JUDGMENT OF THE COURT (Grand Chamber)

29 June 2010 *

In Case C-441/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 24 September 2007,

European Commission, represented by F. Castillo de la Torre and R. Sauer, acting as Agents, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Alrosa Company Ltd, established in Mirny (Russia), represented by R. Subiotto QC, K. Jones, solicitor-advocate, and S. Mobley, solicitor,

applicant at first instance,

* Language of the case: English.

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, R. Silva de Lapuerta, E. Levits and C. Toader, Presidents of Chambers, A. Rosas, K. Schiemann (Rapporteur), M. Ilešič and U. Lõhmus, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 June 2009,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2009,

gives the following

Judgment

1 By its appeal the Commission of the European Communities asks the Court to set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 11 July 2007 in Case T-170/06 *Alrosa* v *Commission* [2006] ECR II-2601 ('the judgment under appeal') annulling 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) (OJ 2006

L 205, p. 24, 'the contested decision') making binding the commitments given by De Beers SA ('De Beers') to bring to an end its purchases of rough diamonds from Alrosa Company Ltd ('Alrosa') with effect from 2009, after a period of progressive reduction of the amounts purchased by it from 2006 to 2008, and bringing the proceedings to an end in accordance with Article 9 of 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).

Legal context

2 According to recital 13 in the preamble to Regulation No 1/2003:

'Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.'

3 Article 7(1) of Regulation No 1/2003 provides:

'Where the Commission, acting on a complaint or on its own initiative, finds that 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. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.'

4 Under Article 9 of Regulation No 1/2003:

'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.'

5 Article 27(2) and (4) of Regulation No 1/2003 provide:

'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. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

…

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.'

Facts of the case

6 The background to the case was set out in paragraphs 8 to 26 of the judgment under appeal, as follows:

'8 [Alrosa] 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 essentially active in Russia, where it is engaged in exploration, mining, valuation and trading activities, and also in the jewellery business.

9 [De Beers] is a company established in Luxembourg (Luxembourg). The De Beers group, of which it is the principal holding company, is also engaged in the world market for the production and supply of rough diamonds, where it occupies the number one position. It is essentially active 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.

10 On 5 March 2002, Alrosa and De Beers notified to the Commission an agreement entered into on 17 December 2001 between Alrosa and two subsidiaries of the De Beers group, City and West East Ltd and De Beers Centenary AG ("the notified agreement"), with a view to obtaining negative clearance or an exemption under Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

11 The subject-matter of that agreement, which was concluded in the context of long-standing trading relations between Alrosa and De Beers, was essentially the supply of rough diamonds.

12 Clause 12 of the notified agreement provided that 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(1) EC, or merit[ed] an exemption under Article 81(3) EC; and [did] not otherwise infringe Article 82 EC".

13 During that period, Alrosa undertook to sell natural rough diamonds produced in Russia to De Beers to the value of USD 800 million a year, while De Beers undertook to buy those diamonds from Alrosa, as specified in clause 2.1.1 of the notified agreement. However, in respect of the fourth and fifth years during which the notified agreement was in force, Alrosa was entitled, under clause 2.1.2, to reduce that amount to USD 700 million. The amount of USD 800 million, established in accordance with the prices in force 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 Community of Independent States (CIS).

14 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.

15 On 31 March 2003, [Alrosa] and De Beers submitted joint written submissions to the Commission in response to the statement of objections issued in Case COMP/E-3/38.381.

16 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 also capable of constituting an anti-competitive agreement prohibited by Article 53(1) of the Agreement on the European Economic Area (EEA) [of 2 May 1992 (OJ 1994 L 1, p. 3, "the EEA Agreement")] and could not be exempted under Article 53(3) of the EEA Agreement. On the same date, it sent a separate supplementary statement of objections to De Beers, expressing the opinion that the notified agreement was also capable of constituting an abuse of a dominant position prohibited under Article 54 of the EEA Agreement.

17 On 7 July 2003, the Commission heard oral submissions from [Alrosa] and De Beers.

18 On 12 September 2003, [Alrosa] proposed commitments 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. [Alrosa] subsequently withdrew those commitments.

19 On 14 December 2004, [Alrosa] and De Beers jointly submitted commitments ("the joint commitments") 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, and subsequently to be capped at that level.

20 On 3 June 2005, the Commission published a "notice … in Case COMP/E-2/38.381 – De Beers-Alrosa" in the *Official Journal of the European Union* (OJ 2005 C 136, p. 32) ("the summary notice"). In that notice, the Commission stated that it had received commitments from Alrosa and De Beers in the course of a Commission investigation pursuant to Articles 81 EC and 82 EC, and Articles 53 and 54 of the EEA Agreement (point 1), gave a summary of the case (points 3 to 10) and described the commitments which had been offered (points 11 to 15). It also invited interested third parties to submit their comments within one month (points 2 and 17) and stated that it intended to adopt a decision making the joint commitments binding, subject to the outcome of that market test (points 2 and 16).

21 Following that publication, 21 interested third parties submitted comments to the Commission, which informed Alrosa and De Beers of those comments on 27 October 2005. At that meeting, the Commission also invited the parties 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.

22 On 25 January 2006, De Beers offered individual commitments ("the individual commitments proposed by De Beers") designed to meet the concerns expressed by the Commission in the light of the outcome of the market test. The individual commitments proposed by De Beers 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 600 million in 2006 to USD 400 million in 2008, and their subsequent discontinuance.

