

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 20/LM/Mar01

In the large merger between:

DB Investments SA

and

De Beers Consolidated Mines Ltd & De Beers Centenary AG

Reasons for the Competition Tribunal's Decision

APPROVAL

On 9 May 2001 the Competition Tribunal issued a merger clearance certificate approving the merger between DBI Investments SA and the De Beers Group (comprising De Beers Consolidated Mines Ltd & De Beers Centenary AG) without conditions in terms of section 16(2)(a). The reasons for the approval of the merger appear below.

BACKGROUND

The parties

Acquiring Firms

1. The primary acquiring firm is ***DB Investments SA*** ("**DBI** "), a company incorporated as a *société anonyme*, under the laws of Luxembourg. DBI is a specially constituted company ("special purpose vehicle") being formed specifically for the purpose of this transaction. DBI therefore conducts no operational activities in SA. This company will be jointly owned by Anglo American, CHL and Debswana (the other acquiring firms).

Anglo American plc/Anglo American Corporation of South Africa Limited
("Anglo")

2. Anglo American plc is a public company registered in England and Wales, listed on the London, Johannesburg and Swiss Stock Exchanges. Anglo is a global leader in specific areas of mining and natural resources. Its worldwide activities,

through its subsidiaries, comprise gold, platinum group metals, coal, base and ferrous metals, industrial minerals, forestry products, financial services and industries and diamonds. Its participation in the diamond industry is limited to its 32% equity interest in the De Beers Group. Upon completion of the transaction, it will, together with its wholly owned subsidiary, Anglo American Corporation of South Africa Limited, hold a 45% equity interest in DBI.

Central Holdings Limited (“CHL”)

3. CHL is an investment holding company for certain Oppenheimer family interests. It is incorporated as a private company under the laws of Luxembourg. CHL presently holds a 2.6% interest in the De Beers Group but will, upon completion of the transaction, hold an effective 40% interest in the group, via DBI. This latter interest will be held by CHL via its subsidiary CHLSPV, a separate special purpose vehicle.¹

CHLSPV

4. CHL and Debswana will hold their shares in DBI via CHLSPV, which will hold a 45% shareholding in DBI directly. This entity is a separate special purpose vehicle formed for the express purpose of investing in shares in DBI. Accordingly, CHL will hold 89% of CHLSPV, with Debswana holding 11%.²

Debswana

5. Debswana, a private company incorporated according to the laws of Botswana, is jointly owned by the Government of the Republic of Botswana (50%) and by the De Beers Group (50%). Currently, Debswana holds a 5% interest in the De Beers group. Post-transaction, Debswana’s effective equity interest in DBI will be 15%.³

Target Firm

6. The primary target firm is De Beers Group, (“De Beers”) comprising De Beers Consolidated Mines Limited (“DBCM”) and De Beers Centenary AG (“De Beers

1 In terms of the initial offer to shareholders, CHL would have held 45% directly in DBI, however an upward adjustment of DBI’s offer on 30 April, necessitated a change in the shareholding structure.

2 These shareholdings entitle both companies to dividends and voting rights in these proportions. At the date of judgement, CHL and Debswana had only concluded a Heads of Agreement in respect of this vehicle, and had not entered into a formal shareholders agreement.

3 This is because of its 10% direct holding and its 11% indirect holding through CHLSPV, which translates to a 5% effective holding.

AG”). These latter two companies are two separate holding companies incorporated under the laws of South Africa and the laws of Switzerland, respectively.

7. De Beers’ principal activities include the production, mining, marketing and trading of rough diamonds worldwide, as well as the generic advertising of diamonds and diamond jewellery to consumers.

Existing Corporate Structure of the De Beers Group

8. DBCM and De Beers AG are two separate companies, despite their having substantially the same shareholders. This arrangement, dating back to 1990, was concluded to facilitate ownership of De Beers’ foreign business by De Beers AG, with the South African business being owned by DBCM.
9. An interest in the De Beers Group is represented by a “linked unit”, comprising one deferred share in DBCM and one depositary receipt issued by Centenary Depositary AG, a wholly-owned subsidiary of De Beers AG. 4 De Beers AG depositary notes are tradeable only with DBCM deferred shares, in other words, acquisition of deferred shares in DBCM entail concomittant acquisition of linked depositary receipts in Centenary Depositary.⁵
10. Despite a historically close association between De Beers and Anglo, in terms of mutually agreed arrangements between the two entities, De Beers has since 1997 been distinguishing itself operationally from Anglo, allowing it to operate as a separate, free standing and independently managed group. Such restructurings have facilitated De Beers’ exclusive focus on diamond mining and the marketing of rough gem diamonds.
11. Presently, the major shareholders in the De Beers Group comprise: 6,

