.e. competition for supplies of rough diamonds, in which all rough diamond manufacturers and rough traders alike participate. Hence, access to these supplies remains outside of De Beers' control.

The absence of De Beers' commitments would, even under the unlikely hypothesis of De Beers increasing its purchases to pre-commitment levels, merely limit the growth of total rough supplies available outside SOC by, at worst, around USD 650 million. This would represent less than 10% of existing non-SOC rough diamond supplies. The Commission further notes that, in para 4 of your response of 12 February 2008 to the Article 7(1) letter, you qualify your estimate of ALROSA's outside sales of USD 900mil as "representing [...] only 8% of worldwide sales". Therefore, even using your own scale, in the worst case scenario described above, the absence of De Beers' commitments would affect the availability of only a limited amount of rough diamonds. The Commission concludes that such a change of availability, which is purely hypothetical and the extent of which is not likely to be as significant as the Commission conservatively assumes for the purpose of this letter, does not require the Commission to review its conclusion in the rejection decision that there is low likelihood of finding anti-competitive input foreclosure, or in any event one which would be significant enough to justify carrying out a complex enquiry.

Your observations on the Commission's supplementary market investigation

In your response to the Article 7(1) letter, you claim that "the Commission has not undertaken any useful and serious investigation" in the framework of the "supplementary procedure". In particular, you blame the Commission for not having sent requests for information to sightholders, rough dealers, manufacturers, polished resellers, diamond bourses but only to diamond producers. The Commission recalls that the scope of this supplementary procedure is limited to the possible impact of the annulment of the commitment decision on the overall conclusion on input foreclosure, as set out in the rejection decision. The other strands of your complaint are outside the scope of this decision. Consequently, with a view to further assessing the availability of rough diamonds to non-sightholders, the supplementary investigation targeted diamonds producers so as to quantify rough diamonds supplies available for non-sightholders.

Your criticism appears to be rooted in a fundamental misunderstanding of the role the Community interest determination plays in the investigation and evaluation of a complaint. As the CFI recognized in *Haladjian Frères SA v. Commission*, "*...if the Commission is under*

[17] See p. 5 of the non-confidential version of De Beers' reply to the request for information of 9 October 2007.

no obligation to rule on the existence or non-existence of an infringement, it cannot be compelled to carry out an investigation, because such an investigation could have no purpose other than to seek evidence of the existence or non-existence of an infringement which it is not required to establish."[18] In other words, all of your criticisms pre-suppose that there was a Community interest for an investigation, a condition precedent that was never satisfied. Carrying out all enquiries that your consider appropriate would in practice imply that the Commission would have to carry out the full investigation.

The Commission considers that the reasoning set out above based on this supplementary investigation is sufficient to demonstrate that there is a low likelihood of finding anti-competitive input foreclosure, or in any event one which would be significant enough to justify carrying out a complex enquiry. The Commission further notes that you do not justify in your response to the supplementary Article 7(1) letter how a more extensive investigation could affect the assessment with regard to the part of your complaint in relation to input foreclosure.

(b) Existence of observable changes resulting from the judgment, and other market developments

For the sake of completeness, the Commission has also examined whether, even if contrary to the Commission's view De Beers' purchases from ALROSA would be found to be decisive for the alleged input foreclosure, the annulment would, in view of the market developments in the interim, be likely to be conducive to a significant reduction in availability of rough diamonds.

As mentioned above, De Beers has taken the decision to continue to abide by its commitments at least until 2008. The Commission recalls that De Beers committed not to purchase rough diamonds in value exceeding USD 500 m in 2007 and USD 400m in 2008, respectively. Thus, at least until the end of 2009, the CFI judgment will not have any effect on the quantity of ALROSA diamonds sold outside De Beers, and consequently, on the rejection decision. In the Commission's view, foreclosure is even more unlikely in view of this purchase policy by De Beers vis-à-vis ALROSA.[19]

The Commission has also considered the effects of the so-called beneficiation process currently underway in the major African rough diamond producing countries, which may affect the way De Beers (and other producers) distribute their rough diamonds. As you are certainly aware, the beneficiation process in the rough diamond producing countries aims at adding value to their natural resources by allocating (either by regulatory or contractual means) a portion of rough diamond mine output to the local cutting and polishing industry.

Since De Beers' mining operations in South Africa, Namibia and Botswana account for the vast majority of DTC's rough diamond intake, the Commission examined the effect of

---

[18] Case T-204/03, *Haladjian Frères SA v. Commission* [2006] ECR II-3779, para 28, citing Case T-24/90, *Automec v. Commission* [1992] ECR II-2223, para 76.

[19] Despite the annulment of the commitment decision, De Beers stated that it would comply with the commitments at least until the end of 2008, see supra footnote 10. De Beers agreed its trading policy versus ALROSA to continue to be subject to monitoring by an appointed Trustee, as provided for in the commitment decision. The Trustee continues to provide the Commission with annual reports on De Beers' commitments.

beneficiation on De Beers' distribution of rough diamonds, in particular as to the question whether the changes due to beneficiation would be likely to reduce the availability of rough diamonds for non-sightholders due to the changes in either of its two distribution channels – SOC and Diamdels.