23 On 26 January 2006, the Commission sent [Alrosa] a copy of the individual commitments proposed by De Beers and invited it to submit its observations in that regard. It also provided it with a copy of the non-confidential versions of the comments from third parties.

24 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 individual commitments proposed by De Beers and the third-party comments.

25 On 22 February 2006, the Commission adopted [the contested decision].

26 Article 1 of the [contested decision] provides that "the commitments as listed in the Annex shall be binding on De Beers" and Article 2 provides that "the proceedings in the present case shall be brought to an end".

Procedure at first instance and the judgment under appeal

7 On 29 June 2006 Alrosa brought an action before the General Court. In support of its application, it put forward three pleas in law:

— infringement of the right to be heard;

— infringement by the contested decision of Article 9 of Regulation No 1/2003, which does not allow commitments to which an undertaking concerned has not voluntarily subscribed to be made binding on the undertaking, *a fortiori* for an indefinite period;

— the excessive nature of the commitments that were made binding, in breach of Article 9 of that regulation, Article 82 EC, freedom of contract and the principle of proportionality.

8 By the judgment under appeal, the General Court annulled the contested decision. Its reasoning may be summarised as follows.

9 In paragraph 126 of the judgment under appeal, the General Court held that 'the [contested decision was] vitiated by an error of assessment which, moreover, [was] manifest. It [was] clear from the circumstances of the case that other, less onerous, solutions than the permanent prohibition of transactions between De Beers and Alrosa were possible in order to achieve the aim pursued by the [contested decision], that their determination presented no particular difficulties of a technical nature and that the Commission could not relieve itself of the duty to consider such solutions'.

10 In paragraph 128 of the judgment, the General Court stated that, prima facie, the most appropriate solution would therefore have been to prohibit the parties from entering into any agreement allowing De Beers to reserve to itself the whole, or even a material part, of Alrosa's production exported outside the CIS, without it being necessary to prohibit all purchases by De Beers of diamonds produced by Alrosa.

11 In paragraph 129 of the judgment, the General Court found that the Commission had failed to explain in what way the joint commitments did not address the concerns expressed in its preliminary assessment. In paragraph 132 it concluded that those

joint commitments, which the Commission admittedly was under no obligation to take into account, none the less represented a less onerous measure than the measure which it decided to make binding.

12 It found, in paragraph 156 of the judgment under appeal, that Alrosa was right to argue, first, that the prohibition on all trading relations between De Beers and itself for an indefinite period manifestly went beyond what was necessary in order to achieve the targeted objective and, second, that other solutions existed that were proportionate to that objective. It said that, in making use of the procedure allowing commitments offered by an undertaking concerned to be made binding, the Commission was not relieved of its duty to apply the principle of proportionality, which required in this case that there should be an appraisal *in concreto* of the viability of those intermediate solutions. It accordingly held, in paragraph 157 of the judgment, that Alrosa's plea alleging infringement of Article 9(1) of Regulation No 1/2003 and of the principle of proportionality was well founded and that the contested decision should be annulled on that ground alone.

13 None the less, for the sake of completeness, the General Court considered Alrosa's plea alleging infringement of the right to be heard.

14 In paragraphs 176, 177, 186 and 187 of the judgment under appeal, the General Court found that, since Alrosa had been involved in both sets of proceedings initiated by the Commission following the notification of its agreement with De Beers and since the proceedings taken by the Commission under Articles 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 Alrosa and De Beers, the connection between the two sets of proceedings and the fact that the contested decision expressly referred to Alrosa should have led to Alrosa being accorded, as regards the proceedings taken as a whole, the rights given to an 'undertaking concerned' within the meaning of Regulation No 1/2003, although, strictly speaking, it did not fall to be so classified in the proceedings relating to Article 82 EC.

15 It pointed out, in paragraph 191 of the judgment under appeal that observance of the right to be heard 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 which must be guaranteed even in the absence of any rules governing the proceedings in question (Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21).

16 After acknowledging in paragraph 195 of the judgment under appeal that the Commission was entitled to take the view, after receipt of the observations from the third parties, that the joint commitments did not address the concerns set out in its preliminary assessment, the General Court none the less held in paragraph 196 that, in a case of this kind, compliance with the right to be heard required, first, that the undertakings which proposed commitments should be informed of the essential factual elements on the basis of which the Commission required new commitments and, second, that those undertakings could express their views on the matter. In the present case, Alrosa had been provided only with a summary of the conclusions which the Commission drew from the third-party observations. At the meeting of 27 October 2005, the Commission merely informed it of the fact that the third-party comments had principally referred to the risk of partitioning of the market and the risk of a cartel between De Beers and Alrosa, and that the Commissioner for Competition had requested the team responsible for the case not to accept the joint commitments in the circumstances. At the same time, Alrosa received a summary of the third-party observations and was informed of the nature of the commitments which the Commission expected the parties to give following the negative result of the consultation with third parties: cessation of all relations with effect from 2009 and a new offer of commitments on that basis.

17 The General Court concluded, in paragraph 201 of the judgment under appeal, that, since Alrosa had not had an opportunity to exercise fully its right to be heard on the individual commitments proposed by De Beers, as a result of the fact that the third-party observations had been supplied to it at the same time as the copy of those individual commitments, it had therefore been impossible for it to make an effective reply and to propose new joint commitments with De Beers.