Anglo American plc (and subsidiaries)	32.2%
Standard Bank Nominees (Transvaal (Pty) Ltd	29.6%
First National Nominees (Pty) Ltd	6.7%
Debswana Diamond Company (Pty) Ltd	5%

- 12 The nominee companies are registered unit holders, holding units on behalf of

4 A Centenary depositary receipt represents an interest in a one-hundredth share in a De Beers AG unit. A De Beers AG unit represents one ordinary share in De Beers AG which has, in turn, been twinned with a participation certificate issue by Centenary Holdings-p494

5 The only unlinked depositary receipts in the Group are the 11% of the depositary receipts issued by De Beers AG and held by DBCM, without a reciprocal holding in DBCM by De Beers AG. De Beers Form CC4(2) P494

6 As at 31 December 2000, according to De Beers Form CC4(2) at page 496. These are those shareholders registered as holding 5% or more of the linked units of the De Beers Group.

beneficial owners, whom individually do not own in excess of 5% of the issued linked units of the De Beers Group.⁷

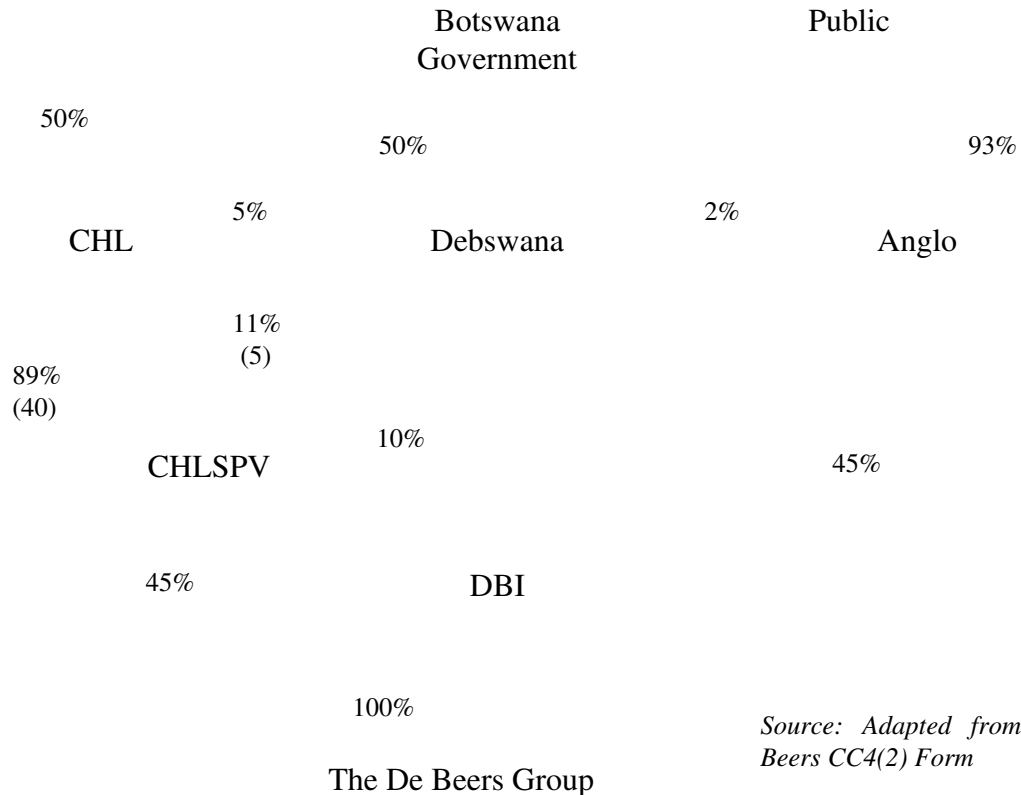
The merger transaction

13. The merger is being effected by the formation of DBI, a newly formed entity (“special purpose vehicle”) constituted specifically for the purpose of this transaction.
14. Anglo, CHL and Debswana are increasing their existing shareholdings in De Beers through DBI. In other words, Anglo, CHL and Debswana will each hold their respective interests in De Beers through DBI, which, in turn, will control 100% of De Beers.
15. The transaction, to be implemented, inter alia, by way of a Scheme of Arrangement,⁸ involving the distribution by De Beers of its existing 35% holding of Anglo shares to all of its shareholders. Simultaneously, the investment consortium, DBI, is to make a bid to acquire all of the equity of the De Beers Group, including all the deferred shares in DBCM and all the depositary receipts in Centenary Depositary, as well as the preference shares not yet held by the shareholders of DBI.
16. Essentially, this arrangement involves a buy-back of DBCM shares and a cancellation of De Beers linked units, in consideration for which there will be a distribution of shares in Anglo and cash.
17. Post-transaction, the linked units of the De Beers Group will be de-listed and all the shares in the De Beers Group will be held by DBI. Accordingly, De Beers will become a wholly owned subsidiary of DBI.
18. Following completion of the transaction, De Beers will be managed by Central Holdings Limited under a proposed 7 year management contract with DBI. In terms of this agreement, CHL will be entitled to nominate for appointment (subject to Anglo’s consent) the chairman of the DBI board and the De Beer’s Group Board.
19. It is envisaged that the existing De Beers management team will remain the same

⁷ Record p496

⁸ Subject to approval by 75% of De Beers Public Unit Holders at the Scheme of Arrangement meeting. The Scheme has already been approved by the High Court.

post-merger, with CHL executives being responsible for the formulation and implementation of the De Beer's Group strategic policies and operational activities.⁹



Source: Adapted from De Beers CC4(2) Form

Rationale for transaction

20. The merging parties cite several pro-competitive benefits arising from entering into this transaction:-

a) Removal of cross-shareholding

⁹ The intended board representation on DBI will be CHL as to 4, Anglo as to 4 and Debswana as to 2 directors. The representation on the De Beers Group board will be CHL as to 2 directors, Anglo as to 2 directors, Debswana as to 2 directors with CHL being entitled to nominate 10 nominees, the majority of whom will be executive directors. Record p32-36