With respect to SOC, it is expected that the value of rough diamonds distribution through SOC would gradually be reduced by around USD 1 billion[20] to the benefit of local supplies. While this could conceivably lead to reduced trade in rough diamonds by sightholders, this would also mean that the importance of the SOC system as a channel for De Beers' supplies of rough diamonds would diminish as these diamonds would be distributed under different commercial terms by local supply bodies, most often joint ventures between national governments and De Beers (Namibia and Botswana), or state traders (South Africa).[21]

The State Diamond Trader ("SDT"), a government business entity in South Africa, established a set of own selection criteria combining the beneficiation requirements with compliance, technical ability, financial capacity, marketing ability etc.[22] In view of SDT's governance structure, it appears highly unlikely that De Beers could exercise *de facto* control in that body.[23] As for the selection criteria of the DTCs in Botswana and Namibia, equal joint ventures between De Beers and the respective national governments, these relate to financial transparency, business ethics and compliance with the De Beers Diamond Best Practice Principles as well as to business performance. Business performance combines pre-determined assessment criteria based on the core Supplier of Choice objectives and local beneficiation oriented criteria, the latter accounting for a significant part of the total assessment of business performance.[24] Against this background, it is likely that competition for supplies will thus be open to both SOC sightholders and non-sightholders alike[25], provided they fulfil the eligibility criteria set by the local supply bodies. These criteria, as mentioned above, appear to differ from the SOC selection criteria to a significant extent in nature and/or scope.

It should be pointed out that in your response to the supplementary Article 7(1) you allege that there is no difference between the selective criteria of DTCs in Botswana and Namibia and the SOC selective criteria and to support your argument you refer to De Beers' response to the Commission's request for information, dated 29 October 2007. However, while citing De Beers' response, you miss out the part of this response which states that in addition to the international SOC assessment criteria, the business performance assessment criteria applied

---

[20] See p. 9 and 10 of the non-confidential version of De Beers' reply to the request for information of 9 October 2007.

[21] See p. 1 and 3 of the non-confidential version of De Beers' reply to an additional request for information of 29 October 2007 as well as the following website: http://www.statediamondtrader.gov.za

[22] See document "Application to purchase rough diamonds", available at: http://www.statediamondtrader.gov.za/application.pdf

[23] See e.g. South African Diamond Amendment Act No 29 of 2005, available at http://www.statediamondtrader.gov.za/a29-05.pdf and p. 1 and 2 of the non-confidential version of De Beers' reply to an additional request for information of 29 October 2007.

[24] Beneficiation criteria of DTC Botswana amount to 60%, and of DTC Namibia to 50%, of the total assessment score for business performance. See p. 4 and 5 of the non-confidential version of De Beers' reply to an additional request for information of 29 October 2007.

[25] For example, DTC Namibia has selected 11 companies for the 2007-2011 contract period (see p. 5 of the non-confidential version of De Beers' reply to an additional request for information of 29 October 2007). It appears that three of them are not affiliated to existing sightholders under the SOC distribution system.

by DTCs Botswana and Namibia involve additional criteria designed to measure specific aspects of an applicant's alignment with the beneficiation objective. This omission renders your allegation that the Commission had misunderstood De Beers' reply and therefore the applied selective criteria unfounded.

Furthermore, I cannot accept your argument that since most of the selected companies are affiliated to existing sightholders, there will be no open competition. The objective nature of the selective criteria, ensures the opening of competition to companies irrespective of whether they are SOC sightholders or non –sightholders.

Beneficiation will also be likely to have an effect on the Diamdels supplies. The establishment of local supply bodies in South Africa, Namibia and Botswana was accompanied by the closure of Diamdel offices in South Africa and Namibia, which have previously served to supply the local cutting industry. The Diamdel office in China will also be closed.[26] This being said, Diamdel is likely to continue to supply non-sightholders in Belgium, Israel, Hong Kong and Mumbai. The total amount of rough diamonds sold through Diamdels is likely to decrease to the extent that the local cutting and polishing industries in Southern Africa are supplied directly by local supply bodies, while the overall availability will, as previously, depend on the total amount of rough diamonds available to De Beers.

On this basis, it appears that, in any event, the market developments described under the present heading are not liable to significantly affect the overall supply situation for rough diamonds as described under heading a) of this assessment. Therefore, the Commission considers that the conclusion as set out at the end of that section under heading a) remains valid.

The additional comments you have submitted in your reply to the Article 7(1) letter (para 64 to 70) concerning the alleged De Beers' "master plan" encompassing a reduction in the number of sightholders and the expansion of the "Forevermark" so as to further control the downstream markets are not related to the issue of input foreclosure and therefore fall outside the scope of this decision.

5. CONCLUSION

In view of the above considerations, the Commission has come to the conclusion that the change in the facts underlying the rejection decision due to the annulment by the CFI of the commitment decision is not a decisive element which would require the Commission to revisit its conclusion related to the issue of input foreclosure, namely that there is no Community interest to further investigate your complaint due to the low likelihood of finding an infringement, which would not justify carrying out a complex enquiry. The Commission concludes that there are no other market developments requiring such review, either. Consequently, the Commission confirms the rejection of this complaint in relation to the issue of input foreclosure.

[26] See p. 10 of the non-confidential version of De Beers' reply to the request for information of 9 October 2007.

6. PROCEDURE

An action challenging this Decision may be brought before the Court of First Instance of the European Communities in accordance with Article 230 of the EC Treaty.

For the Commission
Member of the Commission