18 The Court found in paragraph 203 of the judgment that, in circumstances such as those of the present case, Alrosa had a right to be heard on the individual commitments proposed by De Beers which the Commission envisaged making binding in the proceedings initiated under Article 82 EC, and that it was not given the opportunity to exercise that right fully.

Forms of order sought by the parties

19 The Commission 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 Alrosa to pay the Commission's costs arising from Case T-170/06 and the present appeal.

20 Alrosa contends that the Court should:

— dismiss the appeal;

— order the Commission to pay Alrosa's legal and other costs and expenses in relation to the present matter; and

— take any other measures that it considers appropriate.

The appeal

21 The Commission puts forward two grounds of appeal. The first alleges that the General Court infringed Article 9 of Regulation No 1/2003 and the principle of proportionality. The second alleges that the General Court misinterpreted and misapplied the right to be heard.

First ground of appeal: the General Court infringed Article 9 of Regulation No 1/2003 and the principle of proportionality

22 The Commission's first ground of appeal consists of two parts. By the first part, the Commission submits that the General Court misinterpreted and misapplied Article 9 of Regulation No 1/2003 and disregarded the requirements which follow from that provision in relation to compliance with the principle of proportionality.

23 By the second part, the Commission complains that, when examining whether the commitments were proportionate, the General Court misapplied Article 9 of that regulation, misinterpreted Article 82 EC, ignored the proper scope of judicial review, distorted the content of the contested decision and the factual record, and failed to give adequate reasons at several stages of the judgment under appeal.

First part of the first ground of appeal: misinterpretation by the General Court of the requirements which follow from Article 9 of Regulation No 1/2003 as to compliance with the principle of proportionality

– Arguments of the parties

24 The Commission submits that in the judgment under appeal the General Court underestimated the importance of the essential characteristics of decisions applying Article 9 of Regulation No 1/2003 and compromised the future application of that provision.

25 While accepting that the principle of proportionality applies to decisions applying Article 9 of Regulation No 1/2003, the Commission criticises the position adopted in paragraphs 101 and 104 of the judgment under appeal, which is essentially that the examination of the proportionality of a decision is the same whether it is done under Article 7 or Article 9 of Regulation No 1/2003. That approach disregards the fundamental differences between those two provisions. In contrast to decisions applying

Article 7 of the regulation, decisions concerning commitments made under Article 9 of the regulation do not make a finding of an infringement, nor do they conclude that an infringement has been brought to an end. Article 9 is thus not limited to alleviating the burden of proof in respect of a finding of an infringement.

26 The Commission criticises the General Court for assessing, in the judgment under appeal, the normative content of the principle of proportionality by reference to how it is applied in the context of decisions adopted pursuant to Article 7 of Regulation No 1/2003, as if the balancing exercise to be carried out were the same whatever the legislative context. Such an interpretation of the principle of proportionality deprives Article 9 of Regulation No 1/2003 of its practical effect.

27 The Commission then criticises the General Court for taking the view, in paragraphs 103 to 105 of the judgment under appeal, that the examination of the proportionality of the commitments must ignore their voluntary nature. The Commission considers that Article 9 of Regulation No 1/2003 must at least be interpreted as meaning that the undertaking offering the commitments makes a choice as to the way in which it intends to address the competition concerns and is ready to have them made binding upon itself. The General Court thus failed to consider that the commitment by De Beers represented a free choice as to how it intended to address the Commission's concerns.

28 Finally, the Commission submits that the General Court's interpretation of Article 9 of Regulation No 1/2003 is liable to make the procedure under that provision less attractive, since the judgment under appeal introduces a requirement for the Commission to find the existence of an infringement, even in the context of the application of Article 9.

29 Alrosa submits that the principle of proportionality remains the same regardless of the particular situation at issue, even if the extent of judicial review may vary from case to case. According to Alrosa, the General Court took an approach consistent with regular judicial practice and considered whether reasonable and less onerous alternatives were available to the Commission before deciding that that was the case.

30 Alrosa submits that, in paragraphs 101 and 140 of the judgment under appeal, the General Court did not require the Commission to compare the proposed commitments with measures which could appear in a hypothetical decision pursuant to Article 7 of Regulation No 1/2003, but prevented the Commission from accepting a disproportionate remedy merely because, in proceedings under Article 9 of that regulation, it is not required to prove the existence of an infringement. According to Alrosa, the judgment under appeal in fact states that it was manifestly disproportionate to the aim pursued to request De Beers, pursuant to Article 7 of the regulation, to bring to an end all direct or indirect trading relations with Alrosa. Contrary to the Commission's contention, the General Court's reference to Article 7 should not be understood as requiring the Commission, in all cases in which Article 9 of the regulation is involved, to carry out a parallel hypothetical procedure under Article 7.

31 Alrosa submits that if a decision of the Commission is manifestly disproportionate in a procedure under Article 7 of Regulation No 1/2003 and an infringement can be found to exist, that decision is *a fortiori* disproportionate if it is Article 9 of that regulation that is applied, at least in a case such as the present in which the acceptance of commitments under Article 9 had harmful consequences for a non-consenting undertaking which had the status of a party to the proceedings.