De Beers will distribute the entire shareholding in Anglo to its shareholders, thereby removing the cross-shareholding between Anglo and De Beers, thereby simplifying the corporate structure.

b) Increasing existing shareholdings

Anglo will now hold 45% in De Beers; CHI will hold 40% and Debswana will hold 15%, increasing Anglo's exposure to the diamond business.

c) Increase of Free Float

The free float of Anglo shares available to the public will be increased from 58% to approximately 93%, improving market liquidity, efficiency and ultimately, enhancing Anglo's positioning in the FTSE 100 Index.

d) Maximising value for De Beers Public Linked Unit Holders

The merging parties assert that the transaction will result in full value for the De Beers diamond business, eliminating other value inhibitors, while providing a continuing investment in Anglo and therefore, indirectly, in the diamond business.

f) Benefits of DBI ownership

These include the continued leadership and expertise of the Oppenheimer family and Anglo; developing a closer, strategic relationship with Debswana and the Botswana Government; continuity for De Beers managers and employees.

g) Inflow of Foreign Funds

The transaction will provide an immediate inflow of foreign funds in the amount of approximately R23 billion and an additional R5 billion in subsequent years, represented by the cash portion of the consideration paid by the bidder and ultimately received by South African shareholders. It is argued this demonstrates renewed confidence in the country and its economic development.

EVALUATING THE MERGER

The relevant markets

Anglo

21. The principal activities of Anglo and its subsidiaries include:-

Mining activities

❖ Gold

Anglo owns 53.48% of AngloGold, the world's leading gold producer. AngloGold has operations as far afield as Africa, North and South America and Australia. In South Africa, AngloGold has interests in Rand Refinery, (75%) responsible for refining bullion and by-product and Oro Group (Pty) Ltd, (25%) a manufacturer and wholesaler of gold jewellery.

❖ Platinum

Anglo has a 50.2% share in Anglo Platinum, which mines, processes, refines and markets platinum group metals, gold and base metals. It is the largest primary platinum producer worldwide.

❖ Diamonds

Anglo's interest in this sector is confined to its 32% investment in De Beers. Any income earned from this sector derives from this investment.

❖ Coal

Anglo's coal interests in South Africa are held through its wholly-owned SA subsidiary, AOL.

❖ Base Metals (copper, zinc, lead, nickel and mineral sands)

Most of Anglo's operations in this sector are based outside SA.

Industrial Minerals

Anglo produces construction minerals in Europe, Eastern Europe, the Middle East and the Far East.

Ferrous Metals

In South Africa, Anglo Ferrous metals consist of chrome, manganese, carbon steel, stainless steel and vanadium. Anglo (Ferrous) has a 76% interest in Highveld Steel, a

leading world vanadium producer, which also produces carbon steel, ferro-alloys, carbonaceous products, as well as metal containers and enclosures. Anglo Ferrous metals holds a 40% interest in Samancor, a leading producer of chrome and manganese alloys. Anglo also has interests in the worlds' largest single site steel works through Columbus Steel, a joint venture between the Industrial Development Corporation, Samancor Limited and Highveld Steel. Similarly, through AOL, it has interests in Africa's largest diversified iron, steel and engineering works via Scaw Metals, a division of AOL.

