Thirdly and finally, the applicant submits that the Commission concluded to the absence of sufficient Community interest on the basis of an erroneous assessment, in fact and in law, of the circumstances of the case since:

1) the Commission failed to take into account the manifest publicly stated anticompetitive object of De Beers' limited selective distribution system;

2) the Commission could not assess the anticompetitive effects of the De Beers' distribution system without first assessing De Beers' dominance and market power;

3) the Commission failed to take into account the numerous elements brought to its attention in the complaint demonstrating the inherently abusive and anticompetitive nature of the system;

4) the Commission wrongly assessed the effectiveness of the revised Terms of Reference for the Ombudsman that De Beers had introduced to resolve disputes as to the implementation of the distribution system; and

5) the Commission made an error of law and a manifest error of assessment of the facts in finding that De Beers' distribution system does not foreclose the market.

Action brought on 13 April 2007 — Agrofert Holding v Commission

(Case T-111/07)

(2007/C 129/37)

Language of the case: English

Parties

Applicant: Agrofert Holding a.s. (Praha, Czech Republic) (represented by: R. Pokorný, lawyer)

Defendant: The Commission of the European Communities

Form of order sought

— Annulment of Commission Decision SG.E.3/MIB/md D (2007) 1360 of 13 February 2007 relating to the request for access to documents in merger Case No COMP/M.3543 — PKN Orlen/Unipetrol and Commission Decision 16796/16797 of 2 August 2006;

— order the Commission to produce the documents in question;

— order the Commission to pay the costs.

Pleas in law and main arguments

By means of its application, the applicant seeks the annulment, under Article 230 EC, of Commission's Decision of 2 August 2006 (hereinafter 'Decision I') as well as the Commission's subsequent confirmatory decision of 13 February 2007 (hereinafter 'Decision II') relating to the request for access to all unpublished documents relating to the notification and pre-notification phases of the merger at stake.

The applicant claims that both decisions are contrary to Regulation (EC) No 1049/2001 ([1]), regarding public access to European Parliament, Council and Commission documents (hereinafter 'The Regulation') as they do not fall within the exceptions enshrined in its Article 4(2), relating to protection of commercial interests, protection of the purpose of investigation, protection of Legal Advice or its Article 4(3) relating to protection of decision-making process.

The applicant further submits that Article 4(2), first indent, of the Regulation should not be interpreted as if the exceptions applied to the entirety of the documents but only to the parts due to contain business secrets or commercially sensitive information. Thus, according to the applicant, the defendant could have either released to the public parts of the requested documents or blackened the parts containing the sensitive information without undermining the purpose of inspections, investigations and audits, the notifying parties and third parties right's, the protection of legal advice or the institution's decision-making process.

Moreover, the applicant contends that the defendant, instead of conducting individual examination of each document falling, in its view, under the exception of Article 4(2), third indent, of the Regulation, has generally refused the requested access on the basis of the sole fact that all documents contain business secrets and cannot be disclosed according to Article 17 of the Council Regulation (EC) No 139/2004 ([2]). Such generalisation would be contrary to Article 4(6) of the Regulation.

Besides, the applicant submits that the above-mentioned exceptions apply only if they are not waived by an overriding public interest in disclosure. According to the applicant, such interest to disclose the requested documents, deriving from the damage suffered by the applicant and minority shareholders of the acquired company, exists and outweighs the exceptions to the right of access.

The applicant, moreover, claims that Decision I and II are contrary to Article 1 EU, second subparagraph, enshrining the principle of openness.

Finally, the applicant submits that the defendant did not handle the confirmatory application promptly according to Article 8(1) of the Regulation but exceeded the time-limit for replying by 100 working days.

([1]) OJ L 145, 31.5.2001, p. 43-48.

([2]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1-22).