32 Alrosa argues that the General Court did not limit the Commission's powers under Article 9 of Regulation No 1/2003. The need for the Commission to consider less onerous alternative solutions and to rule out commitments that are manifestly incapable of addressing its concerns is not an insuperable obstacle to the performance of its duties.

33 Alrosa submits that it was excluded from the negotiation of possible alternative commitments. The voluntary nature of the individual commitments offered by De Beers should have had no effect on the assessment of the proportionality of the commitments accepted by the Commission in so far as they concerned Alrosa.

– Findings of the Court

34 Under Article 9 of Regulation No 1/2003, where the Commission intends to adopt a decision requiring an infringement to be brought to an end, it may make the commitments offered by the undertakings concerned binding if they meet the competition concerns expressed in its preliminary assessment.

35 This is a new mechanism introduced by Regulation No 1/2003 which is intended to ensure that the competition rules laid down in the EC Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Art-

icle 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission's concerns.

36 As observed by the parties and by the Advocate General in point 42 of her Opinion, although Article 9, unlike Article 7 of Regulation No 1/2003, does not expressly refer to proportionality, the principle of proportionality, as a general principle of European Union law, is none the less a criterion for the lawfulness of any act of the institutions of the Union, including decisions taken by the Commission in its capacity of competition authority.

37 That being so, in the examination of acts of the Commission, whether in the context of Article 7 or of Article 9 of Regulation No 1/2003, the questions always arise, first, of the precise extent and limits of the obligations which flow from the observance of that principle and, second, of the limits of judicial review.

38 The specific characteristics of the mechanisms provided for in Articles 7 and 9 of Regulation No 1/2003 and the means of action available under each of those provisions are different, which means that the obligation on the Commission to ensure that the principle of proportionality is observed has a different extent and content, depending on whether it is considered in relation to the former or the latter article.

39 Article 7 of Regulation No 1/2003 expressly indicates the extent to which the principle of proportionality applies in situations covered by that article. In accordance with Article 7(1) of the regulation, the Commission may impose on the undertakings

concerned any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

40 Article 9 of that regulation, by contrast, provides merely that in proceedings under that provision, as follows from recital 13 in the preamble to the regulation, the Commission is not required to make a finding of an infringement, its task being confined to examining, and possibly accepting, the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment and having regard to the aims pursued.

41 Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties.

42 Judicial review for its part relates solely to whether the Commission's assessment is manifestly incorrect.

43 In the judgment under appeal, the General Court proceeded from the proposition that the application of the principle of proportionality has the same effect in relation to decisions taken under Article 7 of Regulation No 1/2003 as in relation to those taken under Article 9 of that regulation.

44 In paragraph 101 of the judgment under appeal, the General Court held that it would be contrary to the scheme of Regulation No 1/2003 for a decision which would, under Article 7(1) of the regulation, have to be regarded as disproportionate to the infringement that had been established to be taken by having recourse to the procedure laid down under Article 9(1) in the form of a commitment that is made binding.

45 That conclusion is not correct.

46 Those two provisions of Regulation No 1/2003, as noted in paragraph 38 above, pursue different objectives, one of them aiming to put an end to the infringement that has been found to exist and the other aiming to address the Commission's concerns following its preliminary assessment.

47 There is therefore no reason why the measure which could possibly be imposed in the context of Article 7 of Regulation No 1/2003 should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 of the regulation, or why anything going beyond that measure should automatically be regarded as disproportionate. Even though decisions adopted under each of those provisions are in either case subject to the principle of proportionality, the application of that principle none the less differs according to which of those provisions is concerned.

48 Undertakings which offer commitments on the basis of Article 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine.

49 Moreover, the fact that the individual commitments offered by an undertaking have been made binding by the Commission does not mean that other undertakings are deprived of the possibility of protecting the rights they may have in connection with their relations with that undertaking.

50 It must therefore be concluded that the Commission is right to submit that in the judgment under appeal the General Court wrongly considered that the application of the principle of proportionality must be assessed, in the case of decisions taken under Article 9 of Regulation No 1/2003, by reference to the way in which it is assessed in connection with decisions taken under Article 7 of that regulation despite the different concepts underlying those two provisions.

Second part of the first ground of appeal: incorrect application by the General Court of the principle of proportionality

– Arguments of the parties

51 By the second part of the first ground of appeal, the Commission contests inter alia the General Court's assessment that, since the joint commitments proposed were sufficient to address its concerns, it should have accepted them. It complains that the General Court thus encroached on the Commission's discretion in the field in question.

52 The Commission submits in particular that the General Court failed to take into account the observations received during the public consultation carried out under Article 27(4) of Regulation No 1/2003, which showed clearly that, in the view of the various third parties concerned, the joint commitments and the proposed threshold of USD 275 million were not sufficient to address the competition concerns expressed in the communication made in accordance with Article 27(4), and the commitments would strengthen De Beers's control of the market. Two observations from third parties explained how standing purchases of a significant quantity of diamonds would allow De Beers to perpetuate its role of 'market-maker' beyond the merits of its own production.

53 The Commission criticises the General Court for concluding in paragraph 136 of the judgment under appeal that, despite the fact that the public consultation had produced negative results, the joint commitments were sufficient to address the Commission's concerns. The results of the consultation should have prompted the General Court to consider that this was a relatively complex field in which the Commission enjoyed a broad discretion, or at the very least a measure of discretion.