Forest Products

Anglo Forest Products, operating under the Mondi name, is an integrated products and packaging group, manufacturing pulp, graphic papers, packaging papers, board and converted packaging. It is also involved in the manufacture of solid wood products, including sawn timber, mining support timber and wood chips. It has operations in South Africa, as well as Brazil and Europe.

Other Activities

Anglo Industries

Interests include:-

- ❖ mining services
- ❖ drilling equipment – Boart-Longyear, a division of AOL, is a leading manufacturer and supplier of tools, equipment and contracting services. One of the products it supplies is Tungsten Carbide, an important input in the process for the manufacture of synthetic diamonds.
- ❖ construction
- ❖ mining explosives and chemicals
- ❖ sugar - via Tongaat, a 51% subsidiary
- ❖ aluminium processing.

Financial Services

This is a non-core business area, nevertheless Anglo had minority interests in several financial services companies, including FirstRand, in which it holds 5.25%.

CHL

22. CHL's only operational activities conducted within South Africa are limited to the provision of support services, namely managerial, secretarial, accounting, treasury and administrative services to its subsidiaries, members of, and companies related to the interests of the Oppenheimer family and to the De Beers Group.

Debswana

23. Debswana is active in the diamond mining sector, operating three mines in Botswana under long leases from the Botswana Government.

The De Beers Group

Diamond Production & Marketing

24. De Beers is the world's largest producer and marketer of rough diamonds,¹⁰ with the mines that it owns or has equity in accounting for approximately 45% of worldwide production.¹¹ It owns mines in South Africa, Botswana, Tanzania and Namibia. Management of the latter three mines takes place in partnership with the governments of those three countries. Its South African mines include Venetia mine (Northern Province), Finsch mine (Northern Province), Kimberley mines (Northern Cape), Koffiefontein (Free State), Namaqualand mines (Northern Cape), Premier mine (Gauteng) and various small mines. De Beers also has extensive interests in operations relating to exploration, mining, recovery, and valuation. The Group also manufactures synthetic diamonds.
25. The De Beers Group is active in the downstream market insofar as it sells rough diamonds to diamond manufacturers and dealers in South Africa through its South Africa-based subsidiaries. This is effected via the Diamond Trading Company (Pty) Limited ("DTC"), while sales to the secondary market for rough diamonds is conducted through the Diamond Development Company (Pty) Ltd, ("Diamdel"). Both companies are wholly owned subsidiaries.¹² De Beers is also involved downstream through its Polished Division (responsible for polishing, market testing and selling of its output to wholesalers and jewellery manufacturers); Oriental Diamonds Inc. ("ODI") and De Beers Group Industrial Diamonds ("Debid") (charged with the production, processing and marketing of natural and industrial diamonds for industrial purposes).¹²

¹⁰ Rough diamonds include both industrial and gem quality diamonds.

¹¹ Record p 511

¹² It has indirect interests in the downstream markets via its Supplier of Choice Initiative, involving interaction with intermediaries and customers to stimulate growth in the retail market. It has recently

26. De Beers also has a number of purely financial investments in several listed entities. 13

Impact on competition

27. Anglo has no interests in the diamond business, other than through its existing 32.2% investment in the De Beers Group.
28. The De Beers group neither has any interest in any other mining sector, leaving aside its existing 35% shareholding in Anglo, nor the natural resources sector.
29. CHL does not have any interests in the mining or natural resources sectors. Debswana's interest in mining consists of its diamond mining interests in Botswana. However, as the parties and the commission contended, Debswana is a minority acquiring shareholder. Furthermore, its diamond production is fully attributable to the De Beers Group.
30. The Tribunal therefore agrees with the Commission that there is no product overlap between the activities of the merging parties.
31. Accordingly, the merger would not result in any substantial lessening of competition within either the diamond industry or natural resource sectors.

Nature and Extent of Vertical Integration

32. The Commission alluded to a product overlap between the two vertically integrated companies in respect of tungsten carbide, a key input in the synthetic diamond manufacturing process. Anglo's subsidiary, Boart Longyear, manufactures this product, as does De Beers, albeit for its own in-house use. After further investigation, the Commission concluded that De Beers manufactures this product for its own purposes, and does not supply third parties. Furthermore, the vast array of international suppliers ensure that customers can multi-source their tungsten carbide requirements abroad.
33. Vertical concerns were also alluded to since Boart Longyear purchases industrial diamonds from De Beers and other suppliers in order to manufacture its impregnated tools and drill bits. Furthermore, Anglo Technical Division provides various technical services to the De Beers Group. However technical advice is also obtained by De Beers and other mining companies from other independent companies.

entered into a collaboration with European LVMH Moët Hennessy Louis Vuitton to develop the De Beers group name as a consumer brand.

13 Record p 46.

34. The Tribunal is satisfied that in respect of all the vertical relationships, transactions are conducted on an arm's length basis and in accordance with normal commercial practice, with no exclusive agreements existing between De Beers and any Anglo company. Notwithstanding this, there is sufficient competition with regard to each product and service to counter any possible vertical effects.

Public Interest Considerations

35. Of the 33 trade unions notified of the transaction, only four contacted the Commission advising that they wished to participate in the merger proceedings.

- ❖ NAWUSA, representing employees from the National Amalgamated Workers Union of South Africa;
- ❖ NUMSA, representing employees from the National Union of Metalworkers of SA;
- ❖ NUM, or the National Union of Mineworkers and
- ❖ FAWU, or the Food & Allied Workers Union.

36. NUMSA and NUM expressed the concern that the proposed transaction might be part of a broader restructuring process, entailing job losses. They sought sight of a list of CHL subsidiaries to determine whether any fact they were active in any industries affecting the trade union members. They further sought undertakings from both De Beers and Anglo guaranteeing no future job losses in respect of their members. NUM also raised the concern that the merger might precipitate an outflow of funds from the country in the form of dividends and interest. Further, the fact that DBI would be an unlisted foreign company would raise transparency and accountability issues, affecting their employees in the long-term.

37. At the hearing, only FAWU appeared to make oral submissions. It represents members employed by Anglo's subsidiaries in the sugar and farming industries. FAWU's concerns were centred around Anglo's future restructurings, specifically if Anglo opted out of non-mining industries as it scaled down in favour of its core operations. They were anxious that this would lead to potential job losses. They also commented that the transaction would result in increased concentration and dominance, raising the risk of restrictive business practices arising.

38. The merging parties were prepared to offer an undertaking on behalf of DBI that the instant transaction would not result to any change in employment conditions or job losses post-merger in relation to De Beers employees. This undertaking was accepted by the Attorneys for NUM and NUMSA. However, DBI contended it could not grant an undertaking in perpetuity, DBI would have to in the normal course of events, review employment levels from time to time. They pointed out that in any event, FAWU had no members employed by De Beers. The unions

remained adamant that Anglo furnish an undertaking confirming that there would be no employment implications or changes to employment conditions post-merger.

39. With regard to NUM's concerns, the parties contended that the Reserve Bank's prior approval of the transaction signified that the potential migration of funds outside the country was not a major concern.
40. The Tribunal accepts the arguments of the merging parties with regard to public interest issues. There are no employment concerns raised in the transaction under consideration since it merely entails an increase in shareholding in De Beers, leaving the actual operational structure unchanged. Consequently no employees in the De Beers group will be affected. For the unions to expect Anglo to provide undertakings in respect of employment conditions post-merger is not justifiable, given that there is no evidence that the merger will have any impact on employees of the Anglo Group or the structure of the group. It is furthermore illogical and impractical to expect employers to offer undertakings with regard to maintaining employment levels into the distant future, especially having regard to the dynamic and volatile nature of the relevant industries. Furthermore, the Tribunal does not see how the instant transaction could be impugned merely on the basis of possible, hypothetical future job losses in unrelated industries. It agrees with the assertions of the merging parties that any future notified merger transaction that entailed job losses in these relevant sectors would fall under the scrutiny of the competition authorities, in accordance with the normal course of events.
41. The merging parties also contended that the effect of the delisting of De Beers on the South African economy was not a public interest issue as envisaged in section 12A(3) (a) of the Act.¹⁴ These latter issues fall in any event to be considered by the securities and sector regulators, who have already approved this transaction. The Tribunal endorses the view that these considerations do not fall within the purview of the competition authorities.

Conclusion

The Tribunal therefore endorses the Commission's view that this merger will not result in the substantial lessening or prevention of competition in any market.

18 May 2001

¹⁴ The relevant section, section 12A(3) states that "*When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on – (a) a particular industrial sector or region;...*"

D.H.Lewis

Date

Concurring: N. Manoim, M Holden