54 The Commission submits, moreover, that it encountered considerable difficulties in identifying a sales threshold that was appropriate for addressing its competition concerns, as the results of the public consultation had been largely negative. That complexity was inter alia due to the fact that any threshold would fluctuate annually according to market conditions. However, the General Court took the view, in paragraph 125 of the judgment under appeal, that the Commission had admitted that it had not carried out any complex economic assessment, and concluded in paragraph 126 of the judgment that in any event those difficulties did not exist.

55 The Commission considers that its arguments were grossly distorted. It submits that it is clear from the case-file that it never suggested that it did nothing to assess the relevant quantitative threshold. It explained that, after carrying out the economic

assessment, it had been unable to determine the precise level of sales which would safely address all its concerns as regards competition. It therefore accepted a commitment which gave it a saving of time compared to a complex investigation.

56 Alrosa complains that the Commission acted in the interests of expediency because the consideration of alternative remedies, such as the setting of an agreed ceiling on its sales to De Beers, would have delayed the proceedings. In its view, the Commission's position appears to suggest that there was an urgent need to resolve the matter and that the Commission did not have enough time to determine whether any of the alternative remedies proposed by Alrosa would have addressed its concerns, and that the proposed measures were complicated and difficult to analyse. However, that was not the case.

57 Alrosa submits that, as an alternative to the complete and permanent prohibition of all sales of diamonds to De Beers, it proposed to reduce gradually the volume of its sales to De Beers and thereafter to limit its sales to an annual amount agreed with the Commission. In addition, Alrosa proposed that it should be allowed at least to sell rough diamonds at auctions to the highest bidder, including De Beers, but that proposal was rejected by the Commission.

58 Similarly, according to Alrosa, the General Court also does not suggest in the judgment under appeal that the Commission must act with scientific precision in assessing the available remedies. On the contrary, the General Court expressly recognises that the Commission must be afforded some measure of discretion in applying the principle of proportionality, although it does not have an unlimited discretion, which would adversely affect a third party.

– Findings of the Court

59 It should be recalled that the Commission examined the joint commitments after inviting third parties to submit observations and finding that the results of that public consultation were negative. From that it concluded that those commitments were not sufficient.

60 To answer the Commission's complaint and ascertain whether the General Court really did, as the Commission submits, infringe the discretion it has in connection with accepting commitments under Article 9 of Regulation No 1/2003, the extent of that discretion should first be defined.

61 Since the Commission is not required itself to seek out less onerous or more moderate solutions than the commitments offered to it, as was observed in paragraphs 40 and 41 above, its only obligation in the present case in relation to the proportionality of the commitments was to ascertain whether the joint commitments offered in the proceedings initiated under Article 81 EC were sufficient to address the concerns it had identified in the proceedings initiated under Article 82 EC.

62 As the Advocate General observes in point 80 et seq. of her Opinion, the Commission concluded, after taking note of the results of the market test it had conducted, that the joint commitments were not appropriate for resolving the competition problems it had identified.

63 The General Court could have held that the Commission had committed a manifest error of assessment only if it had found that the Commission's conclusion was obviously unfounded, having regard to the facts established by it.

64 However, the General Court made no such finding.

65 Instead it examined other less onerous solutions for the purpose of applying the principle of proportionality, including possible adjustments of the joint commitments, in paragraphs 128, 129 and 137 to 153 of the judgment under appeal.

66 In paragraphs 129 to 136 of the judgment under appeal, the General Court expressed its own differing assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission, before concluding in paragraph 154 that alternative solutions that were less onerous for the undertakings than a complete ban on dealings existed in the present case.

67 By so doing, the General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment.

68 That error of the General Court in itself justifies setting aside the judgment under appeal.

69 It is consequently unnecessary to consider the other arguments adduced by the Commission in support of the second part of the first ground of appeal.

Second ground of appeal: the General Court misinterpreted and misapplied the right to be heard

Admissibility

70 Alrosa submits that the Commission's argument concerning errors of law on the part of the General Court in its assessment of the rights of the defence is irrelevant, since it is directed against a ground of the judgment under appeal that was included purely for the sake of completeness.

71 That contention must be rejected. Although this part of the General Court's reasoning was included for the sake of completeness, it is, as the Advocate General notes in point 135 of her Opinion, a separate second pillar of the judgment under appeal on which the annulment of the contested decision is based, as is clear from paragraph 204 of the judgment. It follows that the case-law which states that the Court will reject outright complaints directed against grounds of a judgment of the General Court included purely for the sake of completeness, since they cannot lead to its being set aside, does not apply to this ground of appeal.

Substance

72 In its second ground of appeal the Commission makes four criticisms:

— The General Court gave no reasons for its finding that Alrosa's right to be heard was infringed;

— The General Court ruled *ultra petita* and infringed the right to a fair trial;

— The General Court misinterpreted the extent of Alrosa's right to be heard;

— The General Court erred in law by considering that Alrosa's plea concerning infringement of the right to be heard was well founded, in the absence of a clear finding that the alleged infringement had affected the outcome of the case.

73 The Court will start by examining the Commission's argument concerning the General Court's assessment of the extent of Alrosa's right to be heard.

– Arguments of the parties

74 The Commission submits that the production at the meeting of 27 October 2005 of a summary of the comments made by third parties in response to the market consultation protected the rights of defence which could be claimed by Alrosa. Giving Alrosa an opportunity to comment on the individual commitments by De Beers and the observations of the third parties was not a requirement, in the Commission's view, because the Commission had clearly made it known that it rejected the joint commitments, a route which it was fully entitled to follow since it was not bound by a proposal for a commitment. The Commission emphasises that it is entitled to reject a proposed commitment at any time.

75 Moreover, according to the Commission, there was never any question of unilateral commitments by Alrosa alone, since the Commission had only launched two separate investigations, one against De Beers alone on the basis of Article 82 EC and one against De Beers and Alrosa on the basis of Article 81 EC. The Commission submits that, since De Beers was the only one to propose unilateral commitments following the meeting of 27 October 2005, thus addressing the concerns relating to Article 82 EC, there was no reason to include Alrosa in the negotiations with De Beers or to provide it with a copy of De Beers's proposed commitment, which it none the less did, thus enabling Alrosa to submit comments.

76 The Commission points out that the rejection of joint commitments is not a challengeable act, nor a Commission decision, nor even a measure that could affect a party's legal position. No party concerned by infringement proceedings, which in Alrosa's case were initiated solely on the basis of Article 81 EC, is entitled to have its proposed commitment accepted or to have it rejected only for particular reasons. Nor is there any right to comment on proposed commitments put forward by other parties.

77 The Commission further submits that in the judgment under appeal the General Court starts from the premise that Alrosa should have been accorded, as regards the proceedings taken as a whole, the rights of an 'undertaking concerned' within the meaning of Regulation No 1/2003.

78 However, in the Commission's view, it is clear from the very wording of Articles 7(1) and 9(1) of Regulation No 1/2003 that the concept of 'undertaking concerned' refers to the undertakings which have infringed Article 81 EC or Article 82 EC or against which the Commission intends to adopt a decision on the basis of concerns relating to that infringement. A company entering into an agreement with an undertaking which abuses its dominant position does not thereby become a 'co-perpetrator' of the infringement of Article 82 EC, nor an 'undertaking concerned' for the purposes of that article.

79 Thus, according to the Commission, it follows from the clear distinction between the status of 'undertakings concerned' and that of 'interested third parties' that a 'close connection 'between the proceedings opened under Articles 81 EC and 82 EC cannot turn an interested third party into an 'undertaking concerned'. The Commission therefore considers that, even if Alrosa, as an interested third party, were entitled to make known its views on De Beers' proposal for individual commitments, it had no right to have a decision on those commitments postponed until after it could comment on the rejection of the joint commitments.

80 Even if account were taken of an alleged close connection between the proceedings under Articles 81 EC and 82 EC, or even if only a 'single set of proceedings' existed, that would not suffice to enlarge the extent of the procedural rights accorded to Alrosa. Even the 'undertakings concerned' by proceedings initiated under Article 9 of Regulation No 1/2003 have no right to insist that their commitments be made binding.

81 Alrosa submits in this respect that the fundamental point it raised, which the General Court accepted in paragraphs 194 and 196 of the judgment under appeal, was that the Commission could not by the contested decision permanently prohibit it from selling rough diamonds to De Beers, that decision having an effect equivalent to a decision taken under Article 7 of Regulation No 1/2003, without at some stage of the proceedings leading up to that decision giving Alrosa an opportunity to be heard.

82 Alrosa submits that the General Court found that the proceedings brought by the Commission under Articles 81 EC and 82 EC were always treated *de facto* as a single set of proceedings, not only by the Commission but also by Alrosa and De Beers. In its view, it is clear that the Commission did not bring two distinct sets of proceedings but one single integrated proceeding, based on a single set of facts, initiated against it and De Beers on the basis of Article 81 EC and against De Beers alone on the basis of Article 82 EC.

83 Alrosa submits that the General Court could have rejected the Commission's argument solely on the ground that the contested decision leading to a permanent prohibition of all sales of diamonds to De Beers required Alrosa to enjoy all the rights granted to an addressee of such a decision.

84 Alrosa argues that, even if it could be regarded as a mere third party 'directly' and 'adversely' affected by the contested decision, the Commission should none the less have provided it with the reasons for the rejection of the joint commitments, and given it an opportunity to be heard on that rejection and on the unilateral proposal that led to a permanent prohibition of all sales of rough diamonds to De Beers.

– Findings of the Court

85 In the judgment under appeal the General Court proceeds from the assumption that, in the circumstances of the case, having regard especially to the fact that the proceedings brought by the Commission under Articles 81 EC and 82 EC were always *de facto* regarded both by the Commission and by De Beers and Alrosa as forming a single set of proceedings, Alrosa should have been allowed the rights accorded to an 'undertaking concerned' within the meaning of Regulation No 1/2003, even though it did not strictly have the status of 'undertaking concerned' in the proceedings brought under Article 82 EC.

86 After acknowledging in paragraph 195 of the judgment under appeal that the Commission was entitled to take the view, after receipt of the observations from the third parties, that the joint commitments did not address the concerns expressed in its preliminary assessment, the General Court none the less held in paragraph 196 of the judgment that, in a case of this kind, compliance with the right to be heard requires, first, that undertakings which propose commitments should be informed of the essential factual elements on the basis of which the Commission has required new commitments and, second, that those undertakings can express their views on the matter. In the present case, Alrosa was provided only with a summary of the conclusions which the Commission drew from the third parties' observations. At the meeting of 27 October 2005, Alrosa received a summary of the third parties' observations and was informed of the nature of the commitments which the Commission expected the parties to give following the negative result of the consultation with third parties, namely cessation of all relations with effect from 2009 and a new offer of commitments on that basis.

87 The General Court concluded, in paragraph 201 of the judgment under appeal, that Alrosa had not had an opportunity to exercise fully its right to be heard on the individual commitments proposed by De Beers, because the third parties' observations

had been supplied to it at the same time as the copy of the individual commitments of De Beers, so that it was impossible for it to make an effective reply and to propose new joint commitments with De Beers.

88 It must be observed here that in the present case two sets of proceedings were started by the Commission, one under Article 81 EC concerning the conduct of De Beers and Alrosa on the market in rough diamonds, and the other under Article 82 EC concerning the unilateral practices of De Beers. In those two sets of proceedings, separate statements of objections were addressed to De Beers and Alrosa. It follows that Alrosa could have had the status of 'undertaking concerned' only in the context of the proceedings brought under Article 81 EC, in which no decision was taken. In that context, Alrosa could not therefore claim the procedural rights reserved to the parties to the proceedings concerning the individual commitments, since those commitments were offered by De Beers in the administrative proceedings relating to the application of Article 82 EC under reference COMP/E-2/38.381, which were terminated by the contested decision.

89 As the Advocate General observes in points 176 and 177 of her Opinion, only if it transpired that the Commission 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 in relation to the proceedings brought under Article 82 EC. However, the General Court did not find that the Commission misused its powers in that way in the present case, nor indeed was there any evidence in support of that view. It was objectively justified for the Commission to conduct two separate sets of administrative proceedings in view of their different material legal bases, Article 81 EC on the one hand and Article 82 EC on the other. With regard to the proceedings under Article 82 EC, only De Beers as the presumed dominant undertaking could be the addressee of the statement of objections and the Commission's final decision in those proceedings.

90 That being so, it is permissible for a third-party undertaking which considers itself to be affected by a decision taken under Article 7 or Article 9 of Regulation No 1/2003 to protect its rights by bringing an action against that decision. It does not follow, however, that such an undertaking, in the present case Alrosa, acquires the status of a 'party concerned' within the meaning of Article 27(2) of Regulation No 1/2003.

91 As the Advocate General observes in point 175 of her Opinion, in the proceedings under Article 82 EC which were concluded by the contested decision, Alrosa therefore enjoyed only the less extensive rights of an interested third party.

92 It should be noted, moreover, that the General Court based its reasoning on the incorrect proposition that the Commission was obliged to provide Alrosa with a reasoned explanation of why the observations of the third parties had changed its position on the appropriateness of the joint commitments, in order to enable it to offer new joint commitments with De Beers.

93 In this respect the General Court, first, held in paragraph 196 of the judgment under appeal that Alrosa had been provided only with a summary of the conclusions which the Commission drew from the third parties' observations and, second, stated in paragraph 201 of the judgment that the non-confidential version of the third parties' observations had been supplied to Alrosa late, at the same time as the copy of the individual commitments of De Beers, thus making it impossible for it to make an effective reply and propose new joint commitments with De Beers.

94 However, the Commission's acceptance of the individual commitments offered by De Beers did not depend on the position of Alrosa or any other undertaking in this respect. It follows from Article 9(1) of Regulation No 1/2003 that the Commission has a wide discretion to make a proposed commitment binding or to reject it.

95 It follows from the foregoing that the second ground of appeal is also well founded in that, first, the General Court misinterpreted the concept of 'undertaking concerned' within the meaning of Regulation No 1/2003 by comparing the legal position of Alrosa in the proceedings relating to the individual commitments with that of De Beers and, second, the General Court based its reasoning on the incorrect proposition that the Commission was required to give reasons for rejecting the joint commitments and to suggest to Alrosa that it offer new joint commitments with De Beers.

96 It is therefore unnecessary to consider the other arguments put forward by the Commission in its second ground of appeal.

97 The judgment under appeal must consequently be set aside.

The action at first instance

98 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

99 Since the state of the proceedings does so permit, the Court will give judgment on the merits of Alrosa's action for annulment of the contested decision.

100 Alrosa raised three pleas in law before the General Court in support of its action: first, infringement of the right to be heard; second, infringement by the contested decision of Article 9 of Regulation No 1/2003, which does not allow commitments to which an undertaking concerned has not voluntarily subscribed to be made binding on it, *a fortiori* for an indefinite period; and third, the excessive nature of the commitments that were made binding, in breach of Article 9 of that regulation, Article 82 EC, freedom of contract and the principle of proportionality.

Arguments of the parties

101 In the first place, Alrosa submits that the contested decision infringes the right to be heard, which is a fundamental principle of European Union law recognised by the Court on several occasions and comprises, in competition cases, both an obligation on the Commission to inform the undertaking concerned of its objections and a right for that undertaking to reply. The Commission did not express any 'new relevant concerns' after receiving the comments of third parties. The change in the Commission's conclusions can thus only be explained by the 'own analysis' of the Directorate General for Competition, after which the Commission did not give Alrosa an opportunity to be heard in this respect.

102 The fact that Alrosa was not formally a party to the proceedings under Article 82 EC did not deprive it of the right to be heard, since that directorate general acknowledged

in a letter of 8 February 2006 that 'exceptional circumstances' justified its being heard as an undertaking that was directly and individually concerned.

103 The Commission replies that Alrosa was not a party to the proceedings in question and raises the question of the legal basis Alrosa relies on to claim the right to be heard.

104 As to the letter of 8 February 2006, the Commission submits that the right to be heard in the course of the proceedings under Article 82 EC, claimed by Alrosa and accepted by the hearing officer in that letter, differed in extent from the right afforded to undertakings which are the subject of an investigation by the Commission.

105 Although Alrosa occupied a particular position in the proceedings, the Commission argues that, since it only had the status of an interested third party, its right to be heard was limited to the making of observations, which it was invited to do at several stages of the proceedings. The Commission submits that Alrosa therefore fully enjoyed the right to be heard.

106 In the second place, Alrosa submits that the contested decision infringes Article 9 of Regulation No 1/2003, which in its view empowered the Commission to accept not individual commitments but only joint commitments. Article 9 should also be interpreted to the effect that a decision making commitments binding may be adopted only for a specified period.

107 The Commission submits that the words 'undertakings concerned' do not mean that only joint commitments by all the undertakings which are or may be affected by the commitment can be offered. That interpretation assumes that all the undertakings which are party to the agreements in question, even if they are not concerned by the proceedings brought under Article 82 EC, must formally offer commitments and be the addressees of the decision taken under Article 9. However, in the Commission's view, as the proceedings under Article 82 EC related solely to an alleged abuse of a dominant position by De Beers, De Beers was the only undertaking to offer commitments and be the addressee of the decision taken under Article 9.

108 As regards the alleged obligation on the Commission to accept commitments only for a limited period, the Commission submits that that assertion is based on an incorrect interpretation of Article 9 of Regulation No 1/2003. The fact that the Commission's decision confirming commitments 'may' be adopted for a limited period cannot oblige the Commission to take that decision for such a period.

109 In the third place, Alrosa submits that the prohibition on De Beers buying rough diamonds from it infringes Article 82 EC and Article 9 of Regulation No 1/2003 in that it imposes an absolute and potentially unlimited ban on contracts between the parties concerned, which is not justified in the present case. The contested decision thus infringes the fundamental principle of freedom of contract.

110 Moreover, an absolute prohibition is not necessary for addressing the Commission's competition concerns under Article 82 EC. Alrosa submits that the contested decision infringes the principle of proportionality in this respect.

111 The Commission replies that freedom of contract is restricted in particular by Articles 81 EC and 82 EC.

112 It does not deny that the principle of proportionality extends also to an analysis of the impact on third parties, but maintains that it took due account of the legitimate commercial interests of Alrosa.

113 The Commission submits that its primary task was to ascertain that the individual commitments offered by De Beers were sufficient to address its competition concerns. It considers that De Beers was prima facie likely to offer commitments that would not go beyond what was necessary to address those concerns adequately. The Commission was not obliged to study other possibilities going beyond or even falling short of the commitments actually offered by De Beers, only a comparison with the previous proposal for joint commitments in fact being necessary.

114 The analysis carried out by the Commission shows that the joint commitments offered did not satisfactorily meet its competition concerns. The Commission also submits that commitments going beyond those joint commitments were necessary.

115 The Commission is of the view that it was not for the General Court to determine, by performing a complex economic assessment, whether the commitments offered were sufficient to address its competition concerns, but to confine itself to ascertaining whether or not the contested decision was vitiated by a manifest error of assessment. It is not disputed that the Commission enjoys a wide discretion in the field in question.

116 The Commission points out that, since it had not received any other offer of commitments, the only other possibility available to it was to reopen the proceedings leading to the adoption of a decision under Article 7 of Regulation No 1/2003, perhaps against both Alrosa and De Beers, a possibility which could scarcely be regarded as a more appropriate way of addressing its competition concerns.

117 The Commission therefore submits that the individual commitments by De Beers, made binding by the contested decision, were appropriate and necessary for meeting those concerns, and that the alleged breach of the principle of proportionality has not therefore been proved.

Findings of the Court

118 It follows from the considerations set out in paragraphs 85 to 95 above that the first plea in law put forward at first instance cannot succeed.

119 All the criticisms put forward by Alrosa in that plea are based on the premise that it should have enjoyed more extensive procedural rights than those usually afforded to interested third parties. However, that premise was expressly ruled out in paragraph 91 above.

120 The second and third pleas in law put forward at first instance must also be rejected. It follows from all the considerations set out in this judgment that in adopting the contested decision the Commission did not make an error of law or a manifest error of assessment or breach the principle of proportionality. Alrosa has not succeeded in

showing that the individual commitments offered by De Beers and made binding by the Commission manifestly went beyond what was necessary to address the concerns identified by the Commission in its preliminary assessment.

121 Consequently, all the pleas put forward by Alrosa against the contested decision must be rejected and the application brought by it before the General Court dismissed.

Costs

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

123 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 118 of those rules, 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 costs against Alrosa and Alrosa has been unsuccessful, it must be ordered to pay the costs both of the appeal and of the proceedings at first instance.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 11 July 2007 in Case T-170/06 *Alrosa* v *Commission*;**

2. **Dismisses the action brought by Alrosa Company Ltd before the Court of First Instance of the European Communities;**

3. **Orders Alrosa Company Ltd to pay the costs both of the appeal and of the proceedings at first instance.**

[Signatures]